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## Leaving a Legacy on the Federal Courts

Carl Tobias

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# Leaving a Legacy on the Federal Courts

CARL TOBIAS\*

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During the 1992 campaign for the presidency, then Governor Bill Clinton promised to appoint judges who would increase balance on the federal courts, would be intelligent, would possess appropriate judicial temperament, and would be committed to enforcing fundamental constitutional rights.<sup>1</sup> The record compiled during the first Clinton Administration demonstrates that the Chief Executive fulfilled his campaign pledges by choosing judges who more closely reflected American society and who were well qualified. President Clinton named an unprecedented number and percentage of highly competent women and minorities to the federal courts; however, in the second two years of his first term in office, he enjoyed less success partly because the Republican Party controlled the Senate. Thus, at the outset of the second term of the Clinton presidency, it was unclear whether the Chief Executive would continue to appoint many female and minority attorneys. Now that the Clinton Administration has reached the mid-point in its concluding term, judicial selection in 1998 warrants analysis. This essay undertakes that effort by emphasizing the appointment of women and minorities.<sup>2</sup>

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1. See Bill Clinton, *Judiciary Suffers Racial, Sexual Lack of Balance*, NAT'L L.J., Nov. 2, 1992, at 15-16; see also *Bush v. Clinton: The Candidates on Legal Issues*, A.B.A. J., Oct. 1992, at 57-58.

2. See, e.g., 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 balance).

Because the President made minimal changes to procedures used in his first term for choosing judges in 1998, the initial part of this essay thoroughly assesses judicial selection in that administration. I determine that the Chief Executive articulated clear goals and implemented effective processes, especially by searching for, designating and nominating extremely able female and minority lawyers. The piece next evaluates appointments in the second year of the last Clinton Administration, scrutinizing the aspects that departed from past practice. This examination suggests that President Clinton continued submitting the names of numerous women and minorities with excellent qualifications but experienced some difficulty in having them confirmed. Based on these findings, I, therefore, recommend that the Chief Executive institute certain actions that should promote the appointment of many female and minority judges in the final half term.

### I. THE FIRST TERM

Judicial selection during the first four years deserves relatively comprehensive treatment in this essay, even though it has received examination elsewhere.<sup>3</sup> The President and Clinton Administration officers who had responsibility for choosing judges developed and applied efficacious selection practices. The Chief Executive and his assistants enunciated praiseworthy objectives for appointing judges and effectuated procedures that would foster attainment of those goals. For instance, President Clinton expressly proclaimed that increasing the numbers and percentages of talented women and minorities on the bench would be an important administration priority. The Chief Executive and his aides also worked cooperatively with senators, asking that they identify and propose female and minority candidates who had excellent qualifications.

#### A. *Selection During the First Year*

Judicial selection in the Clinton presidency's initial year requires emphasis because the efforts instituted during that time served as the basis for the subsequent three years and were measures from which those charged with choosing judges infrequently deviated. The Administration carefully honored the pledges that then Governor Clinton made during the 1992 presidential campaign. For example, the Chief Executive occasionally repeated promises to appoint very competent attorneys who would enhance gender, racial, and political balance on the federal

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3. See generally Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276 (1995); Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309 (1996).

courts.<sup>4</sup> Administration officials, such as Janet Reno, the Attorney General, and Bernard W. Nussbaum, the White House Counsel, correspondingly stated that the Administration intended to name judges with strong qualifications who would increase diversity.<sup>5</sup> The Department of Justice and the Office of the White House Counsel, the two Executive Branch institutions that had principal responsibility for assisting the President in nominating federal judges, were clearly committed to these objectives and implemented effective measures for achieving the goals.<sup>6</sup>

The procedures used resembled the mechanisms employed by President Jimmy Carter, but the Clinton Administration's practices were somewhat similar to the processes deployed by President George Bush and President Ronald Reagan.<sup>7</sup> For example, the White House Counsel's Office had greater responsibility for selecting possible nominees than the Justice Department. The White House sought and designated qualified lawyers, while the Justice Department actively screened most attorneys only after they became serious candidates.

Senatorial patronage and courtesy were significant factors in choosing nominees for the federal district courts because the President and his assistants exhibited considerable deference to senators from the areas in which the judicial openings arose.<sup>8</sup> The senators usually proposed multiple individuals from whom the Chief Executive selected a nominee. The Administration asked that members of the Senate rely on, or revitalize, district court nominating panels, and lawmakers employed them in approximately half of the states.<sup>9</sup> The President and his aides asserted greater control over the choice of nominees for appellate court vacancies but remained solicitous of senators who represented the locales in which

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4. See Neil A. Lewis, *Unmaking the G.O.P. Court Legacy*, N.Y. TIMES, Aug. 23, 1993, at A10; Susan Page, *Supreme Matter on Home Front*, NEWSDAY, Mar. 24, 1993, at 4; see also *supra* note 1 and accompanying text.

