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Judges I

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The War On the Courts

BOSTON

It gets little public attention, but it is as important as any political effort in this country today: the campaign by the far right to block President Clinton's appointments to the Federal courts.

The principal instrument of the campaign is an organization called the Judicial Selection Monitoring Project, set up by the veteran ultra-conservative Paul Weyrich and run by Thomas Jipping. It is now circulating a videotape to potential donors to raise \$1.4 million. A close look at the tape tells us much about the character of the campaign.

The tape says repeatedly that Mr. Clinton appoints "liberal activist judges." "Many of them will be rewriting the Constitution long after the Clinton Presidency is history," Mr. Weyrich says. Former Attorney General Edwin Meese puts it: "Clinton's judges could eat away at the constitutional system for years to come."

As its main example of a wrong-headed judicial decision, the videotape describes a case in which Federal District Judge Stewart Balzell of Pennsylvania ordered the release of a young woman serving a life sentence for murder, Lisa Michelle Lambert. The murder victim was a high school student, Laurie Show, and the film shows emotional scenes of her parents.

Judge Balzell was in fact appointed by President Bush, not President Clinton. What the tape says about the case is equally misleading.

Judge Balzell held a detailed hearing on a habeas corpus petition for Ms. Lambert's release. In his published opinion, the judge found that the prosecution had knowingly used false testimony by a man he called a murderer, Lawrence Yunkin, who had been allowed to plead guilty to a minor offense.

Mrs. Show, the victim's mother, attended the habeas hearing. She voluntarily took the stand herself to say that she had seen Mr. Yunkin driving from the scene of the crime but that a

Using scare
tactics to block
the President's
nominees.

detective told her not to "dwell on that." The judge praised her as "courageous and honest."

Much other evidence pointed to Ms. Lambert's innocence. Reading what actually happened in that case, I think any American — whatever his or her politics — would be proud of the way our legal system finally worked. Judge Balzell undid a gross miscarriage of justice.

The videotape is designed to alarm conservatives into giving money. "Bill Clinton's first term saw a dramatic shift from constitutional law to political activism," a voice says. An accompanying letter from Robert H. Bork, the failed Reagan nominee to the Supreme Court, says, "The constitutional crisis caused by President Clinton's activist liberal appointees to the federal judiciary is worsening daily."

Numerous professional studies have in fact found Clinton judicial nominees to be, overwhelmingly, centrist lawyers and judges. There has been nothing like the Reagan Administration's highly focused ideological effort to choose conservatives.

Then what is the Judicial Selection Monitoring Project up to? Why is it trying to frighten conservatives with talk of nonexistent "liberal activist" Clinton judges?

The aim is evidently to prevent Senate confirmation of as many Clinton nominees as possible — leaving vacancies to be filled by the next President, who the right hopes will be a conservative Republican.

Mr. Jipping focuses his work intently on the Senate Judiciary Committee. Three ultraconservatives on the committee — Senators John Ashcroft of Missouri, Jon Kyl of Arizona and Jeff Sessions of Alabama — have played a significant part in delaying action on Clinton nominees.

The chairman of the committee, Senator Orrin Hatch of Utah, resents charges that it has unfairly blocked action on judicial nominees. He points out that President Clinton has left many vacancies unfilled for extended periods, and he has scheduled many confirmation hearings in the coming weeks.

But it is also true that the Judiciary Committee has failed to act on some nominees for a long time. Judicial nominations have been pending there for as long as two years without action.

I do not believe that Orrin Hatch will in the end willingly give way to right-wing pressure to keep judicial seats vacant. But the pressure is there, and it takes its toll: not just in senatorial delays but in the demonization of our courts, the institution that more than any other has kept this country free.

file judges

Robert H. Bork

Washington, D.C.

August 30, 1997

Mr. [REDACTED]

Dear Mr. [REDACTED]

In a few days you will be receiving a letter and a video from me that discuss what I believe is the greatest constitutional danger facing our nation today.

When my letter and the video arrive, I hope you will take the time to read and watch my message carefully.

The constitutional crisis caused by President Clinton's activist liberal appointees to the federal judiciary is worsening daily. We must work together to restore judicial restraint and self-government to our nation.

I thank you in advance for your attention to my message.

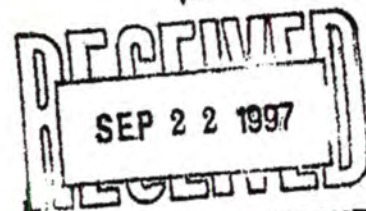
Sincerely,

Robert H. Bork

Robert H. Bork

Paul M. Weyrich

August 17, 1997



I hope you received the special video and letter from Judge Robert Bork we sent you a few days ago.

If you have already responded to Judge Bork's letter, I apologize for troubling you again.

But if you have not, then I urge you to give serious consideration -- today -- to support our Judicial Selection Monitoring Project. We urgently need to raise \$1.4 million in the next few weeks to undertake a major expansion of this vitally needed program!

As each day passes, liberal federal judges are either being nominated or confirmed, or are making decisions that undermine our basic right to self-government. If we can put our three-part plan to expand the Judicial Selection Monitoring Project into action, we can change this -- but that will only happen with your help.

Thank you for your dedication to our cause. Please let us hear from you soon.

Sincerely,

Paul M. Weyrich
Paul Weyrich

for judge

'97 SEP 25 PM1:55

Draft 9/25/97 2:00pm

**PRESIDENT WILLIAM J. CLINTON
RADIO ADDRESS ON JUDICIAL NOMINATIONS
September 26, 1997**

I want to talk this morning about a serious threat to the strength of our judicial system.

For more than 220 years, our nation has remained young and strong by meeting new challenges in ways that renew our oldest values. Throughout our history, our judiciary has helped those values to endure by upholding the laws and defending the rights that reflect them -- without regard for politics or political party. That is the legacy of the judicial system our Founders established -- a legacy we recalled this Thursday, on the 40th Anniversary of the court-ordered desegregation of Little Rock Central High School.

Since I took office, I have tried to build on that legacy by appointing to the federal bench the most highly qualified, most racially, ethnically, and politically diverse group of men and women of any President in our history. They are Democrats and Republicans. They are liberals, moderates and conservatives. But they have at least three things in common: competence, character, and a commitment to uphold the Constitution.

Appointing judges to the federal judiciary is one of the highest shared responsibilities of the President and the Congress under the Constitution. Our founders expected us to work together, and with very few exceptions, we have always done so. But in the past 18 months, this vital partnership has broken down, as Congress has refused to act on nomination after nomination.

In 1996, Congress confirmed just 17 judges -- the lowest election year total in over 40 years. This year, I have already sent 70 nominations to Congress -- so far, they have only acted on 15. The result is a "vacancy crisis" in our courts that Supreme Court Chief Justice William Rehnquist called the most immediate problem our judiciary faces. In federal courthouses across America, almost 100 benches are empty -- some for nearly two years.

Meanwhile, our courts are clogged with a rising number of cases, both criminal and civil. An unprecedented number of civil cases are stalled, affecting the lives of tens of thousands of Americans -- from families seeking life insurance proceeds, to senior citizens trying to collect social security benefits, to small businesses protecting their right to compete. In our criminal courts, as many as 16,000 cases are caught in limbo, while criminals await punishment and victims await justice. Our sitting judges are so bogged down they admit that they are making mistakes, and justice is strained to the breaking point.

Congress' failure to act on my nominations represents the worst of partisan politics. Under the pretense of preventing so-called "judicial activism," the Congressional leadership has taken aim at the very independence our Founders specifically acted to protect. They have threatened sitting judges with impeachment, not for the "high crimes and misdemeanors" the

Constitution specifies, but for judicial opinions with which they disagree. And under this politically motivated scrutiny, under ever-mounting caseloads, our judges must struggle to enforce the laws Congress passes.

Today, on behalf of the American people, I call upon the Congress to fill these vacancies and restore our judicial system to its full power. The intimidation, the delay, the shrill voices of partisanship must stop, so that we can leave an unbroken legacy of a strong and independent judiciary for generations to come. This age demands that we work together, in bipartisan fashion, so that we can move forward into the new century, and the new millennium, as one America.

Thanks for listening.

free judges

LEVEL 1 - 3 OF 7 STORIES

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NPR

SHOW: MORNING EDITION (NPR 10:00 am ET)

SEPTEMBER 23, 1997, TUESDAY

Transcript # 97092313-210

TYPE: PACKAGE

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HEADLINE: Federal Judge Shortage

BYLINE: Nina Totenberg, San Diego; Bob Edwards, Washington, DC

HIGHLIGHT:

In the second installment of a five-part series on the shortage of federal judges, NPR's Nina Totenberg reports from San Diego that the criminal and civil justice systems there are close to collapse because of the backlog of cases.

BODY:

BOB EDWARDS, HOST: This is MORNING EDITION. I'm Bob Edwards.

One of every eight federal judgeships is unfilled. Despite roughly a hundred judicial vacancies now and more expected soon, President Clinton has been slow to nominate and the Senate even slower to confirm judicial nominations.

In some places, the caseload has not jumped dramatically and the remaining judges have been able to manage, unlike other places which have had vacancies for years.

Thirty courts have been designated judicial emergencies by the Justice Department. And while the political battle over nominations continues, the public and the judges bear the burden.

NPR legal affairs correspondent Nina Totenberg went to California, one of the areas most affected by the shortage.

NINA TOTENBERG, NPR REPORTER: San Diego, a city of sparkling blue waters and beautiful vistas that belie its grimy and growing criminal caseload in the federal courts.

Here on the border with Mexico, the docket is almost doubling every two years. The number of federal agents, from immigration to drug to IRS, has doubled since 1994, to enforce added and stiffened federal laws. And the number of felony cases brought by federal prosecutors is the largest of any district in the

MORNING EDITION (NPR), SEPTEMBER 23, 1997

country, 4,000 a year.

There are so many defendants awaiting trial that hundreds have to be housed in prisons 130 miles away and bused in before dawn each morning.

But while the prosecution force and the caseload continue to multiply, the number of judges to deal with these cases has stayed the same since 1980.

Alan Bersin is the U.S. attorney, the chief federal prosecutor for San Diego.

ALAN BERSIN, U.S. ATTORNEY FOR SAN DIEGO, CALIFORNIA: We've reached the limit. We have found that there is an irreducible bottleneck at the point of courtrooms and active federal judges who can hear the criminal cases that are being generated by the agencies and brought by our office.

TOTENBERG: Presiding over the bursting docket with seven active judges is the chief judge and jack of all trades, Judith Keep.

JUDITH KEEP, CHIEF FEDERAL JUDGE, SAN DIEGO, CALIFORNIA: There's an awful lot of just crisis management that's constantly going on.

TOTENBERG: She is bus director, prison manager, court scheduler, construction chief for new holding cells, security maven, personnel manager, and of course the adjudicator of important criminal and civil cases.

KEEP: We're not able to do anything well. Even with the criminal cases, you have to have such an assembly line to get them through. You cannot give them the attention that they deserve. And you know that you're making a lot of mistakes with -- because of the speed.

TOTENBERG: With a caseload that includes 2,500 civil cases a year in addition to the 4,000 felonies, this district, says Keep, should have twice the number of judges it has now.

KEEP: I think that you can just look at numbers like our numbers and say, that is a court that's in trouble.

TOTENBERG: The only way this and many other courts are keeping their heads above water these days is with the help and good graces of senior retired judges, most of them in their seventies and eighties.

In San Diego, Judge Gordon Thompson, at 67, is the youngster of the senior judges. A Nixon appointee, he was chief judge before Judge Keep.

FEDERAL JUDGE GORDON THOMPSON, SAN DIEGO, CALIFORNIA: This is purely voluntary. We are appointed for life and our pensions are for life, so whatever we do here is for free. 'Cause we would be paid whether we stayed home or went out fishing or played golf or whatever, we'd still be paid the same amount of money.

TOTENBERG: Do you see light at the end of the tunnel?

THOMPSON: I don't.

TOTENBERG: Chief Judge Keep is deeply grateful for the senior judges' help, but worried because three of the six have had serious health problems.

KEEP: I don't know what we would do if they quit. The two of them in their eighties keep talking about the fact that they're gonna cut back. But, I mean, how long can I keep asking them to please help me out?

TOTENBERG: But if the courts are chaotic in San Diego, in San Francisco at the appeals court level, they are slowly disintegrating in a stately fashion.

In a beautiful courthouse restored at a cost to the taxpayers of \$89 million after the San Francisco earthquake, there should have been four courtrooms up and operating on the day we visited. But two were empty, because the U.S. Senate has not confirmed a new appeals court

judge in 13 years, despite the fact that the caseload has almost doubled.

This court is supposed to have 28 judges, and the judicial conference headed by Chief Justice William Rehnquist has asked for an additional seven, which would bring the court up to 35 judges. Instead, the court is functioning with only 18 judges. As in San Diego, it's surviving with the help of senior judges, as well as visiting judges from other parts of the country.

SOUNDBITE OF A CROWD IN COURTROOM

BAILIFF: All rise. The U.S. Court of Appeals for the 9th Circuit is now in session.

TOTENBERG: The cases the three-judge panel will hear on this morning involve complicated legal questions and long records. The records for a week's worth of hearings are piled high in stacks on a long conference room table.

The judges say they work six- and seven-day weeks plus evenings to keep up. And still, Chief Judge Proctor Hug says the lack of judges has forced him to cancel arguments in 600 cases this year.

CHIEF JUDGE PROCTOR HUG, 9TH CIRCUIT COURT OF APPEALS: The criminal cases do have priority, and so what this really means is the civil cases aren't going to get heard.

TOTENBERG: In other words, cases not involving potential jail time are last in line. Cases involving large and small amounts of money, huge corporations and small businesses, questions involving everything from abortion and the environment to disability claims and medical expenses. All will have to wait, probably for years.

Back in San Diego, civil cases are considered almost a luxury. There's enormous pressure to settle cases because the wait is so long.

Chief Judge Keep says each year she goes over the civil docket and picks out the oldest and most compelling cases to get them to trial. On the day we visited, she had just finished a 10-year-old civil case involving the shooting of a civilian by a police officer.

KEEP: There's a death. The officer's life is on hold because he shot somebody. The family's life is on hold because they had a loved one die. They need closure.

TOTENBERG: At the appeals court level, the wait is less than 10 years, but often as much as two or three. Lawyers say they have had clients get out of jail before their appeals were decided.

The judges have set up innovative ways to use staff to help them screen out the less contentious cases. But Chief Judge Hug says they have just about run out of innovations. The system, he says, is near a breakdown.

HUG: There are three constitutional branches of government. The judicial branch is dependent upon the other two to provide the

resources that are necessary in order for the judicial branch to do its constitutional duty. And what we are really doing is calling upon the other two branches to give us the resources, to give us the judges, get them nominated, get them voted on, so that we can do the quality job that we want to do.

TOTENBERG: Outside the walls of the courthouse, however, judges are almost powerless to help themselves. In San Diego, Judge Keep is often using her computer to talk to court personnel while she's in the courtroom trying cases.

KEEP: We cannot say, well, because there's 4,000 felonies we need another three or four judges, so we'll just hire them. We can't do that.

TOTENBERG: Nor can judges point the finger at the Senate or the White House in public. Judges are supposed to be above politics.

But prosecutor Alan Bersin has no such inhibitions.

BERSIN: What is a political battle within the Beltway, and may make sense in the logic of Washington politics, has real life consequences. Without judges, we cannot bring these prosecutions. Without the prosecutions, we can't support the agencies in their enforcement efforts and we end up with no effective deterrence to the crime that exists here on the border.