5. See Al Kamen, *When Vacancies Are "Judicial Emergencies,"* WASH. POST, Apr. 26, 1993, at A17; Tom Hamburger & Josephine Marcotty, *Two Proposed for U.S. Court by Wellstone*, MINNEAPOLIS STAR TRIBUNE, Mar. 10, 1993, at 1A; *White House Counsel Discusses Nation's Legal Agenda*, THE THIRD BRANCH, Sept. 1993, at 1, 10.

6. This statement and much of the remaining examination are based on conversations with persons who are familiar with administration selection procedures [hereinafter Conversations.] See generally Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254, 254-55 (1997) (discussing Clinton's judicial selection process); Stephen Labaton, *Clinton May Use Diversity Pledge to Remake Courts*, N.Y. TIMES, Mar. 8, 1993, at A1 (same).

7. See Chris Reidy, *Clinton Gets His Turn*, BOSTON GLOBE, Aug. 8, 1993, at 69; see also Conversations, *supra* note 6.

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

9. Conversations, *supra* note 6.

the vacancies existed.<sup>10</sup>

The administration facilitated its nominees' confirmation by informally consulting with the Senate Judiciary Committee and with individual senators before formally nominating candidates.<sup>11</sup> This close consultation apparently fostered the noncontroversial approval of Circuit Judge Ruth Bader Ginsburg as Clinton's first appointment to the United States Supreme Court. For instance, she secured the support of Senator Orrin Hatch (R-Utah), the ranking Republican member of the Judiciary Committee.<sup>12</sup> The Senate also exercised its advice and consent power judiciously. The Senate Judiciary Committee, which has major responsibility for the confirmation process, and many specific senators were responsive to the Administration's selection goals and worked closely with the Chief Executive and his assistants. For example, Senator Joseph Biden (D-Del.), Committee chair, remarked that there would be insistence on diversity but no "ideological blood test" for candidates who were politically moderate or liberal.<sup>13</sup> Some members of the Senate correspondingly revived district court nominating commissions, which had fostered the candidacies of exceptionally talented women and minorities in the Carter Administration.<sup>14</sup>

President Clinton instituted a number of special efforts to identify and nominate able female and minority lawyers. The Chief Executive, the White House Counsel, and additional high-ranking personnel clearly and strongly declared that the appointment of competent women and minorities was a top priority.<sup>15</sup> Many of the officials who were centrally responsible for choosing judges, such as Janet Reno, the Attorney General, and Eleanor Dean Acheson, the Assistant Attorney General for the Office of Policy Development, were women. Moreover, these officials sought and considered the ideas and suggestions for nominations, from

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10. See Reidy, *supra* note 7. The Administration has not reinstituted the Circuit Judge Nominating Commission which the Carter Administration used. See Goldman, *supra* note 3, at 278-279. See generally LARRY C. BERKSON & SUSAN B. CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES* (1980).

11. See Carl Tobias, *Keeping the Covenant on the Federal Courts*, 47 SMU L. REV. 1861, 1870 (1994). See generally Goldman, *supra* note 3, at 279.

12. See, e.g., William E. Clayton, *Panel Endorses Ginsburg*, HOUSTON CHRONICLE, July 30, 1993, at 20; Martin Kasindorf & Timothy M. Phelps, *In Supreme Company*, NEWSDAY, Aug. 4, 1993, at 23.

13. Labaton, *supra* note 6; see also Lewis, *supra* note 4 (providing Senator Biden's additional observations on judicial selection).

14. See ALAN NEFF, *THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES, AND CANDIDATES* (1981); see also Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136, 141 (1987); Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 174 (1990).

15. See *supra* notes 4-5 and accompanying text; see *infra* note 16 and accompanying text.

national, state, and local women's organizations, public interest groups, and minority political entities.

Numerous senators may have been disposed to search for and propose female and minority judicial candidates, while the Executive Branch's pronouncements may have led their colleagues to implement similar endeavors. The President and his aides asked that senators submit the names of female and minority lawyers and rely upon existing, or revive moribund, district nominating commissions, which numerous senators voluntarily reinstituted.<sup>16</sup> Some lawmakers also consulted with women's groups or minority political organizations, while others suggested female and minority candidates<sup>17</sup> or invoked advisory entities that helped propose women or minorities.<sup>18</sup>

In 1993, President Clinton appointed eleven women out of twenty-eight attorneys (thirty-nine percent) and seven minorities out of twenty-eight lawyers (twenty-five percent) to the federal courts.<sup>19</sup> The Chief Executive concomitantly nominated eighteen female counsel out of forty-eight (thirty-seven percent) and thirteen minority attorneys out of forty-eight (twenty-seven percent).<sup>20</sup> The numbers and percentages of women and minorities named were unprecedented.<sup>21</sup>

Virtually all of the persons whom the Clinton Administration appointed or nominated were well qualified. They were intelligent, industrious, and independent while appearing to have much integrity and balanced judicial temperament. Many were distinguished federal or state court judges. For example, Justice Ginsburg had ably served on the United States Court of Appeals for the District of Columbia Circuit for thirteen years before joining the Supreme Court.<sup>22</sup>

In short, the Chief Executive and his assistants compiled a fine record of choosing judges in 1993. President Clinton was quite successful in appointing and nominating competent women and minorities, while the Administration's efforts clearly surpassed those of the Reagan, Bush

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16. See Lewis, *supra* note 4. A senior White House official said: "we have spoken to each and every Democrat in the Senate and told them we expect their recommendations to include women and minorities." *Id.*

17. The Judiciary Committee held hearings on two African-Americans and one woman proposed by Senator Robert Graham and two women and one African-American proposed by Senator Edward Kennedy. See also Mark Ballard, *New Contenders for Fifth Circuit*, TEXAS LAWYER, Sept. 13, 1993, at 1.

18. See Hamburger & Marcotty, *supra* note 5.

19. Telephone Interview with George Kassouf, Alliance for Justice, Washington, D.C. (Nov. 19, 1993).

20. *Id.*

21. See Tobias, *supra* note 11, at 1866; see also Al Kamen, *Vow on Federal Judges Still on Hold*, WASH. POST, Oct. 29, 1993, at A25.

22. See generally Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. MIAMI L. REV. 159, 162 (1993) (discussing Justice Ginsburg's background).

and Carter Administrations. The President enunciated clear goals for selecting judges and implemented efficacious selection processes, particularly for identifying and nominating highly capable female and minority attorneys.

This record is more striking, given the significant complications that faced the Administration. Not only did the Chief Executive and his staff have to confront the difficulties that all new presidencies must face in the initial year, but they also had to overcome the fact that no Democrat had captured the White House since 1980. This twelve-year hiatus meant that the new Administration lacked recent judicial selection models and personnel with expertise that was less than a dozen years old.<sup>23</sup> There also were several unusual developments early in the Administration's existence. One example was the resignation of Justice Byron White soon after the inauguration. Filling this important vacancy required much attention, especially of personnel responsible for judicial selection in the Office of White House Counsel.<sup>24</sup> Time which staff expended on identifying an excellent successor for Justice White could not be devoted to finding candidates for the appellate and district courts. During its first year, the Clinton Administration compiled a strong record of appointing judges in light of the difficulties confronted.<sup>25</sup>

### B. *Selection During the Succeeding Three Years*

Federal judicial selection during the subsequent three years of President Clinton's initial term warrants comparatively little treatment in this essay primarily because the procedures that the Administration employed remained essentially the same. Nevertheless, to enhance understanding of relevant considerations during the second term, I accord brief examination to developments in each of those years.

#### 1. 1994

Perhaps the most salient quality of judicial selection in 1994 was the close cooperation between the White House and the Senate Judiciary Committee. The President and his assistants worked carefully with the

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

24. See Joan Biskupic, *Promises, Pressures in Court Search*, WASH. POST, Mar. 21, 1993, at A1; Linda Greenhouse, *White Announces He'll Step Down From High Court*, N.Y. TIMES, Mar. 19, 1993, at 1.

25. See generally Kamen, *supra* note 5 (discussing the effort to fill judicial openings in a careful and deliberate way); David Johnston, *Doubts on Reno's Competence Rise in Justice Department*, N.Y. TIMES, Oct. 26, 1993, at A1 (discussing energy spent on the Waco, Texas standoff); *Text of Reno's Letter Recommending Dismissal*, WASH. POST, July 20, 1993, at A11 (providing an example of time spent on decision to retain William S. Sessions as Director of the FBI).

Committee, and numerous senators were responsive to the Administration's objectives in naming judges. For instance, Senator Biden repeated the "committee's willingness to treat filling judicial vacancies as one of its highest priorities."<sup>26</sup> The chair asked 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."<sup>27</sup> Indeed, close consultation with Senator Hatch and Senator Strom Thurmond (R-S.C.), the senior Republicans on the Committee, fostered the noncontroversial elevation of Circuit Judge Stephen Breyer to the Supreme Court.<sup>28</sup> Many members of the Senate continued to depend on or revitalized district court nominating commissions to identify and promote the candidacies of highly qualified women and minorities, and the lawmakers suggested numerous female and minority lawyers.

In 1994, President Clinton named twenty-nine female attorneys out of 101 judges (twenty-nine percent) and thirty-seven minorities out of 101 lawyers (thirty-seven percent) to the federal courts while nominating twenty-six women out of ninety-five lawyers (twenty-seven percent) and thirty minorities out of ninety-five lawyers (thirty-one percent).<sup>29</sup> The numbers and percentages of women and minorities appointed and nominated were completely unprecedented; the figures dramatically eclipsed the record compiled in the Reagan Administration and were much better than the results attained by Presidents Bush and Carter.<sup>30</sup>

The attorneys whom the Clinton Administration named and nominated had outstanding qualifications. Some had rendered distinguished service on the federal or state bench. For example, Second Circuit Judge Jose Cabranes was a highly-regarded federal district judge in Connecticut before his elevation.<sup>31</sup> The American Bar Association (ABA) considered sixty-three percent of the Chief Executive's nominees to be well

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26. 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).

27. *Id.*; see generally AMERICAN BAR ASSOCIATION, THE ABA'S STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS (1991) (discussing ABA's role in evaluating nominees).