TOTENBERG: Bersin says that if Congress expects the laws it passes to be enforced, it has to change its ways.

BERSIN: If we don't have judges, that law ends up having no teeth, and we end up chasing our tails to some degree.

TOTENBERG: And San Diego is not an anomaly. Justice Department officials say the scene here, in terms of too few judges to support law enforcement, is being replicated all along the border and in other parts of the country as well.

Nina Totenberg, NPR News, San Diego.

EDWARDS: Tomorrow and Thursday, what the Senate and White House are doing about the growing vacancies in the judiciary.

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Judicial Vacancies: The Causes

September 22, 1997 -- As America gets tougher on crime and turns more frequently to the courts, a severe problem becomes more apparent: There aren't enough federal judges. For nearly a year, the number of vacancies has hovered around 100...one eighth of the federal judiciary. Courtrooms are empty and people are waiting years to have their cases heard.

In the first of five reports, NPR's Nina Totenberg examines the reasons for the vacancies.

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- ☐ [Real Audio 2.0 Format \(28.8\)](#)
(Requires the [RealAudio](#) player)

Read the Transcript

BOB EDWARDS, HOST: This is MORNING EDITION. I'm Bob Edwards. Americans depend on the law to protect them. They depend on courts to punish the guilty, protect the innocent, and to adjudicate rights. But there's a problem in the federal courts: there are not enough judges. President Clinton has been slow to nominate them, and the Republican-controlled Senate has been even slower to confirm them.

For nearly a year, the number of vacancies has hovered around 100, one-eighth of the federal judiciary. Courtrooms are empty and people are waiting years to have their cases heard. This week, a five-part series on the judicial vacancy crisis.

NPR Legal Affairs correspondent Nina Totenberg reports.

NINA TOTENBERG, NPR REPORTER: The judicial branch of government has always had its tensions with the other two branches. In the early days of the republic, some members of Congress were outraged by *Marbury v. Madison*, the landmark opinion holding for the first time that the court had the power to invalidate acts of Congress. Some members were so outraged that they suggested federal troops be sent to force the court to recant. And in this century, President Franklin Roosevelt became so frustrated with the high court that he proposed his infamous court packing plan to expand the number of justices to 15.

FRANKLIN ROOSEVELT, FORMER PRESIDENT OF THE UNITED STATES: The court has more and more often and more and more boldly asserted a power to veto laws passed by the Congress and by state legislatures. The court has been acting not as a judicial body but as a policymaking body.

TOTENBERG: Just as Supreme Court decisions have been controversial, so, too, have been some nominees to the court. In recent decades there have been fights over nominees like Abe Fortas and G. Harold Carswell. But the fight over the nomination of conservative Robert Bork broke the mold, at least in this century, in that it focused almost exclusively on the nominee's ideology. Senator Edward Kennedy sounded the battle cry of the opposition.

U.S. SENATOR EDWARD KENNEDY (D-MA): In Robert Bork's America, there is no room at the inn for blacks and no place in the Constitution for women. And in our America, there should be no seat on the Supreme Court for Robert Bork.

TOTENBERG: As long as the Democrats kept control of the Senate, they continued to focus their fire on Supreme Court nominees. As for nominations to the lower courts, they mounted an organized opposition to just a handful of Reagan or Bush appointees, and managed to defeat only three in 12 years. Indeed, when Robert Bork was appointed to the appeals court five years before his nomination to the Supreme Court, the appointment went through the Democratic Senate with no fuss or muss, and no votes against him. And Clarence Thomas was likewise quickly confirmed to the appeals court with only two votes against him. It was only when these controversial conservatives were nominated to the Supreme Court that the Democrats took them on. Now, however, with Democrats in the White House and the GOP controlling the Senate, the full-blast ideological and partisan scrutiny by the opposition party has spread to the lower courts, where there are now roughly 100 vacancies. Yale Professor Robert Gordon is a historian of the legal profession.

ROBERT GORDON, YALE PROFESSOR: Part of this is continuing payback for the Democratic defeat of the Bork nomination to the Supreme Court. I think in the Reagan years, the pattern was established in which the conservative movement identified the judiciary as one of the places where it was likely to be able to carry out its program. I think cultural conservatives in particular blamed the liberal Warren court for many of the problems that they saw with society. And they really vowed that they would try to retake the judiciary. And so, even with a Democratic president in the White House, they are still fighting over the composition of the judges.

TOTENBERG: The pressure from conservative Republicans is not just aimed at the White House. Orrin Hatch, the respected Republican chairman of the Senate Judiciary Committee, has weathered stiff behind-the-scenes criticism from fellow conservatives for not being aggressive enough in his criticism of the president's nominees. And Hatch is no shrinking violet.

U.S. SENATOR ORRIN HATCH (R-UT): This president has put up more activist judges than any president in the last 18 years. And we're finding them all over the courts, and that's causing a lot of problems. We have liberal activists who ignore what the law is, don't care what the law is. They're going to do whatever they feel in their souls is right, regardless of what the law says.

TOTENBERG: Every major independent study of President Clinton's judicial nominees, however, has concluded that they are rather centrist: to the left of the Reagan-Bush nominees, and to the right of the Carter nominees. Professor Sheldon Goldman (ph) has studied the judicial appointment process from the 1930s on.

PROFESSOR SHELDON GOLDMAN, JUDICIAL APPOINTMENT EXPERT: The large majority of the Clinton nominees are very solid, mainstream people. None of them have been identified as liberal activists in terms of, you know, public persona or in terms of writings.

TOTENBERG: Indeed, even some conservatives who don't agree with Mr. Clinton's appointees on many issues say the judicial activist label is a ruse. Conservative scholar Bruce Fein was one of the top judge screeners in the Reagan Justice Department.

BRUCE FEIN, FORMER REAGAN ADMINISTRATION APPOINTEE, U.S. DEPARTMENT OF JUSTICE: It's transparent that this is partisanship when you just look at all the cases they cite that arouse their ire. They all happen to be cases they disagree with. And the cases that are equally activist that they agree with, they say nothing about.

TOTENBERG: Nominations to the lower federal courts don't attract much publicity as a rule. This is a political game in Washington that for decades has been played out behind the scenes. But passions run high in every camp. Even though Republican appointees outnumber Democratic appointees by a margin of two to one on the federal courts, many conservatives, especially cultural conservatives, view the federal courts as the enemy. Tom Jipping is director of the conservative Judicial Selection Monitoring Foundation.

TOM JIPPING, DIRECTOR, JUDICIAL SELECTION MONITORING FOUNDATION: I believe that that system is out of balance. It's the judiciary that's been virtually unchecked for most of this century.

The people have everything at stake. I mean, literally, democracy and liberty are what's at stake.

TOTENBERG: On the Democratic side, there is passion too. Senator Patrick Leahy, the ranking Democrat on the Senate Judiciary Committee charges that Republicans, having failed to shut down the entire government two years ago, now are quietly setting their sights on the judiciary,

U.S. SENATOR PATRICK LEAHY (D-VT): They're trying to do it behind the scenes, but they are trying to interfere with the most independent judiciary in the world, the envy of the rest of the world. No Democrat or Republican leader of the Senate before this would ever countenance this kind of irresponsible activity.

TOTENBERG: At the White House, aides to the president point out that 14 judicial nominees have been before the Senate for at least 18 months, and many of them more than two years, without being brought to a vote. White House Counsel Charles Ruff observes that more of President Clinton's nominees have been rated well-qualified by the American Bar Association than any other president's.

CHARLES RUFF, WHITE HOUSE COUNSEL: If we've got candidates who have views with which the Senators disagree, then I think the way to deal with that is have a hearing, let them be heard, let the Senators question them, put them up for a vote, and we'll count on the merits of our candidates to make it through the system.

TOTENBERG: But the White House cannot escape blame for the increasingly empty federal bench and the accompanying chaos in some jurisdictions. Until this summer, the president was woefully behind in naming people to fill those vacancies. As late as July, he'd submitted names for only a third of the vacancies and only now has gotten up to submitting two-thirds. Moreover, he stayed strangely silent on the issue, leaving the field to conservatives in the House and Senate. And for some conservatives, the stall on judicial nominations is part of a broad attack on what conservatives call "judicial activism." They're employing an array of new tools to stamp it out. They have proposed impeachment for some judges, eliminating life tenure for all federal judges, and a bill that would allow lawyers to eliminate a judge from a case in much the way lawyers now can eliminate potential jurors for no stated reason at all. So far, no judge has been impeached and no restriction of the federal judiciary has been adopted. But with one out of eight federal judgeships across the country unfilled, and the federal judiciary asking for an additional 55 new judgeships to be created to deal with new and stiffened drug and immigration laws, judges of all political stripes say there is a crisis on the horizon. Nina Totenberg, NPR News, Washington.

EDWARDS: Tomorrow, two courts where the judges are swamped with work.

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Judicial Vacancies: Overload

September 23, 1997 -- Criminal and civil justice systems in many parts of the United States are close to collapse. Among the problems: One out of every eight federal judgeships is unfilled. Despite roughly 100 judicial vacancies now -- and more expected soon -- President Clinton has been slow to nominate and the Senate even slower to confirm judicial nominations. 30 courts around the country, with empty benches and a growing number of pending cases, have been designated judicial emergencies by the Justice Department. And while the political battle over nominations continues, the judges - and the public -- bear the burden. In the second installment of a five-part series on the shortage of federal judges, NPR's Legal Affairs Correspondent Nina Totenberg reports from San Diego, one of the areas most affected by the shortage.

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NPR legal affairs correspondent Nina Totenberg went to California, one of the areas most affected by the shortage.

NINA TOTENBERG, NPR REPORTER: San Diego, a city of sparkling blue waters and beautiful vistas that belie its grimy and growing criminal caseload in the federal courts. Here on the border with Mexico, the docket is almost doubling every two years. The number of federal agents, from immigration to drug to IRS, has doubled since 1994, to enforce added and stiffened federal laws. And the number of felony cases brought by federal prosecutors is the largest of any district in the country, 4,000 a year. There are so many defendants awaiting trial that hundreds have to be housed in prisons 130 miles away and bused in before dawn each morning. But while the prosecution force and the caseload continue to multiply, the number of judges to deal with these cases has stayed the same since 1980. Alan Bersin is the U.S. attorney, the chief federal prosecutor for San Diego.

ALAN BERSIN, U.S. ATTORNEY FOR SAN DIEGO, CALIFORNIA: We've reached the limit. We have found that there is an irreducible bottleneck at the point of courtrooms and active federal judges who can hear the criminal cases that are being generated by the agencies and brought by our office.

TOTENBERG: Presiding over the bursting docket with seven active judges is the chief judge and jack of all trades, Judith Keep.

JUDITH KEEP, CHIEF FEDERAL JUDGE, SAN DIEGO, CALIFORNIA: There's an awful lot of just crisis management that's constantly going on.

TOTENBERG: She is bus director, prison manager, court scheduler, construction chief for new holding cells, security maven, personnel manager, and of course the adjudicator of important criminal and civil cases.

KEEP: We're not able to do anything well. Even with the criminal cases, you have to have such an assembly line to get them through. You cannot give them the attention that they deserve. And you know that you're making a lot of mistakes with -- because of the speed.

TOTENBERG: With a caseload that includes 2,500 civil cases a year in addition to the 4,000 felonies, this district, says Keep, should have twice the number of judges it has now.

KEEP: I think that you can just look at numbers like our numbers and say, that is a court that's in trouble.

TOTENBERG: The only way this and many other courts are keeping their heads above water these days is with the help and good graces of senior retired judges, most of them in their seventies and eighties. In San Diego, Judge Gordon Thompson, at 67, is the youngster of the senior judges. A Nixon appointee, he was chief judge before Judge Keep.

FEDERAL JUDGE GORDON THOMPSON, SAN DIEGO, CALIFORNIA: This is purely voluntary. We are appointed for life and our pensions are for life, so whatever we do here is for free. 'Cause we would be paid whether we stayed home or went out fishing or played golf or whatever, we'd still be paid the same amount of money.

TOTENBERG: Do you see light at the end of the tunnel?

THOMPSON: I don't.

TOTENBERG: Chief Judge Keep is deeply grateful for the senior judges' help, but worried because three of the six have had serious health problems.

KEEP: I don't know what we would do if they quit. The two of them in their eighties keep talking about the fact that they're gonna cut back. But, I mean, how long can I keep asking them to please help me out?

TOTENBERG: But if the courts are chaotic in San Diego, in San Francisco at the appeals court level, they are slowly disintegrating in a stately fashion. In a beautiful courthouse restored at a cost to the taxpayers of \$89 million after the San Francisco earthquake, there should have been four courtrooms up and operating on the day we visited. But two were empty, because the U.S. Senate has not confirmed a new appeals court judge in 13 years, despite the fact that the caseload has almost doubled. This court is supposed to have 28 judges, and the judicial conference headed by Chief Justice William Rehnquist has asked for an additional seven, which would bring the court up to 35 judges. Instead, the court is functioning with only 18 judges. As in San Diego, it's surviving with the help of senior judges, as well as visiting judges from other parts of the country.

SOUNDBITE OF A CROWD IN COURTROOM

BAILIFF: All rise. The U.S. Court of Appeals for the 9th Circuit is now in session.

TOTENBERG: The cases the three-judge panel will hear on this morning involve complicated legal questions and long records. The records for a week's worth of hearings are piled high in stacks on a long conference room table. The judges say they work six- and seven-day weeks plus evenings to keep up.

And still, Chief Judge Proctor Hug says the lack of judges has forced him to cancel arguments in 600 cases this year.

CHIEF JUDGE PROCTOR HUG, 9TH CIRCUIT COURT OF APPEALS: The criminal cases do have priority, and so what this really means is the civil cases aren't going to get heard.

TOTENBERG: In other words, cases not involving potential jail time are last in line. Cases involving large and small amounts of money, huge corporations and small businesses, questions involving everything from abortion and the environment to disability claims and medical expenses. All will have to wait, probably for years. Back in San Diego, civil cases are considered almost a luxury. There's enormous pressure to settle cases because the wait is so long. Chief Judge Keep says each year she goes over the civil docket and picks out the oldest and most compelling cases to get them to trial. On the day we visited, she had just finished a 10-year-old civil case involving the shooting of a civilian by a police officer.

KEEP: There's a death. The officer's life is on hold because he shot somebody. The family's life is on hold because they had a loved one die. They need closure.

TOTENBERG: At the appeals court level, the wait is less than 10 years, but often as much as two or three. Lawyers say they have had clients get out of jail before their appeals were decided. The judges have set up innovative ways to use staff to help them screen out the less contentious cases. But Chief Judge Hug says they have just about run out of innovations. The system, he says, is near a breakdown.

HUG: There are three constitutional branches of government. The judicial branch is dependent upon the other two to provide the resources that are necessary in order for the judicial branch to do its constitutional duty. And what we are really doing is calling upon the other two branches to give us the resources, to give us the judges, get them nominated, get them voted on, so that we can do the quality job that we want to do.

TOTENBERG: Outside the walls of the courthouse, however, judges are almost powerless to help themselves. In San Diego, Judge Keep is often using her computer to talk to court personnel while she's in the courtroom trying cases.

KEEP: We cannot say, well, because there's 4,000 felonies we need another three or four judges, so we'll just hire them. We can't do that.

TOTENBERG: Nor can judges point the finger at the Senate or the White House in public. Judges are supposed to be above politics. But prosecutor Alan Bersin has no such inhibitions.

BERSIN: What is a political battle within the Beltway, and may make sense in the logic of Washington politics, has real life consequences. Without judges, we cannot bring these prosecutions. Without the prosecutions, we can't support the agencies in their enforcement efforts and we end up with no effective deterrence to the crime that exists here on the border.