28. Joan Biskupic, *Senators Question Breyer's Economics*, WASH. POST, July 15, 1994, at A6; *Open Minds?*, NAT'L L.J., July 25, 1994, at A18; see also Ruth Marcus, *President Asks Wider Court Hunt*, WASH. POST, May 6, 1993, at A11.

29. 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, Alliance for Justice, Washington, D.C. (Sept. 28, 1994).

30. See Carl Tobias, *Increasing Balance on the Federal Bench*, 32 Hous. L. Rev. 137, 145 (1995).

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



qualified, a number that was ten points higher than the ratings assigned to nominees of the Reagan and Bush Administrations.<sup>32</sup>

President Clinton, thus, compiled a very successful record of judicial selection during his second year, which was especially noteworthy given the difficulties confronted. For example, there were the resignations of Philip Heymann and Webster Hubbell, the initial Deputy and Associate Attorneys General, and Bernard Nussbaum, the first White House Counsel.<sup>33</sup> Justice Harry Blackmun's decision to leave the Court concomitantly consumed resources that would have been committed to filling lower court openings.<sup>34</sup> The ongoing Whitewater investigation and additional problems correspondingly required time of officials in the White House Counsel's Office and the Justice Department who worked on judicial selection.

## 2. 1995

In 1995, President Clinton changed certain features of the practices that he had used during the first two years in office. The 1994 congressional elections in which the Republican Party recaptured the Senate seem to explain these modifications. The Office of White House Counsel and the Department of Justice continued sharing principal responsibility for choosing judges, but the White House assumed a larger role, particularly in designating candidates.<sup>35</sup> The White House staff evidenced greater reluctance to proffer attorneys who might be controversial and greater willingness to compromise.<sup>36</sup> For instance, the Chief Executive did not resubmit purportedly controversial individuals whom he had nominated in 1994,<sup>37</sup> and the White House Counsel publicly stated that President Clinton would not propose lawyers whose candidacies might provoke confirmation battles.<sup>38</sup>

The Administration continued the practice of informal consultation

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32. See DOJ Record, *supra* note 29; Al Kamen, *Cutler to Face Backlog in Seating Judges*, WASH. POST, Mar. 14, 1994, at A17.

33. 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, at 1.

34. See Biskupic, *supra* note 31.

35. See generally Goldman, *supra* note 3, at 278-79; Goldman & Slotnick, *supra* note 6, at 254-57.

36. See *Conversations*, *supra* note 6; Goldman, *supra* note 3, at 279; Goldman & Slotnick, *supra* note 6, at 255-56.

37. See Joan Biskupic, *Facing Fights on Court Nominees, Clinton Yields*, WASH. POST, Feb. 13, 1995, at A1; Neil A. Lewis, *In Selecting Federal Judges, Clinton Has Not Tried to Reverse Republicans*, N.Y. TIMES, Aug. 1, 1996, at A20; Ana Puga, *Clinton Judicial Picks May Court the Right*, BOSTON GLOBE, Dec. 29, 1994, at 1.

38. See Biskupic, *supra* note 37; see also Goldman & Slotnick, *supra* note 6, at 256-57.

on potential nominees. The President and his assistants worked efficaciously with Senator Hatch when he assumed the Committee chairmanship in 1995.<sup>39</sup> The chair seemed to process the Clinton Administration's nominees similarly to the way that Senator Biden had treated President Reagan's nominees in his seventh year. Senator Hatch observed that the Committee would vote favorably on all candidates who were "qualified, in good health, and understand the role of judges," and in 1995, the Committee did so.<sup>40</sup> The Committee held confirmation hearings on one appeals court nominee and four or five district court nominees every month that Congress was in session.<sup>41</sup>

In 1995, the Clinton Administration appointed seventeen female lawyers out of fifty-three judges (thirty-two percent) and eight minority attorneys out of fifty-three judges (fifteen percent).<sup>42</sup> The ABA highly ranked the lawyers who were nominated and confirmed.<sup>43</sup> For example, Seventh Circuit Judge Diane Wood had served as a Deputy Assistant Attorney General in the Justice Department.<sup>44</sup> Once again, this record was commendable, especially in light of the difficulties that the Clinton Administration confronted, many of which could be fairly ascribed to Republican Party control of the Senate.

### 3. 1996

In 1996, the Chief Executive and his assistants employed practices that closely resembled those invoked in 1995. The White House seemingly assumed even greater responsibility for choosing judges, evinced more willingness to compromise, and displayed considerable sensitivity to the complications posed by presidential election-year politics. These problems might have been worsened because Senator Bob Dole (R-Kan.), the eventual Republican candidate for President, was also the Senate Majority Leader until his June resignation. Senator Dole, thus, apparently did not expedite the confirmation process, as doing so might

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39. See Tobias, *supra* note 3, at 317-18; see also Senator Orrin Hatch Looks at Courts, Legislation, and Judicial Nominees, *THE THIRD BRANCH*, Nov. 1995, at 10; Goldman & Slotnick, *supra* note 6, at 255-57.

40. See Neil A. Lewis, *New Chief of Judiciary Panel May Find an Early Test With Clinton*, N.Y. TIMES, Nov. 18, 1994, at A31; see also Orrin G. Hatch, *Judicial Nominee Confirmations Smoother Now*, DALLAS MORNING NEWS, June 27, 1998, at 9A.

41. See generally Al Kamen, *Window Closing on Judicial Openings*, WASH. POST, June 12, 1995, at A17 (providing a statistical update of the progress of selection for judicial vacancies).

42. Telephone Interview with Deborah Lewis, Alliance for Justice, Washington, D.C. (Jan. 22, 1996); see also Tobias, *supra* note 3, at 314.

43. See Tobias, *supra* note 3, at 315.

44. See, John Flynn Rooney, *New 7th Circuit Judge Seen as More Liberal Member*, CHICAGO DAILY L. BULL., July 3, 1995, at 1.

have indicated insufficient confidence in his own presidential aspirations.

From January to July, the Senate confirmed three judges, although the Judiciary Committee had voted favorably on twenty-six nominees.<sup>45</sup> In July, the leaders of both political parties agreed to conduct floor votes on one nominee each day. President Clinton, therefore, named five female attorneys out of twenty judges (twenty-five percent) and four minority lawyers out of twenty judges (twenty percent) in 1996.<sup>46</sup> The appointees were highly qualified. For instance, Ninth Circuit Judge A. Wallace Tashima was a well-respected jurist in the Central District of California before his elevation.<sup>47</sup> The 1996 record of choosing judges was respectable, given the difficulties presented by election-year politics.

### C. *Summary of the First Term*

President Clinton, during his first term, attained the judicial selection goals that he espoused during his campaign. The Chief Executive named 202 attorneys to the federal bench; sixty-two (thirty-one percent) of those judges were women and forty-seven (twenty-eight percent) were minorities.<sup>48</sup> This record was unprecedented and compares very favorably with the results that the three previous administrations achieved. For example, the Clinton Administration named more women between 1993 and 1995 than the Bush Administration appointed over four years and more than the Reagan Administration selected in two terms.<sup>49</sup> The ABA accorded President Clinton's appointees the highest rankings since the Bar Association began formally analyzing nominees qualifications during the 1950s.<sup>50</sup>

In sum, during the first term, the Chief Executive and his aides attained much success in choosing judges, notwithstanding the significant obstacles that they had to overcome. The Administration seemed prepared to capitalize on these achievements by continuing to apply numerous objectives and procedures that it invoked during the initial

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45. Telephone Interview with Mike Lee, Alliance for Justice, Washington, D.C. (Sept. 3, 1996).

46. Lee, *supra* note 45.

47. See Albert, *supra* note 23; Henry Weinstein, *Clinton Nominates L.A. Judge to U.S. Appeals Court*, L.A. TIMES, Apr. 10, 1995, at B1.

48. See *supra* notes 19-20, 29, 43, and accompanying text.

49. See Tobias, *supra* note 3, at 314; see also Goldman, *supra* note 3, at 280, 286.

50. See Tobias, *supra* note 3, at 315; see also Lewis, *supra* note 37; Robert A. Stein, *For the Benefit of the Nation*, A.B.A.J. Mar. 1996, at 104; Henry Reske, *Judicial Vacancies Declining*, A.B.A.J. Jan. 1995, at 24.

four years. Nevertheless, factors that are primarily political have impaired judicial selection in the President's concluding term.

## II. JUDICIAL APPOINTMENTS IN 1998

In this section, I emphasize judicial appointments during 1998 for several reasons. First, in the final term, President Clinton and his aides have essentially followed the goals and practices employed during the initial four years that I scrutinized above.<sup>51</sup> The objectives and procedures used resembled more closely those deployed in 1995 and 1996 than 1993 and 1994 principally because the Republican Party captured a 55-45 majority in the Senate in the 1996 elections. Second, selection in 1997 has been analyzed elsewhere.<sup>52</sup>

The attorneys whom President Clinton appointed and nominated in 1998 were highly capable individuals who held relatively moderate political views and who enhanced gender and racial diversity on the federal courts. Most of the nominees received high rankings from the ABA, while many had prior judicial experience in federal or state courts. During this time, the Chief Executive nominated a few persons with ties to the Republican Party and successfully pressed for the elevation of Judge Sonia Sotomayor whom President Bush had named to the district bench.<sup>53</sup>

The goals and processes that the President and his aides employed were very similar to those invoked during the first term.<sup>54</sup> For instance, the White House retained major responsibility for designating candidates, especially for vacancies on the appeals courts. The Administration correspondingly continued to defer to the suggestions of senators for nominations to district court openings.

The Chief Executive and his assistants maintained special efforts to discover, and submit the names of, very competent women and minorities.<sup>55</sup> Several senior Justice Department officials, including Attorney General Reno and Assistant Attorney General Acheson, who secured the appointment of many female and minority judges in the initial Clinton Administration, played major roles during 1998. The White House figured prominently in the confirmation of Susan Graber, Margaret McKeown, and Kim Wardlaw, as well as the nomination of Marsha Berzon,

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51. See *supra* notes 3-50 and accompanying text.