TOTENBERG: Bersin says that if Congress expects the laws it passes to be enforced, it has to change its ways.

BERSIN: If we don't have judges, that law ends up having no teeth, and we end up chasing our tails to some degree.

TOTENBERG: And San Diego is not an anomaly. Justice Department officials say the scene here, in terms of too few judges to support law enforcement, is being replicated all along the border and in other parts of the country as well.

Nina Totenberg, NPR News, San Diego.

EDWARDS: Tomorrow and Thursday, what the Senate and White House are doing about the growing vacancies in the judiciary.

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Judicial Vacancies: The Senate

September 24, 1997 -- Since Republicans regained control of the Senate in 1994, there's been a dramatic change in the judicial appointment process. The new, more conservative, Senators have proved less deferential to the Constitutional mandate that the President nominates and the Senate confirms all federal judges. In part three of her series, NPR Legal Affairs Correspondent Nina Totenberg reports the tension between the Senate and President Clinton has resulted in a shortage of federal court judges, and a backup of court cases.

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Read the Transcript

BOB EDWARDS, HOST: This is MORNING EDITION. I'm Bob Edwards.

The Constitution of the United States provides that the president nominates and the Senate confirms all federal judges. In practice, senators, especially those from the president's party, have had considerable influence on the president's choices. Presidents Reagan and Bush were more protective of presidential prerogative and less deferential to senators than most of their predecessors. Still, the confirmation process proceeded quickly, with 570 nominations confirmed, a pattern that continued in the early years of the Clinton administration. Since Republicans regained control of the Senate in 1994, however, there's been a dramatic change.

In part three of her series, NPR legal affairs correspondent Nina Totenberg reports on the Senate's role in the judicial appointment process.

NINA TOTENBERG, NPR REPORTER: In politics, what goes around comes around, sometimes to exaggerated proportions. That seems to be what's happened on the question of judicial nominations, where fights were once confined largely to the Supreme Court and battles over lower court judicial nominations were rare. In the 12 years of the Reagan and Bush administrations, there were donnybrooks over only a half dozen nominees, and just three were defeated. One of the three rejected as unfit for the federal bench was Jefferson Beauregard Sessions, a federal prosecutor in Alabama accused of racially-motivated prosecutions and of making racially insensitive remarks. In this exchange with Senator Edward Kennedy, for instance, Sessions was asked whether he had called the NAACP and the National Council of Churches "un-American."

U.S. SENATOR EDWARD KENNEDY (D-MA): Labels used as

un-American and communist activities are not used lightly, I think, in our society.

JEFFERSON BEAUREGARD SESSIONS, CANDIDATE FOR FEDERAL JUDGESHIP: I have not said that they are un-American. I explained that I said that they take positions that are considered un-American; they hurt themselves.

TOTENBERG: Sessions never became a judge. But in 1994, he was elected to the U.S. Senate and became a member of the new Republican majority as well as a member of the Judiciary Committee that had once spurned him. The GOP takeover in Congress marked a new approach to judicial nominations: intense scrutiny of the president's nominees and little action. It is normal in a presidential election year for the opposition party to slow down judicial confirmations, and so it went relatively unremarked in 1996 when the Senate confirmed only 17 nominees, compared for instance to 1992, when the Democratic Senate confirmed 66 of President Bush's nominees. Moreover, President Clinton until recently has had little basis for complaint, since he'd named people to fill only about a third of the 100 vacancies that have existed for many months. But the president now has submitted names for more than two-thirds of the vacancies, 65 nominees, and so far this year, the Senate has confirmed only 15. Patrick Leahy is the ranking Democrat on the Judiciary Committee.

U.S. SENATOR PATRICK LEAHY (D-VT), RANKING DEMOCRAT, SENATE JUDICIARY COMMITTEE: We've had far more vacancies, the Senate's taken far more vacancies than it has confirmed judges. I mean, this hasn't happened in 200 years. It's being done to pander to the ultra-right and pander to some of these fundraising appeals. But what it is doing is damaging the integrity and the independence of the federal judiciary.

TOTENBERG: Senator Orrin Hatch, the respected chairman of the Judiciary Committee, denies that there's any vacancy crisis. But, he adds...

U.S. SENATOR ORRIN HATCH (R-UT), CHAIRMAN, SENATE JUDICIARY COMMITTEE: I want to emphasize that the primary criteria in this process is not how many vacancies need to be filled but whether President Clinton's nominees are qualified to serve on the bench and will not upon receiving their judicial commissions spend a lifetime career rendering politically-motivated, activist decisions.

TOTENBERG: Although Hatch staunchly defends the GOP record on judgeships, the Democrats do not view him as the main obstacle to confirmation. Hatch is getting pressure from some Republicans to hold the line, and earlier this year he beat back an attempt by fellow conservatives to strip him of much of his power as chairman.

LEAHY: I think Senator Hatch is probably getting his orders directly from the Republican Caucus.

TOTENBERG: Democrat Patrick Leahy.

LEAHY: And I think if it was left to Orrin Hatch and myself, we'd get most of these judges through.

TOTENBERG: But the truth about judicial confirmations is that, with rare exception, the battling is done behind the scenes, and the principal weapon opponents use is delay. A few examples illustrate the point. Item: the case of Michael Schattman, a former Texas state court judge nominated to a federal district court judgeship in 1995. Initially, the nomination was not opposed by Schattman's home state senators Phil Gramm and Kay Hutchison. But the Judiciary Committee held no hearing for the next year, and the nomination died with the 104th Congress, to be resubmitted in the 105th. This time, though, Gramm and Hutchison did oppose the nomination, with Gramm citing the fact that Schattman had once been an active Democrat. Texas newspapers noted pointedly that Gramm had supported active Republicans for judgeships in the past. But without Gramm's blessing, there is unlikely to be any hearing or vote for Michael Schattman. Chairman Hatch:

HATCH: Well, the policy is that if a senator returns a negative blue slip, that person's gonna be dead.

TOTENBERG: Item: Margaret Morrow, a prestigious corporate lawyer and the first woman president of the California Bar Association. She was nominated in May of 1996 with support from key California Republicans and got a hearing a month later. But her nomination died on the election year vine, to be immediately resubmitted this year. After a second hearing, she was asked by Senator Charles Grassley how she'd voted on over 100 California referenda in recent years. The list was eventually pared to about 10 of the most controversial. The contretemps made Morrow something of a poster child for the judicial vacancy story, with Senator Leahy branding the questioning as "McCarthyism" and Senator Dianne Feinstein accusing Republicans of using a different standard for women than men.

U.S. SENATOR DIANNE FEINSTEIN (D-CA): I have never seen a male nominee go through what she has gone through. She's been asked questions that everyone has assured me have never been asked of any district court nominee.

TOTENBERG: Item: William Fletcher, a University of California law professor nominated more than two years ago to the appeals court in California. Last year, in an episode dubbed "Throw Momma from the Bench," Hatch said Fletcher would not be confirmed until his mother, a sitting appeals court judge, promised to retire. Republicans cited an archaic anti-nepotism law that had never in modern times been invoked when relatives were appointed to the same court. Nonetheless, Betty Fletcher agreed to retire once her son was confirmed, but the nomination continues to languish in committee. The delay strategy is perhaps best illustrated with a nominee who was uncontroversial and was eventually confirmed: Merritt Garland (ph), a top Justice Department official who presided over the Oklahoma City bombing investigation. Garland was first nominated to the U.S. Appeals Court here in Washington in September 1995 with endorsements from an array of Republican conservatives who had served in the Reagan and Bush Justice Departments. But the nomination was not acted on in the next year and a half, and was resubmitted after the new Congress was sworn in in 1997. In March, it finally came to the Senate floor where Hatch recommended the nominee in glowing terms.

HATCH: I know him personally. I know of his integrity. I know of his legal ability. I know of his honesty. I know of his acumen. And he

belongs on the court.

TOTENBERG: Still, Republican after Republican rose to oppose the nomination, not on its merits, but because they said the seat did not need to be filled now. Here, for example, was Jeff Sessions of Alabama.

SESSIONS: I think it would be very unwise for us to fill a vacancy that if there's any possibility that this caseload will continue to decline anymore. Because once its filled, they hold that position for life, and we're obligated to pay their salary for life.

TOTENBERG: After hours of debate, Chairman Hatch finally erupted at his GOP colleagues, and in particular at Sessions, the senator who had once been rejected for the bench.

HATCH: My colleague from Alabama circulated a letter saying that confirming Merritt Garland would be a "rip-off" of the taxpayers. Having just led the fight for the balanced budget amendment, I don't think that's quite fair. I'm never gonna rip off the taxpayers. But I'll tell you one thing, playing politics with judges is unfair. And I'm sick of it. A rip-off? Let's be serious about this, folks. This is a serious matter.

TOTENBERG: Shortly thereafter, the Garland nomination was approved with 23 Republicans voting against it, including Majority Leader Trent Lott.

Nina Totenberg, NPR News, Washington.

EDWARDS: Tomorrow, the president's role in the vacancy problem.

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Judicial Vacancies: President Clinton

September 25, 1997 -- Both President Clinton and Congress were elected after campaigning on a platform of law and order: More police; more laws; more judges. A year later, one out of every EIGHT federal judgeships is empty, and the Senate refuses to act on dozens of the President's judicial nominees. Yet HE remains uncharacteristically silent.

In part four of her series, NPR legal affairs correspondent Nina Totenberg examines the growing federal court vacancy problem, and the role of the President.

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BOB EDWARDS, HOST: This is MORNING EDITION. I'm Bob Edwards. Both President Clinton and Congress were elected after campaigning on a platform of law and order, more police, more laws, more judges. A year later, one of every federal judgeships is empty and the Senate refuses to act on dozens of the president's judicial nominees. Yet, he remains uncharacteristically silent. In part four of her series, NPR legal affairs correspondent Nina Totenberg examines the growing federal court vacancy problem, and the role of the president.

NINA TOTENBERG, NPR REPORTER: As long as the Democrats had control of the Senate, President Clinton had a pretty decent record on judicial appointments. More than 200 nominations were made and approved in his first term. But when the GOP won control of the Senate, Republicans signaled they intended to make the judiciary an election issue in the 1996 presidential campaign. Senator Bob Dole, in his response to the president's state of the union speech, accused President Clinton of putting liberal judges on the bench to "war with our values."

FORMER SENATE MAJORITY LEADER ROBERT DOLE (R-KS): What's wrong is that the elites in charge don't believe in what the people believe in.

TOTENBERG: And Dole was soon calling for the impeachment of a judge in New York who had excluded evidence in a drug case. Accounts differ as to whether President Clinton was spooked by the attack on his judicial nominations. But his campaign staff was soon at work identifying Republican judges who had made equally unpopular rulings. And according to Democratic sources, the president's campaign aides did some polling on the issue. They learned that the attack on the judiciary had some effect on voters, but not if they were told that the Clinton appointees had extraordinarily high ratings from the American Bar

Association, and not when they were told that Senator Dole had voted for all of Mr. Clinton's judicial appointees. After the election, the Republican-controlled Senate called off a decades-long formal relationship with the American Bar Association, and the practice of routine screening and Senate confirmation for most judicial nominees seemed to come to a halt.

What was particularly strange, though, was that Mr. Clinton didn't seem to care. His own submission of nominees dwindled to a trickle. In the first six months of his new term, he submitted only 27 names to fill 104 judgeships. And most of the 27 were names that had been submitted in the previous Congress and had not yet been acted on. Senator Orrin Hatch, the chairman of the Judiciary Committee, said it was taking the president an average of 600 days to fill a judicial vacancy.

U.S. SENATOR ORRIN HATCH (R-UT), CHAIRMAN, SENATE JUDICIARY COMMITTEE: If anybody is to blame here, it's the administration, which is not sending us up nominees.

TOTENBERG: In recent months, however, the White House has gunned itself into action, submitting a total of 66 judicial nominations. And Senator Hatch now says that the Senate has only confirmed 15 nominees because of problems with those nominations.

HATCH: We do have an occasional nuance where some conservative senator doesn't like some liberal nominee. You'll note that when the president sends us good nominees, we move them, we move them fast. When they just renominate the same people who have the same problems, it makes it very difficult.

TOTENBERG: Every major independent study of the Clinton appointees, however, concludes that they are quite centrist -- to the left of President Reagan's and to the right of President Carter's. In fact, most like President Gerald Ford's. University of Massachusetts professor Sheldon Goldman (ph) has studied the judicial appointment process from the 1930s on. He says the major difference between the Clinton and Carter nominees is that Clinton, unlike Carter, seems to have eliminated all overt liberals from his pool.

PROFESSOR SHELDON GOLDMAN, UNIVERSITY OF MASSACHUSETTS: The Clinton administration and Clinton himself have been very careful to lower the ideological temperature of the judicial appointment process. They have nominated mainstream people. They've gone to a great deal of trouble before they actually send the nomination to run them by Senator Hatch. But we see that one, you know, extremist senator can gum up the works.

BRUCE FEIN, REAGAN ADMINISTRATION JUDGE SCREENER: They're stalling. Because President Clinton himself has displayed gross disinterest in the judicial nomination process.

TOTENBERG: Bruce Fein served as a judge screener in the Reagan administration.

FEIN: It's like he's orphaned it. And if the president doesn't push, it's pretty easy to stop what's goin' on.

TOTENBERG: Nan Aron, director of the liberal Alliance for Justice,

agrees.

NAN ARON, DIRECTOR, ALLIANCE FOR JUSTICE: Unlike every other administration, this president has not made judgeships a priority. He has not defended his judges. And as a result, we have a real vacuum at this point.

TOTENBERG: Even in the first Clinton administration, liberals like Aron were unhappy because the president did not nominate to the bench some of the leading liberal thinkers in the legal community to counter the leading conservative thinkers appointed by Presidents Bush and Reagan. Now, however, the liberals see the president as caving in to the GOP because some of the president's most recent picks are Bush and Reagan trial court judges being elevated to appeals or circuit courts. Nan Aron notes that, as the numbers now stand, the Reagan/Bush appointees on the federal bench outnumber the Democratic appointees by a margin of 2-1. And she says that Mr. Clinton campaigned on a promise of more progressive appointments.

ARON: One would have hoped that this president would use his power to begin to put some fresh perspectives and voices on these circuit courts. That is something he has chosen not to do.

TOTENBERG: Indeed, the president has never given a major speech on the issue, devoted even a five-minute Saturday address to it, nor has he used the slow confirmation as a bargaining chip in other major negotiations, such as the budget deal. If there's a model for how to win the approval of judicial nominations, it's probably the Reagan administration. Fred Fielding served as White House counsel and major domo of the judge-picking process for Mr. Reagan.

FRED FIELDING, WHITE HOUSE COUNSEL UNDER PRESIDENT REAGAN: I think that the secret of our success was that the president was interested in filling these positions; he was interested in them being filled expeditiously. There were some controversies. But at least President Reagan was clear from his record in that he was willing to take on a fight, he wouldn't be intimidated just because of the possibility that there was a potential confirmation fight.

TOTENBERG: Many of President Clinton's Senate allies today are puzzled by his silence. Senator Dianne Feinstein:

U.S. SENATOR DIANNE FEINSTEIN (D-CA): The president does need to weigh in and does need to use his bully pulpit.

TOTENBERG: That interview with Senator Feinstein was in May, and still the president has remained mum. Again, here's former Reagan administration official Bruce Fein.

FEIN: The president can command nationwide audiences. And if he cared a lot about it, he could say, ladies and gentlemen, you elected me president of the United States, and one of my mandates as president is to appoint judges. And that if the Senate wishes to place themselves on the record against my nominees, then they must do so. But simply to try to avoid their accountability by not voting at all is an outrage, and I'm identifying and identify the senators by name that are doing this.