52. See Carl Tobias, *Fostering Balance on the Federal Courts*, 47 AM. U. L. REV. 935 (1998); see also Goldman & Slotnick, *supra* note 6.

53. See Sharman P. Duffy, *Clinton Announces Nominees for Eastern District Court*, LEGAL INTELLIGENCER, Aug. 4, 1997, at 1; The White House, Office of the Press Sec'y, *President Clinton Nominates Sonia Sotomayor to the Federal Bench* (June 25, 1997).

54. See, e.g., *supra* notes 4-12 and accompanying text.

55. See *supra* notes 4-5 and accompanying text.

and Richard Paez for Ninth Circuit vacancies in 1998. The Justice Department and White House officials again worked closely with senators by asking that they designate and propose capable female and minority candidates, while these personnel and Senate members continued seeking the aid of women's organizations and minority political groups.

The Administration continued to encounter certain problems expediting appointments in 1998; however, these delays can be ascribed to many people and entities involved in judicial selection.<sup>56</sup> The Clinton Administration was partially responsible for some delay in the appointments process. The President could have submitted more nominees who were acceptable to Republicans earlier in 1998, and occasionally tendered names somewhat irregularly thereafter. Moreover, the President often nominated multiple individuals on the identical date, which might have complicated the Judiciary Committee's efforts to evaluate nominees promptly.

The Republican Party leaders in the Senate and individual GOP senators also were responsible for delayed appointments in 1998. For example, Senator Hatch could have expedited consideration, but he asserted that processing was delayed by the administration's sporadic submission of nominees, some of whom were not acceptable to him or other Republicans apparently because they might be "judicial activists."<sup>57</sup> The Senate Majority Leader, Senator Trent Lott (R-Miss.), often did not schedule floor debate and floor votes on nominees promptly after they received Judiciary Committee approval.<sup>58</sup>

It is difficult to assign exact responsibility for delayed judicial selection in 1998. The above analysis suggests that all of the principal participants in the selection process probably could have done more to facilitate the appointment of additional judges. Indeed, the Senate had confirmed only forty judges by September, although the pace of judicial selection significantly improved over the remainder of 1998.

Notwithstanding these difficulties in 1998, the President named twenty-one women out of sixty-five lawyers (thirty-two percent) and eighteen minorities out of sixty-five attorneys (twenty-eight percent) to the federal bench.<sup>59</sup> These numbers and percentages of women and

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56. See *supra* notes 35-47 and accompanying text. See generally Goldman & Slotnick, *supra* note 6, at 255-57 (discussing Clinton's selection process under a Republican Congress); Tobias, *supra* note 52.

57. See 144 CONG. REC. S6186 (daily ed. June 11, 1998) (statement of Sen. Hatch).

58. See 144 CONG. REC. S8477 (daily ed. July 17, 1998) (statement of Sen. Leahy); *The Senate's Hostage Game*, L.A. TIMES, July 28, 1998, at B6.

59. Judicial Selection Project: 1998 Annual Report 2 (1998); telephone interview with Stephan Kline, Alliance for Justice, Washington, D.C. (Jan. 6, 1999).

minorities confirmed resemble the record compiled in 1995.<sup>60</sup> All of the individuals appointed appear to have excellent qualifications. The people seem intelligent, industrious and independent and exhibit integrity and balanced judicial temperament. Most have rather moderate political perspectives, and a few have Republican Party ties. A number of the appointees and nominees had rendered distinguished federal or state court service. These include Federal District Judge Kim Wardlaw and Magistrate Judge Barry Silverman whom President Clinton elevated to the Ninth Circuit.

In short, the Clinton Administration compiled an admirable record during the second year of its concluding term. The president continued to appoint and nominate significant numbers of very competent women and minorities, while he and his assistants enunciated clear objectives for selecting judges and implemented effective practices. The success achieved is remarkable, given the significant hurdles that the president faced. Although the Administration contributed to some of these problems, such as the intensified Whitewater investigation and ultimate issuance of the articles of impeachment, those difficulties were compounded by the Republican Party majority in the Senate, by some problems in working with the GOP leadership, and by a few Republican senators' partisan approaches to appointments.<sup>61</sup> In the final analysis, the efforts of President Clinton and his aides were commendable; however, they should attempt to attain more success in the last half term of the final administration by applying the goals and procedures previously employed and by consulting the suggestions that follow.

### III. RECOMMENDATIONS FOR THE REMAINDER OF THE SECOND-HALF TERM

Recommendations respecting the objectives that President Clinton should attain and how he can realize the goals deserve relatively limited examination here. Numerous suggestions have been afforded elsewhere,<sup>62</sup> and a few have already been treated in this essay.

#### A. *Why More Women and Minorities Should be Appointed*

A crucial reason why the President should name additional, very

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60. See *supra* note 42 and accompanying text.

61. See generally Charles F.C. Ruff, *Lewinsky Probe Has Impact on President*, WASH. POST, May 28, 1998, at A16; (discussing the state of the Clinton Presidency); *Meet the Press* Interview with Sen. Lott (NBC Television broadcast) (transcription file with NBC News Transcripts) (same).

62. See generally Goldman, *supra* note 3, at 289-91 (discussing the future for the judicial branch and judicial selection); Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 B.Y.U. L. REV. 1257, 1274-85 (same).

talented female and minority lawyers is the diverse perspectives that most of these attorneys will bring to the federal bench. The jurists may improve other judges' understanding of complicated public policy issues, such as abortion and affirmative action, which the courts must resolve.<sup>63</sup> Appointing more women and minorities could also limit gender and racial bias in the federal courts.<sup>64</sup> Some evidence concomitantly suggests that the American populace would have greater confidence in a federal bench whose composition corresponds more closely to that of the society.<sup>65</sup> A number of these judges, such as Justice Ginsburg and Chief Judge Joseph Hatchett of the Eleventh Circuit, have rendered distinguished service.<sup>66</sup> Expanding the number of female and minority judges can be an important indicator of a presidential administration's commitment to improving circumstances for women and minorities in the nation, in the federal courts, and in the legal practice.<sup>67</sup>

Another important reason for appointing more female and minority lawyers is the need to remedy the lack of gender, racial, and political balance on the present federal courts, more than a majority of whose members Presidents Reagan and Bush selected. Fewer than two percent of the judges whom President Reagan chose were African-Americans, while President Bush named one Asian-American, nine Latinos, and ten African-Americans.<sup>68</sup>

The selection of so few women and minorities by President Reagan and President Bush is troubling because they had bigger, more experienced, pools of female and minority attorneys from whom to choose than did President Carter. In 1988, 140,000 women practiced law compared to 62,000 in 1980.<sup>69</sup> The number of African-American, Latino,

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63. See Marion Z. Goldberg, *Carter-Appointed Judges - Perspectives on Gender*, TRIAL, Nov. 1990, at 108; 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).

64. 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 *Commentaries on Bias in the Federal Courts*, 32 U. RICH. L. REV. 647 (1998)(analyzing bias in the individual federal circuits).

65. See Slotnick, *supra* note 63, at 272. 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. POL'Y 425 (1994); Jennifer A. Segal, *The Decision Making of Clinton's Nontraditional Judicial Appointees*, 80 JUDICATURE 279 (1997); see also Tobias, *supra*, note 62, at 1262-64 (recognizing that this is controversial).

66. See Tobias, *supra* note 2, at 1244; Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477, 483 (1991).

67. See Tobias, *supra* note 14, at 176; Tobias, *supra* note 66, at 483; see also Tobias, *supra* note 22, at 175-76.

68. See Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 287, 293 (1993); Alliance for Justice, *Judicial Selection Project, Annual Report 3* (1992).

69. See Tobias, *supra* note 2, at 1241 n. 22.

and Asian-American practitioners correspondingly increased from 23,000 in 1980 to 51,000 during 1989. These attorneys have engaged in a broad spectrum of challenging legal endeavors, including, for instance, the pursuit of pathbreaking civil rights litigation or the writing of novel legal scholarship.<sup>70</sup>

A final significant reason for appointing additional women and minorities is the need to fill all current openings so that the federal judiciary will be functioning with the total complement of judges whom Congress has authorized. Naming lawyers to those vacancies would permit the Third Branch to resolve criminal cases more expeditiously and reduce the district courts' substantial civil backlogs.<sup>71</sup> Appointing additional women and minorities would end what the presidents of numerous national legal organizations during 1997 characterized as a "looming crisis in the Nation."<sup>72</sup>

### B. *Procedures To Consider*

Suggestions for ways that the Chief Executive and officers responsible for judicial selection can place additional highly competent women and minorities on the federal courts warrant relatively limited discussion. A number of analogous recommendations have been proffered elsewhere<sup>73</sup> and some were examined above, while President Clinton and his assistants are clearly committed to appointing greater numbers of female and minority attorneys and have implemented effective procedures for securing that goal.

However, the Chief Executive and his aides might wish to consider efficacious means of redoubling their admirable attempts to search for, identify, and appoint numerous talented women and minorities. The President and Administration employees ought to expand prior efforts, examine novel ways of proceeding, and invoke resources that they have not yet consulted.

Choosing Supreme Court Justices and circuit judges warrants little evaluation, because the White House has continued to have primary responsibility for openings on those courts.<sup>74</sup> President Clinton and the

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70. See Tobias, *supra* note 62, at 1280; see also Tobias, *supra* note 11, at 1875.

71. See Alliance for Justice, Judicial Selection Project Mid-Year Report 4 (1994). On March 31, 1994, 219,424 civil cases were pending, and 14,658 had been pending for over three years. See also Robert Schmidt, *The Costs of Judicial Delay*, LEGAL TIMES, Mar. 28, 1997, at 6 (suggesting judge shortage backlogs civil cases).