TOTENBERG: Even within President Clinton's administration, there is

consternation at the slow pace and low profile of judicial nominations. One top official noted that the attrition rate for judges is about 17 retirements a quarter. "At this rate," lamented the official, "we're not even keeping up. And the vacancies are bound to reach much higher numbers." Republicans note that there have been times in the past when there have been as many vacancies, but not for such a prolonged period of time, and not since the recent dramatic expansion of federal laws on drugs, immigration, and other subjects. Indeed, the U.S. Judicial Conference, the policymaking body of the federal judiciary, has recommended the creation of 55 new federal judgeships. Chief Justice William Rehnquist has said the gravest threat to the federal courts is the vacancy crisis. And still, the president has remained silent. Professor Goldman:

GOLDMAN: President Clinton, one might say with a little poetic license, is playing Hamlet rather than Henry V in this matter. And what is called for at this point in time is leadership.

I'm Nina Totenberg, NPR News, Washington.

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Judicial Vacancies: Politics

September 26, 1997 -- Many legal experts believe Republicans in Congress are using their Senatorial prerogatives to stall the confirmation of federal judges, advance their own political aims, and intimidate sitting judges. For months, the number of judicial vacancies in federal courts has hovered around 100...about an eighth of the federal judiciary. In the final report in our five-part series on the national shortage of federal judges, NPR's Nina Totenberg examines a situation judges of all political persuasions are calling a looming crisis.

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Read the Script

BOB EDWARDS, HOST: This is MORNING EDITION. I'm Bob Edwards.

For months, the number of judicial vacancies in federal courts has hovered around 100, about an eighth of the federal judiciary. Judges of all political persuasions are calling the situation a looming crisis. Many legal experts believe that the Republican-controlled Congress is deliberately stalling judicial nominations as part of a larger plan to intimidate judges and take partisan advantage of the confirmation process.

NPR legal affairs correspondent Nina Totenberg reports.

NINA TOTENBERG, NPR REPORTER: While the battle over judicial nominations continues largely behind the scenes, conservative Republicans have acted aggressively to call attention to and put limits on the federal courts. Senator Orrin Hatch, the chairman of the Senate Judiciary Committee, has repeatedly warned judges that their own actions are responsible for the wrath of the Senate. Here's Hatch talking at a meeting of the Federal Judges Association last spring:

U.S. SENATOR ORRIN HATCH (R-UT), CHAIRMAN, SENATE JUDICIARY COMMITTEE: But if that judiciary continues to overstep its bounds, then that judiciary is doing itself a great deal of harm. And it's one of the reasons why we're having these arguments today. And I think all of you need to know that.

TOTENBERG: Hatch's approach is mild-mannered compared to many other conservatives. Some have proposed doing away with life tenure for judges. They've proposed impeaching judges whose decisions they don't like. They've held hearings on judicial activism, singling out judges whose opinions they oppose. And they've introduced legislation to limit

the authority and reach of the federal courts. Last week, House Republican Whip Tom DeLay told The Washington Post that federal judges "need to be intimidated. If they don't behave, we're going to go after them in a big way." Democrats immediately cried foul, accusing Republicans of delaying judicial confirmations to intimidate judges. Senate Minority Leader Tom Daschle:

U.S. SENATOR TOM DASCHLE (D-SD), SENATE MINORITY LEADER: That kind of statement is as strong a challenge to our form of government as anything I've heard in the United States Senate. So we now know, as this becomes more clear to all of us, the Republicans are holding up judgeships, causing extraordinary delay of justice in many parts of our country because we don't have judges, in order to intimidate the judiciary.

TOTENBERG: Senate Majority Leader Trent Lott, asked if there is such a plot to delay judicial confirmations, replied with a smile...

U.S. SENATOR TRENT LOTT (R-MS), SENATE MAJORITY LEADER: Naw, I don't know of anything of that nature. But sound like a good idea to me. I mean, you know who some of the most unpopular people in America are, I think they've got, you know, they maybe are at the top of the list. When I go home, nobody says, oh, please, give us some more federal judges. A lot of them say, these people are out of control and they are goin' beyond what the Constitution intended.

TOTENBERG: While segregationists in the 1950s and '60s called for impeaching Supreme Court Chief Justice Earl Warren, the nation's political leadership has never seriously entertained the idea before. But during the 1996 presidential campaign, Republican standard bearer Bob Dole repeatedly called for the impeachment of a New York judge who had excluded evidence from a drug trial. Dole's use of impeachment as a campaign issue, and President Clinton's weak response, was such a break with precedent that Chief Justice William Rehnquist, himself a conservative Republican appointee, spoke out. He said using impeachment as a political tool is a threat to what he called the crown jewel of the American democracy, "an independent judiciary."

WILLIAM REHNQUIST, CHIEF JUSTICE, U.S. SUPREME COURT: Federal judges have been impeached and convicted. Happily, only a very few. But it has been for criminal conduct such as tax evasion, perjury, and the like.

TOTENBERG: Eventually, the New York judge, Harold Baer, reversed his earlier ruling. But Baer is not alone. At the top of the GOP hit parade of most reviled judges is federal judge Thelton Henderson, who last December blocked enforcement of California Proposition 209, the referendum banning affirmative action by the state. House Republican Whip DeLay prompted called for the judge's impeachment, though the ruling was later reversed on appeal. Although scholars from liberal to conservative have pointed out that the Constitution provides for impeachment only for high crimes and misdemeanors, DeLay, at a hearing on judicial activism, maintained that the category of impeachable offenses is not limited to indictable offenses.

U.S. REPRESENTATIVE TOM DELAY (R-TX), HOUSE MAJORITY WHIP: America's founders believed that impeachment could be a effective way of keeping the judiciary within its bounds. When is

impeachment a legitimate tool? Can Congress impeach a public official for non-criminal acts? I think the answer is yes. Anyone can be impeached that has the majority of the House and two-thirds -- and removed from office with two-thirds vote from the Senate.

TOTENBERG: Reagan administration official Bruce Fein rebuked his fellow conservatives, saying their attack jeopardized our very system of government. Part of the role of a judiciary, he said, is to resist popular passions, as it did in the civil rights era.

BRUCE FEIN, REAGAN ADMINISTRATION OFFICIAL: If a judge goes out and says, "gee, you know, if I decide, you know, that equal protection as the Supreme Court interpreted means desegregation of the schools," and you're a district judge or circuit judge, then you get impeached the next day, boy, you know, we'd still be very, very backward in the civil rights period.

TOTENBERG: Fein is critical, too, of the way fellow conservatives in the Senate have handled the confirmation process for lower court judges.

FEIN: If you look at the purpose of the confirmation power as Alexander Hamilton elaborated it, it's to check for cronyism, corruption and incompetence. It's not that the Senate cannot explore judicial philosophy, because I think the people ought to know who the president is appointing and can hold the president accountable.

TOTENBERG: But, said Fein, blocking lower court appointments because of philosophy is out of line. Tom Jipping of the conservative Judicial Selection Monitoring Foundation disagrees.

TOM JIPPING, JUDICIAL SELECTION MONITORING

FOUNDATION: The most important criterion is judicial philosophy and whether or not judges fit in the kind of balanced system that we're supposed to have. So, the Senate's role in the judicial selection process is a check on the president's power of appointment. I mean, checks are there for a reason. Checks are there to be exercised. If the integrity of our separation of powers, if the designation of the people really as having the ability to govern themselves, and if saying to judges they don't have the power unlimited to do whatever they want, if that's not important enough to fight over, I don't know what is.

TOTENBERG: This conflict is now being drawn more starkly than ever in the Senate, where the new Republican majority seems to have dug its heels in, refusing to act for months, even years, on many judicial nominations, and adding many parliamentary obstacles that have not existed before. Jack Quinn is President Clinton's former White House counsel.

JACK QUINN, FORMER WHITE HOUSE COUNSEL TO

PRESIDENT CLINTON: There's a constitutional crisis on the horizon here. The Republicans in the Senate appear determined not to let the president exercise the constitutional prerogative that the people of the United States granted to him last November when they reelected him.

TOTENBERG: Professor Sheldon Goldman, who studied the judicial appointment process from the 1930s on, agrees that some new, and he believes ominous, has happened to the appointment process.

PROFESSOR SHELDON GOLDMAN, EXPERT ON THE JUDICIAL APPOINTMENT PROCESS: One can make an analogy with the actions of the Republican senatorial leadership today and Roosevelt's court-packing proposal of 1937. Both schemes seriously jeopardized the independence and integrity of the judicial branch of government.

TOTENBERG: In 1937, Franklin Roosevelt, though he had big majorities in both houses of Congress, failed to win approval for his plan to expand to 15 the number of justices on the Supreme Court. That, however, was a high-profile political battle. In contrast, the battle in the Senate right now is for the most part being waged behind the scenes. While former Massachusetts Governor William Weld's aborted nomination to be ambassador to Mexico made headlines for weeks, dozens of judicial nominees face similar tactics without much public notice. And if the Weld nomination proved anything, it is that the rules and customs of the Senate give a single senator a great deal of power to be exercised for good or for ill, depending on your point of view. Nina Totenberg, NPR News, Washington.

EDWARDS: The series on judicial vacancies was edited by Michele DuBach.

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Special Report

September 23, 1997

Publication: SR-22-Judiciary

The Judicial Vacancy Crisis: the Republican Strategy to Delay and Intimidate Threatens the Independence of the Judiciary

DPC Staff Contact: Chuck Cooper (202-224-3232)

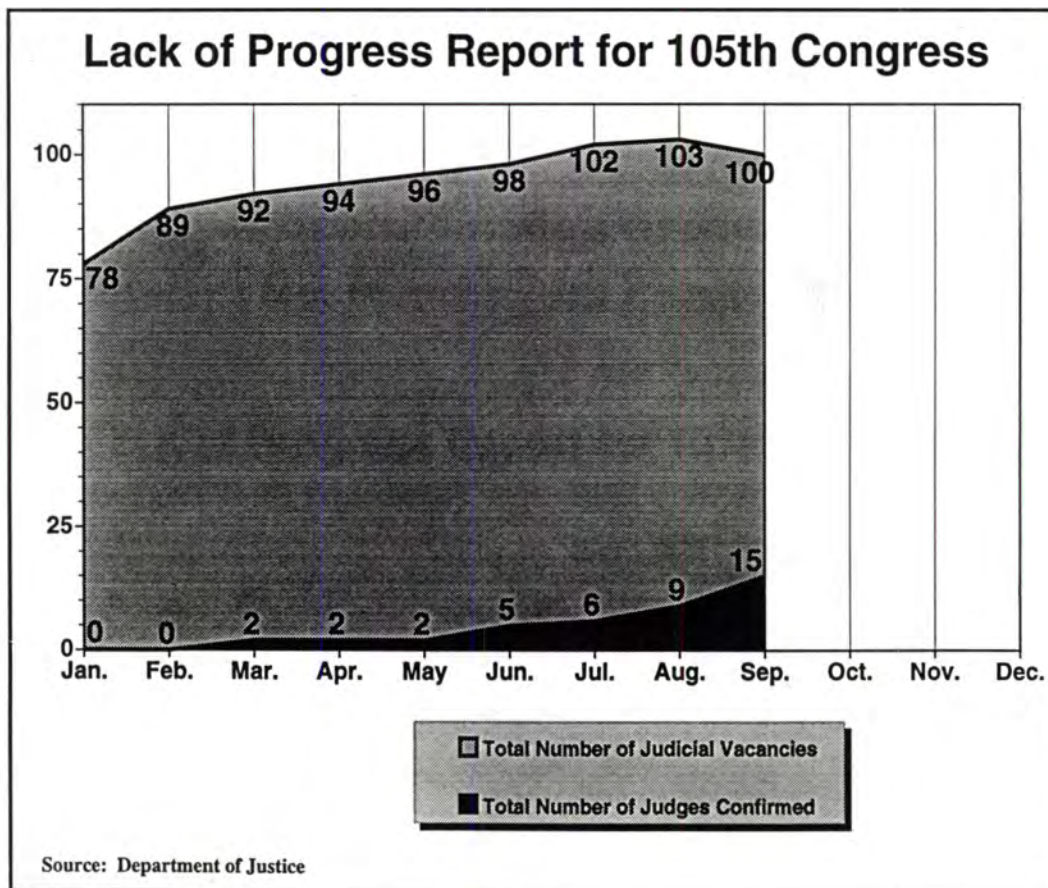
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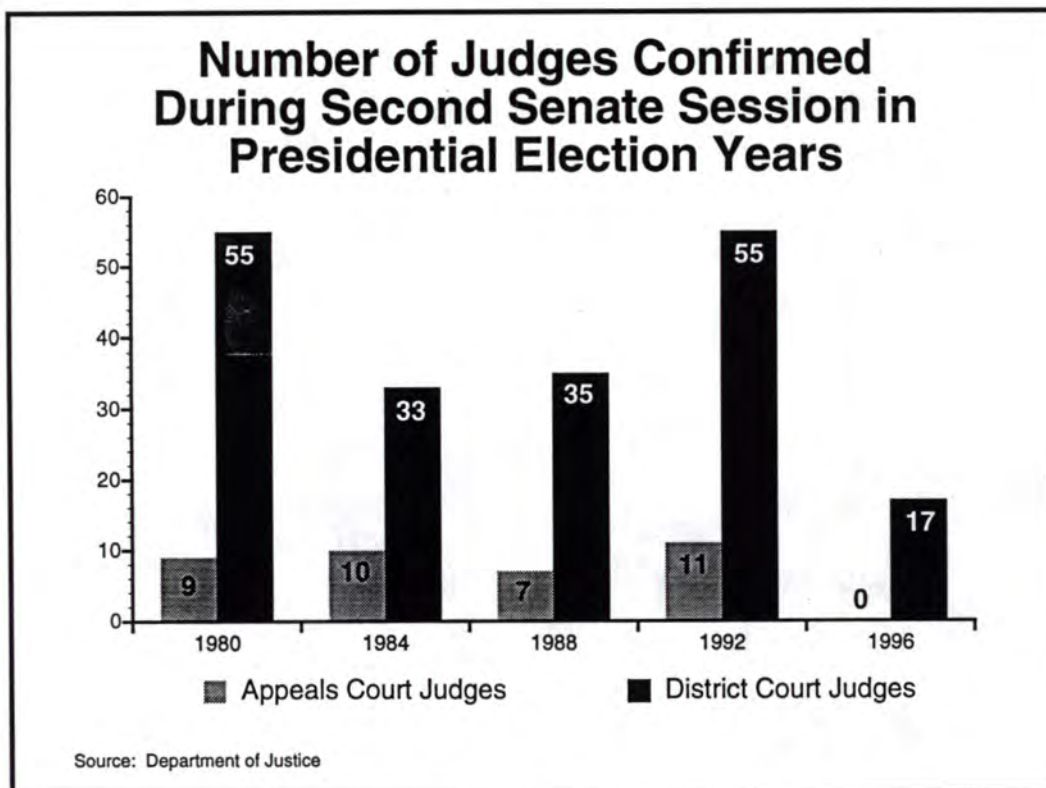


Republicans Attempt to Shut Down the Nomination Process

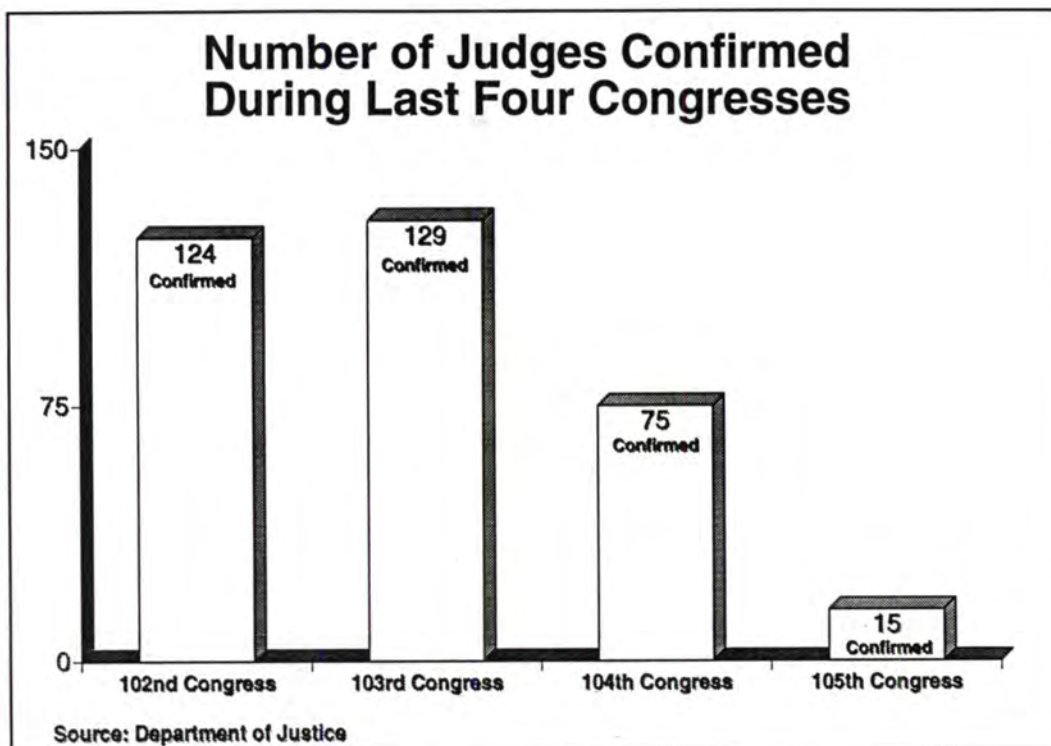
Republicans in Congress have engaged in an unprecedented, coordinated strategy to delay the judicial nomination process. Vacancies in the Federal courts have increased by more than 50 percent over the last year. There are 100 vacancies in the Federal judiciary—that's a vacancy rate of 12 percent. President Clinton has nominated 66 judges during this session of Congress, yet the Republican-controlled Senate has confirmed only 15. The Administrative Office of the U.S. Courts has reported that 31 of these vacancies now constitute "judicial emergencies."



The dismal Republican record in 1996. Republican efforts to shut down the judicial confirmation process are a continuation of a misguided GOP strategy. In the second session of the 104th Congress, the Republican-controlled Senate confirmed only 17 Federal district court judges. Last year's Republican record on confirming district court judges was worse than that of any election-year session in more than 20 years. And for the first time this century there was a year in which the Senate did not confirm a single judge to a Federal appeals court—1996 (*The New York Times*, 2/9/97; Congressional Research Service).



The responsible Democratic record in 1992. This dismal Republican record stands in sharp contrast to the election-year performance of the Senate in 1992. The Democratic-led Senate confirmed 66 Federal judges in 1992, including 11 court of appeals judges—the highest election year total in modern history. In fact, the 66 judges confirmed in the second session of the 103rd Congress was the highest number of any previous year of the Bush administration (Department of Justice; Congressional Research Service).



Republican Delays in Nominating Federal Judges Prompt Sharp Reaction

- Chief Justice William Rehnquist observed earlier this year that the rising number of judicial vacancies is *"the most immediate problem we face in the Federal judiciary"* (*Los Angeles Times*, 5/30/97).
- The presidents of seven national lawyers' associations, including the American Bar Association, sent a letter to President Clinton and Senator Lott on July 14, 1997 stating that the *"looming crisis in the Nation brought on by the extraordinary number of vacant Federal judicial positions"* and the resulting delays threaten to *"undermine our democracy and respect for the law."*
- *The Chicago Tribune* recently editorialized that the Republican *"approach is as irresponsible as it is cynical. The Federal courts ... can hardly be expected to do their job expeditiously and well while operating seriously shorthanded"* (8/25/97).

The Vacancy Crisis Results in a Denial of Justice

The combination of the dramatic increase in judicial vacancies and more criminal and civil case filings has resulted in an enormous backlog of Federal cases. The total number of cases filed in 1996 was up more than 24,000 cases over 1995 (Chief Justice Rehnquist, "1996 Year-End Report on the Federal Judiciary").

The number of active cases pending for at least three years jumped 20 percent from 1995 to 1996 (Administrative Office of the U.S. Courts). According to the most recent data available from the Department of Justice, there are more than 16,000 Federal cases older than three years.

In an unusually public reaction, Federal judges have spoken out on the vacancy crisis.

- The Chief Judge of the 9th Circuit, Procter Hug, Jr., called the ten vacancies on his 28-member court a *"crisis of serious proportions. We simply do not have enough active district and appellate judges to hear and decide cases in a prompt and timely manner"* (*Los Angeles Daily Journal*, 5/27/97).
- When testifying about the *"crushing workloads"* facing the 11th Circuit, Chief Judge Joseph Hatchett stated the Court *"is no longer able to provide the public with the same standard of excellent service that it did in the past"* (Hearing, Senate Judiciary Scte. on Administrative Oversight and the Courts, 6/9/97).
- Chief Judge J. Phil Gilbert of the Southern District of Illinois announced he went an entire year without hearing a single civil case because of his tremendous criminal caseload (*Time*, 5/26/97).

Republican Delays Have Real Life Consequences

While Republicans play politics with judicial nominations in Washington, the backlog of Federal cases has had a serious impact on Americans. In northern Texas, where nominee Michael D. Schattman has awaited confirmation for two years, embattled residents are in the midst of a war on drugs. In a district where Federal agents have redoubled efforts to combat drug smuggling, the court is straining to keep up with the increased criminal caseload, and hundreds of citizens with civil cases are being denied timely hearings. One Texas family filed their lawsuit seven years ago and have not yet had their day in court (*The Dallas Morning News*, 9/7/97; Transcript from *World News Tonight with Peter Jennings*, ABC television broadcast, 6/6/97).

Democrats have been at the forefront in the war on crime. Democratic legislative initiatives have put more police officers on the beat, taken guns out of the hands of street thugs, and cracked down on violence against women. In order for Federal anti-crime legislation to be effective, however, judges must be on the bench presiding over trials and sentencing convicted criminals. The politically-motivated Republican scheme to shut down the judicial nomination process keeps the judges off the bench and may keep criminals on the street.

Republican Claims of “Judicial Activism” Refuted

In condemning President Clinton's judicial nominations, Senator Ashcroft described the judicial branch as being full of *“renegade judges, [who are] a robed, contemptuous intellectual elite.”* (*St. Louis Post-Dispatch*, 6/13/97).

Similarly, when trying to explain why a California appeals court judge had been delayed for two years, Senator Hatch stated, *“If you want to blame somebody for the slowness of approving judges to the 9th Circuit, blame the Clinton and Carter appointees who have been ignoring the law and are true examples of activist judging”* (*The Washington Post*, 9/14/97).

Commentators and academics have come to far different conclusions.

- In a recent article, *The Washington Post* described President Clinton's judges as being "*generally pragmatic moderates*" (9/14/97).
- A study by a team of political scientists published in *Judicature* magazine found President Clinton's judges have been less liberal than President Carter's and more akin to President Ford's nominees. According to one of the authors of the article, Professor Donald Songer of the University of South Carolina, "*Clinton judges on the average are moderate*" (*Judicature*, July-August, 1996).
- William E. Leuchtenberg, a professor of legal history at Duke University Law School, observed that President Clinton "[h]as not taken advantage of his tenure as President to offset the decidedly ideological appointments that Reagan and Bush made in the 1980s" (*New York Times*, 4/20/96).

Republicans Offer Specious Defense of Their Delay Tactics

When not blaming "judicial activists" for the slow pace of judicial confirmations, Republicans deny the existence of a crisis. On September 11, 1997, Senator Hatch argued on the Senate floor that Republicans were "doing a fairly good job" in processing nominations. To support his argument, Senator Hatch cited the fact that "[t]here are more sitting judges today than there were throughout virtually all of the Reagan and Bush administrations" (*Congressional Record*, 9/11/97). While there are more sitting judges now, new case filings per year have increased by about 67,000 since the end of the Bush Administration (Administrative Office of the U.S. Courts).

This argument also ignores the fact that the vacancy problem is most severe in two of our most heavily populated appellate circuits. The 9th Circuit Court of Appeals, which covers nine western states and two territories, has a vacancy rate of 36 percent. There is a 31 percent vacancy rate in the Second Circuit, which includes New York, Connecticut, and Vermont. As a result, 67 million Americans—one-quarter of the population—face unprecedented delays in the consideration of their cases.

Republican Attacks on an Independent Judiciary

Republican “DeLay” tactics. Not content with obstructing the judicial nomination process in the Senate, Republicans have used a wide array of tactics to attack the independence of the Federal judiciary directly and to undermine the President’s constitutional authority to select Federal judges. In statements that raise extraordinary constitutional questions, House Majority Whip Tom DeLay claimed that “*judges need to be intimidated,*” and suggested that impeachment would be an appropriate weapon against judges who issue opinions with which Republicans disagree (*The Washington Post*, 9/14/97). In response to Rep. DeLay’s threats to intimidate judges, Senator Lott stated, “[i]t sounds like a good idea to me.” (*The Washington Post*, 9/17/97).

The Constitution ensures the independence of the judiciary. The framers of the United States Constitution sought to ensure the independence of the Federal judiciary. The Constitution establishes three independent, co-equal branches of government. Article III of the Constitution guarantees to Federal judges the right to continue in office during good behavior, and provides that their compensation may not be reduced. Since 1805, the Senate has accepted the well-settled principle that judges’ rulings from the bench would not be a basis for their removal from office (Speech, Chief Justice Rehnquist, “On the Importance of an Independent Judiciary”, 4/9/96).

Conservative Justices Agree the Independence of the Judiciary is Essential.

- Chief Justice William Rehnquist has called the independence of the judiciary “*the crown jewel of our system of government*” (“On the Importance of an Independent Judiciary,” 4/9/96).
- Justice Antonin Scalia, one of the most conservative members of the Supreme Court, has stated, “*I think we have enough respect for our courts, enough understanding in the country that if you let the legislature intrude too much on the judiciary we’ll be in trouble.*” (*The Washington Post*, 5/23/97).

Withering public attacks. Republicans in Congress have begun a sustained, well-organized campaign to erode the independence of the Federal judiciary. Conservatives have subjected sitting judges to withering public attacks. When Third Circuit Judge Lee Sarokin resigned from the bench, he attributed his resignation to his concern that he would become a "prime target" for attack, and condemned attempts to "*Willie Hortonize the Federal judiciary*" (*National Law Journal*, 6/17/97). The House Majority Whip's threat that "*judges need to be intimidated*" is particularly ominous.

Judicial impeachment, term limits, and downsizing? Republican members of Congress also have announced their intention to impeach Federal judges for unpopular decisions, introduced legislation to impose term limits on the judiciary, suggested that Federal appeals courts be downsized, and recommended that Federal judges be limited in their ability to enjoin unconstitutional state and local referenda (*The Washington Post*, 9/14/97; *National Journal*, 5/31/97).

Republicans propose a litmus test. Earlier this year, Republican Senators even considered requiring the President to get advance approval over a nominee's judicial philosophy. Senate Republicans also gave careful consideration to proposals to allow individual Senators to have a form of veto power over Federal appeals court judges (*The New York Times*, 4/27/97).

Democrats Continue the Fight to Confirm Judges and Preserve the Independence of the Judiciary

The framers of the Constitution realized that the independence of the judiciary was essential to the proper functioning of a democracy. Recognizing the value of this uniquely American idea, many emerging democracies have incorporated the principle into their constitutions. While nations around the world copy the idea of judicial independence, Republicans threaten to undermine the independence of judges through a campaign of intimidation. Democrats understand that preserving an independent judiciary and ensuring the prompt confirmation of Federal judges are essential to the fair and effective administration of justice.

THE WHITE HOUSE
WASHINGTON

DATE: 9/26

TO: *Melanne Vever*

FROM: White House Counsel
2nd Floor, West Wing x6-2632

- ☐ FYI
- ☐ Appropriate Action
- ☐ Let's Discuss
- ☐ Per Our Conversation
- ☐ Per Your Request
- ☐ Please Return
- ☐ Other



Lawyers' Committee for Civil Rights Under Law

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Washington, DC 20005

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Fax: 202/783-0857
Bulletin Board: 202/783-0854

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Marc L. Fleischaker
Jack W. Londen
Secretary
David R. Andrews
Treasurer
William L. Robinson
Counsel
Jerome Libin
Executive Director
Barbara R. Arnwine

September 25, 1997

Honorable William J. Clinton
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

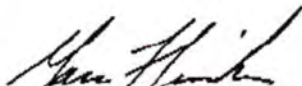
Dear Mr. President:

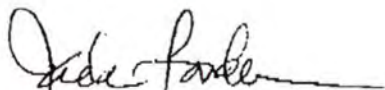
On behalf of the Lawyers' Committee for Civil Rights Under Law, a non-partisan, non-profit, national civil rights legal organization, we submit to you a statement addressing the urgent need to act promptly and with determination to fill the current vacancies in, and to maintain the vital independence of, the federal judiciary. The statement was signed by more than 90 Directors and Trustees of the Committee, both Republicans and Democrats, including a number who have held the positions of Attorney General and other top Justice Department posts, federal judge and president of the American Bar Association, as well as many of the nation's leading lawyers. The Lawyers' Committee strongly urges both the President and the leadership of the Senate to give a high priority to assuring that current judicial vacancies are filled and the viability and strength of the federal judiciary is restored.

This statement simultaneously is being submitted to the Majority and the Minority Leaders of the Senate, Senators Lott and Daschle, and the Chair and Ranking Member of the Senate Committee on the Judiciary, Senators Hatch and Leahy.

If we may provide additional information or assistance regarding this statement, please contact either of us (Mr. Fleischaker at (202) 857-6000; Mr. Londen at (415) 268-7000) or the Lawyers' Committee Executive Director, Barbara R. Arnwine, or Deputy Director, Thomas J. Henderson.

Respectfully,


Marc L. Fleischaker
Co-Chair


Jack W. Londen
Co-Chair

Enclosure



Lawyers' Committee for Civil Rights Under Law

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STATEMENT OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW ON VACANCIES IN THE FEDERAL JUDICIARY

Fundamental to our constitutional democracy and to the protection of the civil and political rights we enjoy is a strong, independent and fully functioning federal judiciary. The current vacancies in the federal courts and the slow pace of considering nominees to fill these vacancies are interfering with the availability and administration of justice in this nation and now pose a threat to the health and viability of the federal courts and, thus, our form of government. As well, inappropriate threats of impeachment directed at sitting federal judges, inaccurate charges of "judicial activism," and expressions of ideological "litmus tests" as to judicial nominees, all threaten the vital independence of the judiciary and politicize the process of nominating and confirming federal judges.

The Lawyers' Committee for Civil Rights Under Law is a non-partisan, non-profit, national civil rights legal organization formed by leading members of the nation's bar in 1963 at the request of President Kennedy. The Lawyers' Committee urges both the President and the bi-partisan leadership of the Senate to act promptly and effectively to remedy the crisis affecting the nation's federal courts.