72. See 143 CONG. REC. S8046 (1997) (daily ed. July 24, 1997) (reprinting Letter to William J. Clinton, President, from N. Lee Cooper, ABA President).

73. See, e.g., Tobias, *supra* note 2, at 1245-49; see also Tobias, *supra* note 62, at 1274-85; Goldman, *supra* note 3, at 289-91.

74. See Tobias, *supra* note 3, at 316-17; see also Goldman, *supra* note 3, at 278-79.



White House Counsel, accordingly, must guarantee that White House personnel who help select judges appreciate the importance of appointing greater numbers of female and minority lawyers and use the best procedures for attaining this objective. Experience over the Administration's first term and a half suggests that these staff members comprehended the goal and have implemented effective methods to attain it.

The objectives and processes for choosing district court judges require more assessment because the President has deferred to senators who represent the locales in which openings occur when naming lawyers to the trial bench. The senators' interests or the prodding of Administration employees has apparently prompted numerous members of the Senate to institute or maintain mechanisms for delineating, and promoting the candidacies of, very able female and minority attorneys and to propose many women and minorities. The Chief Executive might thank the senators who have assisted him in realizing the Administration's goals, while he may want to contact individual senators who have not, request that they suggest female and minority lawyers<sup>75</sup> and employ techniques, namely commissions, which will search for, and foster the appointment of, these practitioners. The President could concomitantly repeat, in a significant public forum, repeat his strong commitment to appointing many capable women and minorities and, thus, focus attention on this issue.

Administration personnel who help choose judges must work effectively with Senator Hatch and the entire Judiciary Committee by, for example, continuing to consult on potential nominees. These employees and Senate members should correspondingly seek the assistance of other sources who will be familiar with quite capable female and minority attorneys. Those staff and senators might solicit input from traditional entities, including bar associations. More important will be less conventional sources, namely women's groups or minority political organizations. The President should rely upon all of the female senators, who can convince their colleagues to proffer more women and minorities and help the Administration promote possible nominees' candidacies.

The qualifications and contacts of female and minority counsel, who currently comprise approximately one-quarter of the nation's practicing bar, will be crucial to this effort. Equally valuable could be the endeavors and networking of female and minority Cabinet members, such as Attorney General Janet Reno; of women and minorities throughout the federal government, including Deputy Attorney General Eric Holder; and Hillary Rodham Clinton, who chaired the American Bar

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75. See *supra* note 16 (quoting White House official who stated that administration had encouraged all Democratic senators to support women and minorities).

Association Commission on Women in the Profession.<sup>76</sup>

### C. *Role of Politics*

The earlier discussion of the 1998 appointments process indicated that political factors partially explain the number of judges confirmed and the rather small percentage of women and minorities who were named. It would be unrealistic to ignore the impacts of political phenomena on appointments generally and on selection of female and minority judges specifically because these effects may intensify during the remainder of President Clinton's concluding term.

The exact relevance of politics for choosing judges, particularly the selection of women and minorities over the next two years, is uncertain. For instance, some Republican senators may be more amenable to voting for nominees whom they consider politically conservative or moderate. The speed with which candidates are nominated and confirmed may partially depend on the public perception of the presidency in the aftermath of impeachment. If the American people believe that the Chief Executive has violated the law, this could impede the Administration's efforts to submit nominees, thus affording Republican senators a reason to delay the confirmation process.

The above ideas show that President Clinton and his aides should carefully evaluate how they might efficaciously continue naming highly competent women and minorities while achieving additional significant goals, such as expeditiously filling the more than seventy openings on the federal courts. There are numerous measures that the Administration might consult and apply. The Chief Executive could tender nominees, many of whom are competent women and minorities, for every existing vacancy. President Clinton might concomitantly force the issue of slow candidate confirmation by employing his office as a bully pulpit for remonstrating or accusing GOP senators or by invoking recess appointments.<sup>77</sup> The Administration could also consider permitting the Republicans to propose a number of judges in exchange for their consent to numerous other nominees or for passing legislation which would create new judgeships. These propositions suggest that the Chief Executive may need to weigh carefully the objective of naming many talented female and minority attorneys and additional goals, such as filling the

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76. See Tobias, *supra* note 2, at 1248-49.

77. See *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1962). See generally Thomas A. Curtis, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758 (1984) (arguing that recess appointments are constitutional); Goldman & Slotnick, *supra* note 6, at 272 (advocating President Clinton's use of recess appointments).

judicial vacancies, at a future date in the concluding administration.<sup>78</sup>

#### IV. CONCLUSION

President Clinton and personnel responsible for choosing judges compiled an admirable record over the course of the initial term and a half. They delineated praiseworthy judicial selection goals and instituted effective ways of achieving them. The Administration appointed unprecedented numbers and percentages of very capable women and minorities. If the Chief Executive and his aides redouble their efforts, they should be able to name additional excellent female and minority judges and leave a valuable legacy on the federal courts.

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78. I am not advocating the concepts in this paragraph, but the President must be realistic about filling openings and should analyze their importance generally and in specific courts; although he may find the ideas to be less significant than appointing additional women and minorities.