As of September 1, 1997, there were 103 vacancies, or 12% of the 837 positions, among the federal appellate and trial courts, and 52 nominations are awaiting Senate action. Of these vacancies, 31 are identified as "judicial emergencies" by the Administrative Office of the U.S. Courts, having been vacant for more than 18 months. The current vacancies represent an increase from 1996, during which the Senate confirmed only 20 judges, and which ended without Senate action on 28 nominees and with 87 vacancies. This year, while 25 new positions have become vacant, only 9 judges have been confirmed. Both the number of vacancies and the virtual refusal promptly to act on nominations are unprecedented and alarming.

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Our judiciary cannot carry out its essential constitutional functions without judges, and the current situation is tantamount to a partial shut-down of the judicial branch of government. Stripping the courts of their ability to act has very real consequences for real people; cases cannot be heard, controversies cannot be decided, and precious constitutional rights cannot be secured.

The White House has begun to act in response to this crisis in recent months by sending to the Senate a substantial number of nominations and assuring that additional nominations will be forthcoming. We intend to monitor fulfillment of those assurances. We strongly urge the President to treat continued judicial nominations as an important priority.

A corresponding effort is now required of the Senate as a whole, and of the Committee on the Judiciary in particular. We request the Senate to act with dispatch to consider and vote on both longstanding and more recent nominations. Suggestions that the Senate maintain its extraordinarily slow pace of acting on nominations, such as considering only one nominee per month, must be rejected. Any further delay will only exacerbate the current crisis. As well, we ask the Senate to refrain from actions that disturb the long-established, bi-partisan balance between the Executive's prerogative and the Senate's advice and consent role in judicial nominations. We strongly urge the leadership of both parties in the Senate to make the prompt consideration and disposition of judicial nominations, to both the courts of appeals and district courts, one of the highest priorities of that body.

It is equally necessary that the consideration of judicial nominees be free from undue partisan and ideological influence. If the independence of the judiciary is to be maintained, it is vital that nominees be considered on the merits of their qualifications and fitness, and not according to partisan considerations or ideological "litmus tests." Although people of goodwill may differ on a number of questions, a demonstrated commitment to preserve and protect the constitutional and civil rights for which our forebears gave their lives should be seen as an essential qualification of any candidate for judicial office.

We note in particular, in this regard, that several nominees have been sharply questioned in confirmation hearings regarding their pro bono service to the disadvantaged through civil rights and public interest legal organizations. There can be no question that a lawyer's efforts to make the legal

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

system accessible to the disenfranchised or unpopular is relevant to confirmation; it is evidence that a candidate has fulfilled his or her ethical and professional obligations as a lawyer, and has used his or her talents and position for more than mere personal gain.

Nor should the Executive's choice of nominees or the exercise of the Senate's advice and consent be influenced by baseless and ill-considered threats of impeachment or charges of "judicial activism." The Lawyers' Committee stated its views on this subject in the July 15, 1997 testimony of one of its Co-Chairs, Marc L. Fleischaker, before the Senate Subcommittee on the Constitution, Federalism and Property Rights, urging the Senate to refrain from using such unfounded allegations as an excuse for failing to fulfill its obligations to assure the administration of justice in America. We reiterate our concerns here.

Maintaining the health and independence of the judicial branch of our federal government is not, and should not be made, a partisan or ideological issue. As Chief Justice Rehnquist has warned, "Unless the executive and the legislative branches change their ways, the future for judicial appointments is bleak."

We therefore strongly urge the President to continue the recent pace of judicial nominations and we implore the Senate to respond to this crisis by acting promptly on pending and forthcoming nominations, and assuring that judicial vacancies are filled, thereby restoring the ability of our courts to carry out their constitutional functions.

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Fay Clayton
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file judge

*by fax
4 pages*

MARY ELLEN SCHATTMAN

October 28, 1997

Dear Melanne,

We had a very good weekend in the press: NY Times Sat and Mon and the LA Times on Sunday. I am attaching the LA Times in case you missed it. It really sets up the case very well.

I talked to the reporter again yesterday. He was truly stunned by the tape. We have now identified all seven senators on the tape: in addition to the four who appear, Gramm, Sessions, Smith and Inhofe, the support letters are from K. Hutchison, Bond and Ashcroft.

I was interested in the Triad story in today's NY Times. I believe that there are serious legal implications for this tape and fund raising program.

Most of the federal judicial nominees are slotted for existing benches. The contents of their anticipated civil dockets are matters of public record. The ability of a donor to anonymously purchase an indefinite continuance by having the nominee for the court where his/her case is filed "held" by an unidentified senator strikes at the very soul of our Constitution. A **single** senator in league with a special interest would have (under current Senate rules) the ability to determine the fate of each and every judicial nomination.

The debate on campaign finance has been centered on buying access. With this tape it moves to a new plateau: guaranteed results. Some of the Senators on the tape have publicly signed the "Hatch Pledge", a promise to block any nominee labeled an activist. In a turn of phrase that puts McCarthy to shame, the "Hatch Pledge" includes "those nominees who are or **will be** judicial activists." **Since the group doing the fund raising is the group doing the blacklisting, a donor can be pretty sure his tax-deductible contribution will get the desired result.**

In Hollywood terms, a secret, tax-deductible contribution will buy you a contract on the nomination of any federal judge. Where is Elliott Ness when you need him!

As ever,



Attachment

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Sunday, October 26, 1997

Drive Seeks to Block Clinton Judicial Nominees

■ Politics: Four GOP senators, Meese and Bork aid conservative effort. But in alleging judicial excesses, group's videotape omits some key facts.

By HENRY WEINSTEIN, Times Legal Affairs Writer

[PREV STORY](#)

[NEXT STORY](#)

Four Republican U.S. senators, former Atty. Gen. Ed Meese and former appeals court Judge Robert Bork are playing key roles in a new \$1.4-million fund-raising campaign in support of an arch-conservative organization seeking to block the appointment of what it calls "activist liberal judges."

The group endorses the work of the Washington-based Judicial Selection Monitoring Project in a 15-minute videotape that has been sent to potential contributors. The project has taken a prominent part in trying to block several nominees of President Clinton.

The videotape repeatedly warns viewers that by the end of Clinton's presidency, he will have appointed more than half of the nation's federal judges. These judges, the tape contends, could do great damage to the nation and subject citizens to what Meese calls "judicial tyranny."

In addition to endorsing the project, Bork signed a fund-raising letter that accompanies the video and some explanatory materials.

The videotape cites several examples of alleged judicial excess. It spotlights an April 1997 decision by U.S. District Judge Stewart Dalzell in Philadelphia, ordering the release of a woman convicted of murder in 1992.

Featured are Hazel and John Snow, the parents of murder victim Laurie Snow, and Dalzell's picture is flashed on the screen twice.

Nowhere on the tape are the judge's detailed reasons for releasing the woman, including his conclusions that another man committed the murder and that there were 25 instances of police and prosecutorial misconduct.

Nor does the video tell viewers that Dalzell was appointed by President George Bush in 1991.

Although the thrust of the video is that the threat is from Clinton appointees, it does not state that the other three opinions mentioned, including one involving California's anti-affirmative action Proposition 209, were not the work of Clinton judges either.

Senators appearing on the tape are Phil Gramm of Texas, James Inhofe of Oklahoma, Robert Smith of New Hampshire and Jefferson Sessions of Alabama, whose nomination to be a federal judge in 1986 was killed by the Senate Judiciary Committee after civil rights groups opposed him.

Sessions was subsequently elected to the Senate and is now a member of the Judiciary Committee.

In its fund-raising solicitation, the monitoring project offers donors giving \$10,000 the opportunity to attend "intimate dinners" with "leading conservative elected and public figures closely involved with the judicial confirmation process."

If donors can give \$1,000, they will receive an autographed copy of the 1996 book "Slouching Toward Gomorrah," a truculent attack on modern liberalism by Bork, whose nomination to the U.S. Supreme Court was rejected by the Senate in 1987.

A \$5,000 contributor would receive the Bork book plus a personally inscribed gavel.

In addition to the other forms of recognition, well-heeled donors who give \$25,000 will get "on-air credits" during the monitoring project's television show "Legal Notebook," and a forthcoming TV series on judicial activism.

The campaign's goal is to raise \$1.4 million for research, advertising and coalition-building, according to the letter signed by Bork, whose bid to become a

Supreme Court justice was blocked after one of the most bruising confirmation battles in history.

It could not be determined how much money has been raised so far.

The fund-raising material includes a page titled "Outrageous Decisions From Clinton Judges," and cites five examples from federal appeals courts judges around the country.

A review of those rulings reveals that in each instance the judge's opinion was a dissent from the majority decision.

In one of the five cases, a Clinton appointee was on the prevailing side of a 2-1 decision that the project favored.

In another case, involving a civil rights suit filed against a police officer, the fund-raising material states that four Clinton appointees "unilaterally" overthrew "a well-established precedent limiting" the scope of such cases.

In fact, the four judges were among seven dissenters—including a Bush appointee—on the 18-judge panel. More important, no precedent was overturned.

The Sept. 9 fund-raising letter signed by Bork states that "over the past 4 1/2 years, the more than 200 Clinton judicial appointments have been drawn almost exclusively from the ranks of the liberal elite. These judges blazed an activist trail, creating an out-of-control judiciary."

The letter highlights a huge gulf between the way liberals and conservatives view Clinton's nominees. The president's liberal critics have said he has leaned toward centrist nominees and has not moved fast enough in making nominations, contributing to a growing number of vacant judgeships.

During Clinton's first term, all but four of the president's nominees who made it to a vote before the full Senate were confirmed on voice votes. The four who faced roll call votes also were confirmed.

However, a number of other nominees have been stalled for some time, including two women lawyers from Los Angeles whom Clinton tapped for federal trial judgeships, as well as a sitting federal trial judge and a UC Berkeley law professor tapped by the president for the U.S. 9th Circuit Court of Appeals.

Bork declined comment on the campaign, as did Paul M. Weyrich, head of the Free Congress Foundation, the parent group of the monitoring project.

A spokesman for Thomas L. Jipping, director of the monitoring project, said he was out of the country and unavailable for comment. McClellan and two of the senators did not return calls.

Gramm's press secretary, Larry Neal, said he was not familiar with the video or the fund-raising appeal.

Gary Hoitsma, a spokesman for Imhofe, said the senator agreed with the project's philosophy on judges and had taped a segment for the group. However, he said Imhofe had not been asked to attend any dinners with donors and was unaware of the contents of the video other than what he said on it.

The fund-raising solicitations do not make clear which conservative elected and public figures would attend the dinners.

Michael Josephson, president of the Josephson Institute of Ethics in Marina del Rey, said he thought the campaign "takes the precedent set in Bork's confirmation fight ... to a whole new level" of partisanship.

"Republicans are rightly criticizing Democrats for selling the White House," Josephson said, "but here they're doing the same thing."

Stephen Gillers, a New York University law professor and an expert in legal ethics, said he was not troubled by the campaign.

"Bork and Weyrich are aiming broadly to achieve their political purpose," Gillers said. "They're allowed to do this."

Referring to the Snow murder case, he said "it would be inaccurate to blow this up as an example of judicial excess, but it's easy to do. This effort is not governed by the Federal Trade Commission. If consumer protection applied, Weyrich would be in trouble, but the 1st Amendment includes the right to exaggerate and to conceal."

Two Democratic senators who have expressed concern about Republican efforts to stall or block Clinton nominees said they were outraged by the fund-raising campaign.

"This extremist diatribe has been red meat for some elements of the Republican base, and now they apparently see this as a pot of gold," said Sen. Patrick Leahy of Vermont, the ranking Democrat on the Judiciary Committee.

"This explains why Republicans are holding up mainstream men and women who have bipartisan support," said Sen. Barbara Boxer of California.

Boxer has been attempting to get a roll call vote on the confirmation of Margaret

Morrow, a Los Angeles lawyer who was the first female president of the California Bar Assn.

Clinton nominated Morrow for a federal trial judgeship in Los Angeles in 1995 and the nomination was twice voted out of the Judiciary Committee. But it has been vigorously opposed by the monitoring project and held up by Republicans in the Senate, although Morrow has bipartisan support.

A Texas attorney whose nomination for a federal judgeship in Fort Worth has been stalled more than two years has spoken out against the solicitation. Michael D. Schattman, who was a state court judge for 18 years, said in an interview the tape was given to him in early October by a Republican friend who said he was concerned about its misleading tone.

Schattman said he has sent the tape to 40 other nominees in an attempt to get them to speak out "about the depth of the misinformation campaign being waged across the country against all of us."

He lambasted the quality of the research embodied in the fund-raising materials and said it was particularly misleading that the videotape did not inform viewers that Dalzell was a Bush appointee.

Schattman, who was a classmate of Clinton at Georgetown University, was nominated by the president to the federal bench in December 1995. His nomination has been pending since then.

The state's two Republican senators, Gramm and Kay Bailey Hutchinson, initially gave his bid a favorable nod. But they reversed field over the summer and Schattman's prospects for confirmation are now considered bleak.

In a letter to other judicial nominees, Schattman said, "I know you are nervous about doing anything to upset your chances. . . . But history shows that nominees, for example, Clarence Thomas [who narrowly was confirmed by the Senate as a Supreme Court justice in 1991 after a drawn-out battle], who fight in their own defense fare better than those who feel they shouldn't have to fight."

Nonetheless, some other nominees interviewed by The Times said they fear that commenting on the monitoring project's campaign would further harm their chances at confirmation.

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THE WHITE HOUSE

WASHINGTON

December 19, 1996

MEMORANDUM FOR THE PRESIDENT

FROM: *Jack Quinn* JACK QUINN, BRUCE LINDSEY, JONATHAN YAROWSKY,
PETER ERICHSEN, PAUL CAREY, MELANNE VERVEER,
KUMIKI GIBSON, ELEANOR ACHESON AND ROBERT VAN KIRK

SUBJECT: NOMINATION OF JUDICIAL CANDIDATES -- DECISION
MEMORANDUM

The next four years present you with an historic opportunity to influence the makeup and character of the federal courts. We believe that the initial months of the First Session of the new Congress will be crucial to the success of our efforts to meet this challenge and fill the growing number of judicial vacancies. With the commencement of the 105th Congress in early January -- just three weeks away -- it is essential that we begin preparing candidates for nomination immediately. Because this vetting process -- even for previously nominated candidates -- will take much of that time, we would like your approval to proceed now with those candidates posing the fewest confirmation issues.

For this reason, this memorandum seeks decisions concerning candidates who were nominated, but not confirmed, during the 104th Congress, as well as decisions concerning three of four Court of Appeals candidates who received your approval in that same period but were not nominated prior to adjournment because it was clear they would not be acted upon by the Senate. In the coming weeks, we anticipate sending you additional memoranda discussing individuals that were previously nominated or approved, but who present more serious issues, and several new candidates who have been in the selection process and are now prepared for a final decision.

I. BACKGROUND

By any standard, your first term in office was highly successful in filling judicial vacancies. Overall, 204 appointments to the federal courts were made during your first four years in office. This total exceeds the 195 appointments made by President Bush and the 167 appointments made by President Reagan in their respective first terms. As the last two-term President, President Reagan appointed 385 individuals to the federal courts over eight years, accounting for just over 50 percent of the judiciary by the end of his second term. With over 200 appointments in your first term and a comparable number of vacancies expected during the second term, you are positioned to exceed that total by naming a greater number of federal judges than any President in history.

A. The Task Ahead

The challenges we face in the second term to realize this opportunity are significant, particularly given Republican control of the Senate. The Second Session of the 104th Congress was marked by unprecedented partisanship concerning judicial appointments on the part of the Senate leadership. During the entire session, only 17 nominees were confirmed -- the lowest election year total in over 20 years. In addition, all 17 confirmed nominees were district court judges -- the first time in over 40 years that a session of Congress has ended without a single court of appeals nominee being confirmed by the Senate.

The effect of this partisan approach to vacancies in the federal judiciary has been significant. As a consequence of the shutdown of the confirmation process during this election year, the vacancy level has grown steadily throughout 1996 and now stands at just under 80. Based solely on announced future retirements, it will increase to 92 by the time Congress returns; if retirement announcements continue at a standard rate, total vacancies may well exceed 100 -- approximately the same level as when you took the oath of office on January 20, 1993. In sum, the blocking actions of the Republican Senate have jeopardized the excellent record you achieved in your first three years in office.

B. The Current Political Climate

At the moment, the Republican leadership is sending conflicting signals on the subject of judicial nominations. On the one hand, Majority Leader Trent Lott and others have mentioned judges as an issue that they will continue to monitor closely as conservative interest groups warn of the profound effect your second term of office could have on the face of the judiciary. Moreover, recent statements by Senator Hatch at a meeting of the Federalist Society carried a sharp partisan edge as he warned that liberal nominations would not be welcome at the Senate Judiciary Committee. On the other hand, members of the Republican leadership continue to repeat their post-election mantra that the American public expects the divided government elected on November 5 to work together. And Senator Hatch, in a call to wish Jack Quinn well in his future endeavors, specifically asked that Jack let you know that he wishes you well and is looking forward to working with you in the new Congress.

We thus need to make clear to both the Republican and Democratic leadership in the Senate that bi-partisan work in filling the growing number of vacancies in the federal judiciary will be one of the criteria by which to judge whether the government is indeed working together.

II. PREVIOUSLY NOMINATED CANDIDATES

A. Court of Appeals

Seven of the eight court of appeals nominations that were returned by the Senate pose either no confirmation issues or issues that we believe are surmountable and worth the effort. As to each of these candidates, no new issues have been raised since you gave your initial approval to nominate. As noted below, we recommend at least deferring the renomination of Judge Richard Leonard of North Carolina, one of your two nominations to the Fourth Circuit, pending further discussions with the North Carolina Senators.

Accordingly, we recommend that you renominate the following seven individuals:

1. Eric Clay -- Sixth Circuit (Michigan)

Clay, a private practitioner in Detroit, had a hearing before the Senate Judiciary Committee on March 27, 1996 and was approved unanimously by the Committee on April 25. No floor vote was taken. Senator Abraham (R. Mich.) was supportive of the nomination last session and already has called to express his continuing willingness to assist Clay. There are no significant issues surrounding Clay's nomination.

Recommendation: We recommend that you renominate Clay.

2. Merrick Garland -- DC Circuit

Garland, currently the Principal Associate Deputy Attorney General, was approved by the Committee on December 14, 1995, by a vote of 14 to 2. No issues have arisen relating to Garland's qualifications for the bench; he is nearly universally regarded as an able, politically moderate nominee. Senator Grassley has based his opposition to Garland on his argument that the DC Circuit does not need a twelfth judge. While this argument lost some of its force when Judge James Buckley announced his retirement in August -- leaving only ten active judges on the court -- Senator Grassley has indicated that he will continue to oppose the Garland nomination until legislation he has introduced eliminating the twelfth seat has been passed.

Senator Hatch told us last term, and has confirmed recently, that, having shepherded Garland through the Committee, he would work to secure Garland's confirmation. We continue to believe that despite Senator Grassley's objections, we should be able to win Garland's confirmation. But, in the meantime, we view it as advisable to engage Grassley in a dialogue about his views on the judiciary since he will be a major player for the Republicans on judicial nominations.

Recommendation: We recommend that you renominate Garland.

3. William Fletcher -- Ninth Circuit (California)

The nomination of William Fletcher, a law professor at the University of California at Berkeley, presents only one issue -- the nepotism problem that Senator Hatch and other Republican members of the Committee claim arises from the fact that Fletcher's mother, Betty Fletcher, is an active Ninth Circuit judge. Fletcher had his hearing before the Senate Judiciary Committee on December 19, 1995 and was approved by a closely divided vote on May 16, 1996 after his mother agreed to take senior status to obviate concerns Republicans had raised about an obscure anti-nepotism statute that has never previously been thought to apply to the appointment of federal judges.

It is unclear how Senator Hatch and his colleagues will handle this issue in the new Congress. Judge Fletcher's agreement was conditioned on her son's being confirmed before the election, so there currently is no understanding with Senator Hatch. Although we would like to avoid the necessity of Judge Fletcher's taking senior status, Professor Fletcher has informed us that his mother is willing to retire under the same conditions if it is required. You should know that Professor Fletcher was the subject of escalating attacks from conservative activists prior to the election and may yet again come under scrutiny for some of his academic opinions, none of which is particularly problematic in our view.

Recommendation: We recommend that you renominate Fletcher.

4. Richard Paez -- Ninth Circuit (California)

Paez, whom you appointed to the Central District of California in 1994, was nominated to the Ninth Circuit on January 25, 1996, and had a hearing before the Committee on July 31. He would be your first Hispanic nominee to the Ninth Circuit. The Committee did not vote on Paez prior to adjournment, but the failure to do so was apparently unrelated to any concerns about Paez' nomination. While Paez attracted little controversy after his nomination, he may be targeted because of his early career as a legal aid lawyer or on the ground that his relatively brief stint on the District Court does not qualify him for the Court of Appeals (he served prior to his federal appointment as a municipal court judge in Los Angeles). Paez, however, has the support of the Hispanic Bar and should be well positioned to withstand any attacks.

Recommendation: We recommend that you renominate Paez.

5. Margaret McKeown -- Ninth Circuit (Washington)

McKeown, a partner with the Perkins Coie firm in Seattle, was nominated on March 29, 1996 after considerable pre-nomination efforts to resolve concerns raised by Senator Hatch and conservative activists. Just before her nomination, we were finally able to secure a meeting between McKeown and Hatch. The meeting went extremely well. Although Hatch did not express his support for McKeown, they held a frank and substantive discussion about the issues likely to bedevil her nomination -- her representation of the plaintiffs in a legal challenge to an anti-gay-rights ballot initiative in Washington, the fact that she signed the ABA resolution supporting abortion rights, and her participation in the 9th Circuit gender bias task force. At Hatch's suggestion, we arranged meetings with Senators Specter and Abraham and with Senator Thompson's staff, all of which were less substantive than the Hatch meeting but went well.

We can expect that the McKeown nomination will draw fire from conservative activists. To date, one very negative op-ed on McKeown has appeared in the *Washington Times*, and we can expect further opposition if she is renominated.

Recommendation: McKeown may well become a controversial nominee, but we believe this is a candidate we should fight for both because she is superbly qualified and because the issues on which she has been criticized (reproductive freedom and gender equity), are generally favorable to us. Moreover, those who have criticized the Administration's judicial appointments in the past are looking to this nomination (as well as the nomination of James Beaty discussed below) as a sign that we will defend perceived "liberal" nominees from Republican attacks. Because McKeown has considerable support from within the 9th Circuit bar, from her business clients, and from Senator Murray, she is well-situated to fight and win a confirmation struggle. We recommend that you renominate her.

6. Arthur Gajarsa -- Federal Circuit

Gajarsa, a private practitioner here in Washington, was nominated on April 18, 1996 and was voted out of Committee on June 27. Although Senator Hatch was not overly pleased with this nomination, Gajarsa acquitted himself well at his hearing and faces little opposition. He also has the considerable support of the Italian-American community.

Recommendation: We recommend that you renominate Gajarsa.

7. James Beaty -- Fourth Circuit (NC)

The only other appellate nominations that were returned were your Fourth Circuit candidates, James Beaty, a district court judge in North Carolina whom you appointed in 1994, and Richard Leonard, a bankruptcy court judge in North Carolina. Both men were nominated on December 22, 1995, but neither Senator Helms nor Senator Faircloth ever returned a "blue slip" on either nomination. We should note that Leonard was nominated, in part to help us get Beaty through the confirmation process with Helms and Faircloth; but we had no strong stake in Leonard's nomination during the last Congress, and none now.

Throughout the year, Senator Helms made clear through intermediaries and in press comments that he would prevent the Committee from holding a hearing on either nominee until his candidate, U.S. District Judge Terry Boyle, was nominated to one of the vacancies. (You will recall that we reviewed Judge Boyle's record last term to determine his suitability and recommended, based on that review and strong opposition from your North Carolina supporters, that you not consider appointing him.) Senator Faircloth had cordial meetings with both nominees but also made clear that he would follow Senator Helms' lead in all respects. The most recent public comments from Senator Helms suggest that he intends to adhere to this position next term.

The situation has been complicated by the fact that Senator Hatch has criticized severely and publicly a recent decision joined (but not written) by Judge Beaty while sitting by designation with the 4th Circuit. Hatch included lengthy and gory descriptions of the facts of the case -- a per curiam grant of a habeas petition to an alleged double murderer -- in two of the floor speeches that he delivered against Clinton judges last spring; and he mentioned the case again last month in a speech to the Federalist Society. The *Wall Street Journal* and others have also criticized the decision.

Although the critics made a strong effort to turn Beaty into "another Judge Baer", they were not successful. Beaty did not receive widespread negative publicity; in fact, the *Winston-Salem Journal* ran two favorable editorials and a highly complimentary front-page profile of Beaty in mid-February, quoting numerous local lawyers and prosecutors contradicting the "soft-on-crime" label.

Recommendation: Our pre-election thinking for these 4th Circuit vacancies included a re-examination of the situation if Helms and Faircloth held firm, with the possibility of moving one of the vacancies to West Virginia or Maryland. With Senator

Helms' reelection and the Senate even less friendly than last session, we are concerned that moving a judicial seat, even one never expressly assigned to North Carolina and one that has never been filled, would create a potential backlash in the Committee and indeed in the Senate as a whole, especially if we failed to first renew our efforts to negotiate a solution with Senators Helms and Faircloth.

Although the controversy around Beaty has complicated the situation, we recommend sticking with this nominee, in part to demonstrate our resolve in fighting for embattled candidates and in part as a matter of principle because the criticism of this candidate is so unfair. However, because a return to the status quo is likely to again bog down the process of filling these seats, we recommend not renominating Judge Leonard, at least initially, to hold open the possibility that we might move the seat to another state and, more positively, to create an avenue for negotiation with Senator Helms about candidates other than Judge Boyle. Hopefully, Erskine Bowles can help with Senator Helms on this issue.

B. District Court

Of the 21 district court nominations that were returned at the end of the session, 14 individuals pose either remediable or no confirmation difficulties. We recommend that you renominate each of these individuals. They are as follows:

1. Anne Aiken -- District of Oregon

Aiken, a state court judge in Oregon, secured a hearing at the very end of the session with the assistance of Senators Hatfield and Wyden. However, no Committee vote was taken before adjournment. Aiken's nomination drew some criticism from conservative quarters based on a few sentencing and criminal law opinions in the early days of her tenure as a state judge. Those issues were addressed in the initial Presidential decision memorandum and seem to have been resolved by the time of her hearing, which went without incident. We also understand that Aiken has the support of Oregon's new Republican senator, Gordon Smith, who flew from Oregon to attend her hearing last fall.

2. Lawrence Baskir -- Court of Federal Claims

Baskir, currently the Principal Deputy General Counsel of the Department of the Army, was nominated on March 29, 1996 but did not receive a hearing. Baskir has no confirmation issues but was held up because Republicans feared you would exercise your statutory authority to appoint Baskir to the Chief Judge

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- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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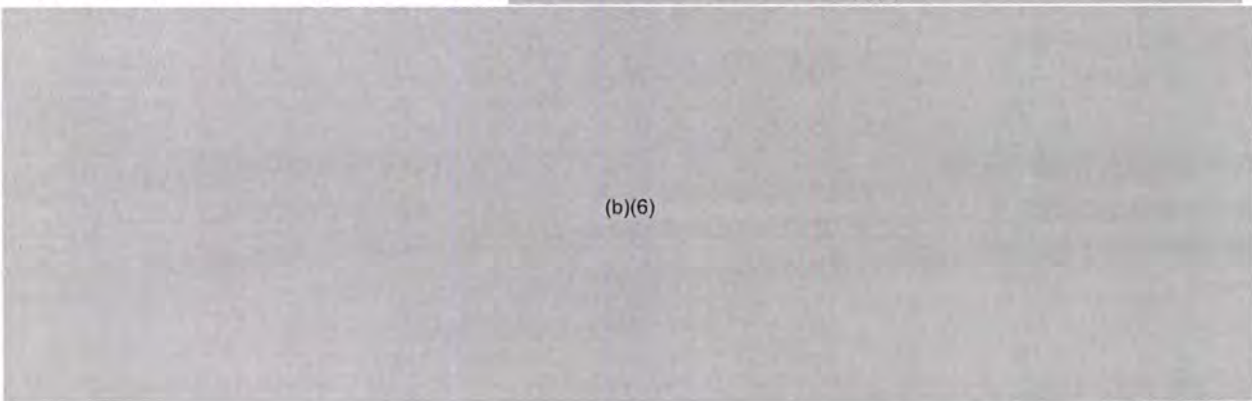
Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

position, thereby displacing Judge Loren Smith, who has furthered conservative takings theories during his tenure. We resisted attempts to secure an agreement not to name Baskir to the Chief Judge position as a condition of his confirmation last term and would recommend adhering to this position.

3. Joseph Bataillon -- District of Nebraska

Bataillon, a private practitioner in Omaha, was nominated on March 6, 1996 and received a hearing on July 31. No vote was taken on his nomination. (b)(6)



(b)(6)

4. John Bingler -- Western District of Pennsylvania

Bingler, a private practitioner in Pittsburgh, was nominated on July 21, 1995, but never had a hearing. He is part of a large block of Pennsylvania nominees/vacancies being held up primarily by Senator Santorum with the acquiescence of Senator Specter. Santorum's specific objection to Bingler is that he supported the campaign of his Democratic opponent then Senator Harris Wofford. More generally, Santorum and Specter are seeking a larger role in the judicial selection process through the creation of an advisory panel that would submit recommendations to you. We have strongly resisted these efforts and will continue to do so. To reinforce our position and signal our determination on this issue, we believe Bingler should be renominated even though there is no guarantee we can broker a larger deal that will win his confirmation.

5. Colleen Kollar-Kotelly -- District of Columbia

Kotelly, a judge on the Superior Court in DC, was nominated on June 29, 1996 had a hearing on July 31, and was the only one of six nominees at that final hearing to be voted out of Committee. Her nomination has been well received by both sides of the aisle, and she should face no confirmation hurdles.

6. Richard Lazzara -- Middle District of Florida

Lazzara, a judge on the Florida state trial court, was nominated on May 9, 1996 but did not receive a hearing. Lazzara faced some staff opposition (but no adverse publicity to date) based on a death penalty case in which he declined to follow the jury's recommendation of death in a particularly brutal murder. Lazzara, however, reached this decision only after concluding that Florida law precluded the death penalty under the facts of the case. He is otherwise known as a tough sentencer and has imposed the death penalty on two other occasions. Moreover, we believe we can count on at least the tacit support of Senator Mack should any issues arise.

7. Donald Middlebrooks -- Southern District of Florida

Middlebrooks, a private practitioner in West Palm Beach, was nominated on September 5, 1996. We do not expect any problems to arise with this nomination.

8. Jeffrey Miller -- Southern District of California

Miller, a state court judge in San Diego, was nominated on July 19, 1996. He is extremely well regarded in California and should pose no confirmation issues.

9. Susan Oki Mollway -- District of Hawaii

Mollway, a private practitioner in Honolulu, was nominated on December 21, 1995 and was approved by the Committee after a hearing on March 27, 1996. She is an American of Japanese descent and her father served in the military with Senator Inouye, who has been a forceful advocate for her nomination. She encountered opposition based largely on her service as a board member of the Hawaii chapter of the ACLU. The issue took on particular significance during debate on the Defense of Marriage Act because the Hawaii ACLU was involved in the same-sex marriage litigation. Mollway, however, was not a board member when the Hawaii gay marriage case was first initiated and did not participate in the case in any manner. Given the outcome of the litigation, however, her nomination may face continued opposition. Despite this possibility, we recommend renominating Mollway.

10. Margaret Morrow -- Central District of California

Morrow, a private practitioner in Los Angeles, was nominated on June 25, 1996. We do not believe her nomination will face significant opposition. While Jack participated in the original recommendation to nominate her in June, he did not participate in the current round of discussions about renomination because Morrow has recently become affiliated with his former law firm as a result of a merger.

11. Robert Pratt -- District of Iowa

Pratt, a private practitioner in Des Moines, was nominated on August 2, 1996. Pratt's practice is focused on low-income clients and he has a legal services background. He is strongly supported by Senator Harkin and should have the support of Senator Grassley. Accordingly, we do not anticipate any confirmation problems.

12. Christina Snyder -- Central District of California

Snyder, a private practitioner in Los Angeles, was nominated on May 15, 1996. We do not believe her nomination will encounter significant opposition.

13. Clarence Sundram -- Northern District of New York

Sundram, currently the Commissioner of the State Quality of Care for the Mentally Disabled in New York, was nominated on September 29, 1995, and had a hearing before the Committee on July 31, 1996. No Committee vote was taken. Sundram's nomination faced a number of hurdles based on his lack of trial experience and several issues associated with his present post, none of which we regard as significant. These issues appear to have been largely resolved, or at least fully addressed, prior to adjournment. While it is possible that Sundram could face further opposition, Senator Moynihan is very committed to the nomination, and we believe the intensity of the opposition is likely to wane in the wake of the election.

14. Thomas Thrash -- Northern District of Georgia

Thrash, a private practitioner from Atlanta, was recommended by Senator Nunn. He was nominated on May 15, 1996 and had a hearing before the Committee on July 31. Although the Senate has, in the past, expedited consideration of candidates submitted by retiring senators, no Committee vote was taken. Thrash has solid credentials and no confirmation issues. While we intend to consult with newly elected Democratic Senator Cleland prior to making the renomination, we recommend that you resubmit Thrash's name to the Senate unless there is opposition from Cleland.

15. Other Candidates -- The remaining seven

nominations that were returned by the Senate present issues that will be the subject of a subsequent memorandum.

Recommendation: We recommend that you renominate each of the individuals identified in paragraphs 1 through 14.

III. NOMINATIONS OF PREVIOUSLY APPROVED CANDIDATES

A. Court of Appeals

You previously have approved three appellate candidates who were not nominated prior to the adjournment. We recommend that you now nominate all three individuals.

1. Andrew Hurwitz -- Ninth Circuit (Arizona)

Earlier this year, you gave your approval to the nomination of Andrew Hurwitz, a Phoenix lawyer, to the Ninth Circuit. Because it was apparent that Senator Kyl would not support Hurwitz during an election year, we did not make the nomination prior to the adjournment. Hurwitz has outstanding credentials and has the support of Secretary Babbitt, for whom he worked in Arizona. Although he may face opposition based on some of the matters on which he has worked during his career, we do not believe there will be a serious challenge to his nomination.

Recommendation: We recommend that you proceed with the nomination of Hurwitz after we first consult with Senator Kyl as well as Senator McCain, who may wish to play a larger role in nominations in this session of Congress.

2. Marjorie Rendell -- Third Circuit (Pennsylvania)

Rendell, whom you appointed to the federal district court in Philadelphia, was approved for elevation to the Third Circuit earlier this year. Her nomination was delayed due to calls by some interests groups for appointment of an alternative candidate and by the continuing uncertainty over the general situation in Pennsylvania (we now have six district court vacancies in addition to this seat). Rendell has developed an outstanding reputation on the district court in a very short period of time and should face few confirmation difficulties, provided we can resolve the larger issue in the state.

Recommendation: We recommend that you nominate Rendell even in the absence of a global agreement for two reasons: first, nominating Rendell now may help to decouple this appellate vacancy from the district court seats; and second, even if a package deal is necessary, we will emphasize that Rendell must be part of any agreement. Given the past delays in reaching a compromise, we see little benefit in postponing this nomination.

3. Helene White -- Sixth Circuit (Michigan)

White, a judge on the Michigan Court of Appeals, also was approved earlier this year but was not nominated before Congress adjourned. Although White initially was selected because other more qualified candidates posed potential election year risks, Senator Levin asked for and received our commitment to nominate White in the second term. She received a Q/NQ rating from the ABA and has a few problematic decisions from her tenure on the state court, but we do not believe her nomination will face serious obstacles.

Recommendation: Absent Senator Levin's personal intercession, we might have wanted to reconsider this selection at some later juncture. However, based on the express written commitment we made to Senator Levin last Congress, we recommend that you nominate Helene White.

V. CONCLUSION

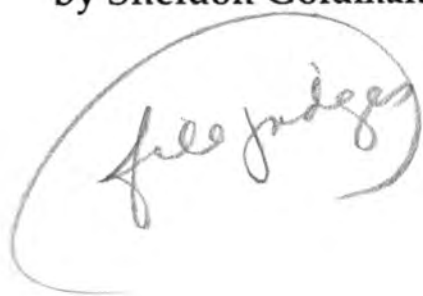
We recommend that you renominate each of the 24 candidates listed above who were nominated last term, as well as the three candidates listed above who previously received your approval.

_____ **APPROVE ALL**

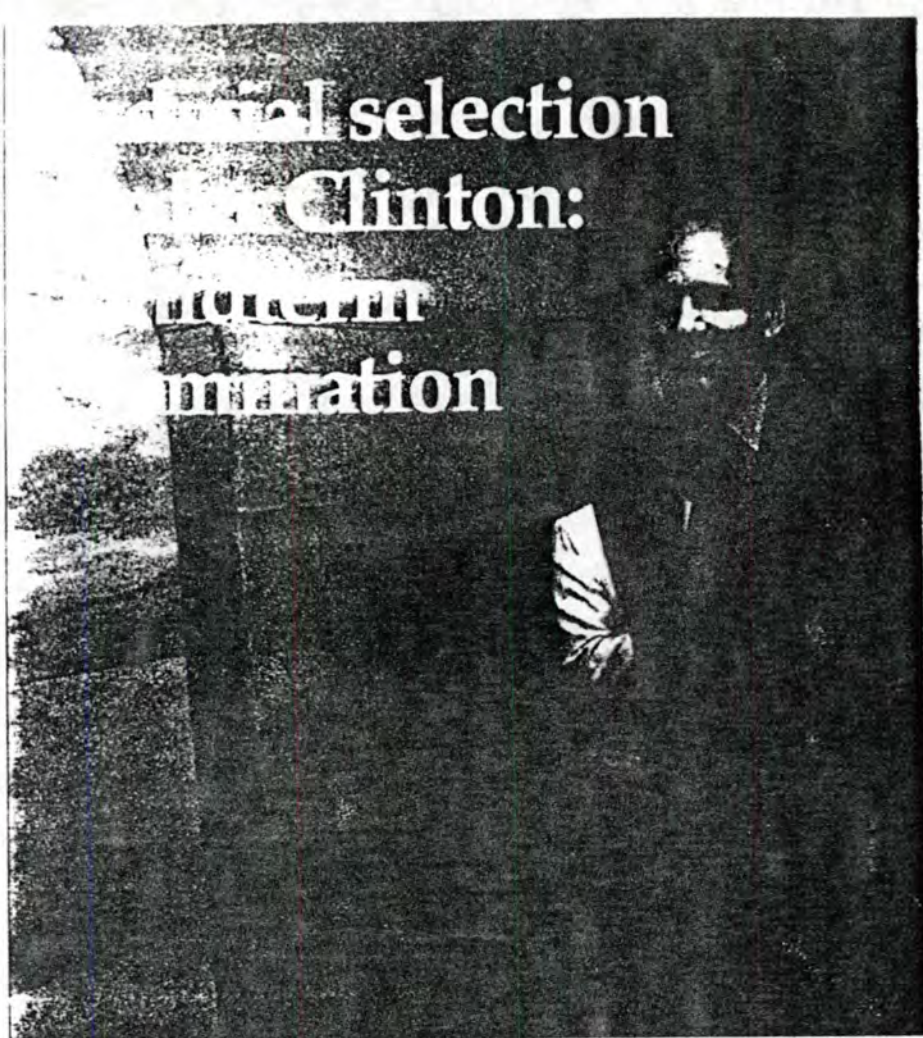
_____ **DISAPPROVE AS FOLLOWS:**

In his first two years in office, President Clinton acted to fill more than 75 percent of judicial vacancies. His commitment to diversity ensured unparalleled opportunity for women and minorities.

by Sheldon Goldman



President Clinton and his second appointee to the Supreme Court, Stephen G. Breyer.



The election of Democrat Bill Clinton in 1992 brought a halt to 12 years of Republican control of the White House and of Republican-named federal judges. The 103rd Congress elected with Clinton remained under Democratic control, which meant that for the first time since the Carter administration a Democratic president and a Democratic Senate would nominate and confirm the key players in the third branch of government. This partnership abruptly ended on November 8, 1994, when the midterm election placed Congress in Republican hands. For the first time since 1946, the Republican party gained

the first half of Clinton's first term and considers his administration's judicial selection process. It also presents demographic profiles of Clinton's appointments to the federal district and appeals courts confirmed during the 103rd Congress compared to those of his three predecessors, a time span of 18 years. Finally, the article speculates on the impact of Republican control of the Senate on judicial selection.

The data include only persons confirmed to lifetime appointments on the lower courts of general jurisdiction. Among the data sources were the questionnaires the nominees submitted to the Senate Judiciary Committee,

confirmation hearings, personal interviews, biographical directories,¹ local newspaper stories and reporters, various boards of elections, professional colleagues, and responses from Clinton appointees to written questions from the author.

Supreme Court appointments

In 1993 and 1994 a record proportion of women and minorities, about three-fifths of all appointees, were appointed to the federal bench. The selection of nontraditional appointees (women and minorities) was discussed in an earlier article;² the statistics are brought up to date here. During this

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control of both houses of Congress while a Democrat was president.

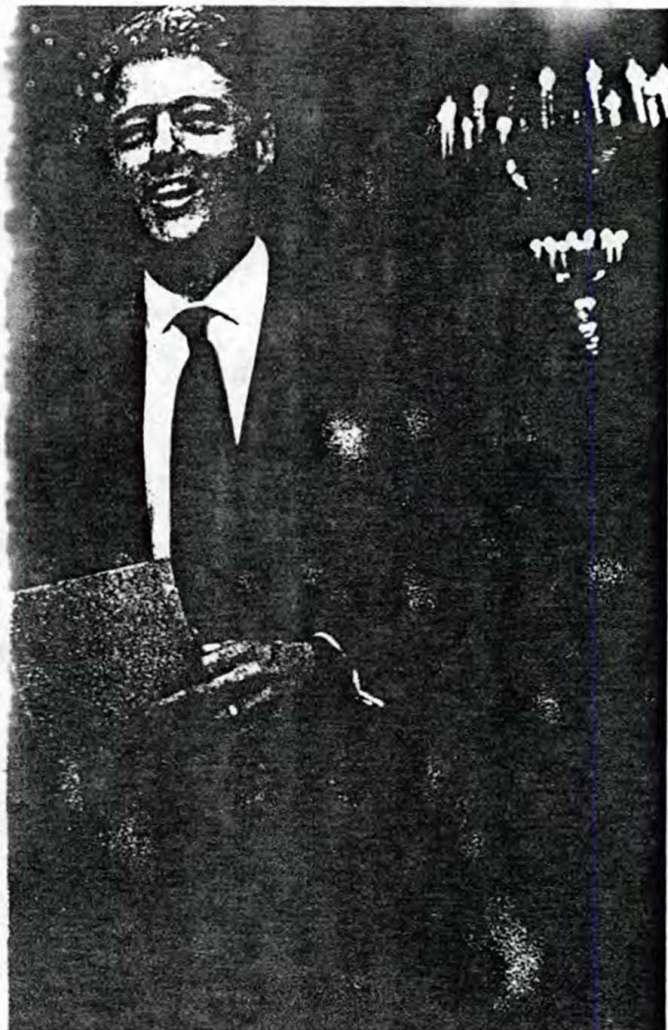
This article reviews the major events concerning judicial selection during

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Deputy Assistant Attorney General Peter Erichsen for their generous assistance, and is indebted to the many Clinton appointees who answered his queries. All errors of fact and interpretation remain the responsibility of the author.

1. Among the directories consulted were *THE AMERICAN BENCH* (7th edition), *Who's Who* (national and regional editions), *MARTINDALE-HUBBELL LAW DIRECTORY*, and *THE JUDICIAL STAFF DIRECTORY* (1994 edition).

2. Goldman and Saronson, *Clinton's nontraditional judges: creating a more representative bench*, 78 *JUDICATURE* 68 (1994).



WHITE HOUSE PHOTO

same period two new Supreme Court justices were selected.

Clinton was in office for only about two months when Byron White, the only Democrat then remaining on the Supreme Court, announced he would retire at the end of the term. Thus Clinton would be the first Democratic president in 26 years to make a Su-

preme Court appointment. Although the typical pattern of Supreme Court selection has been for a successor to be named within several weeks of the announcement of the impending vacancy,³ the president indicated he would move deliberately and extensively consider a wide variety of potential candidates.⁴

White House Counsel Bernard W. Nussbaum took responsibility for overseeing the evaluation of possible candidates and winnowing down the large list of potential nominees. At various times over a period of months numerous names surfaced as leading candidates. In some respects the leaking of names to the press served as trial balloons. Various interest groups were able to respond to the leaked names and indicate their support or opposition. Likewise, key

members of the Senate Judiciary Committee from both parties were in a position to suggest the degree of support or opposition that could be expected in the Senate.

Some speculated that Clinton wanted to name the first Hispanic, while one newspaper story reported that among equally qualified candidates Clinton would like to restore

"the Jewish seat" that had remained unfilled since Abe Fortas resigned from the Court in 1969.⁵ Some thought Clinton would select a woman. The president himself was thought to prefer someone schooled in high political office, thus adding some balance to a Supreme Court dominated by justices who had never held elective office.⁶ There was speculation that New York Governor Mario Cuomo would be an ideal justice, but after intense media publicity Cuomo removed himself from consideration.

After more than two months, three men—two federal appeals court judges and Interior Secretary Bruce Babbitt—were reported as front-runners. Conservation and environmental groups reportedly urged that Babbitt remain in Interior, and Republican senators indicated they thought Babbitt too liberal.⁷ The president then appeared to settle on First Circuit Judge Stephen G. Breyer, a former chief majority counsel of the Senate Judiciary Committee, who had bipartisan support. Clinton asked Breyer to come to Washington for a meeting but apparently was unsatisfied with the interview.

Over an intense weekend, out of view of the press, Clinton met with Judge Ruth Bader Ginsburg of the U.S. Court of Appeals for the District of Columbia Circuit. Ginsburg was characterized as the "Thurgood Marshall of the women's movement" in acknowledgment of her work on behalf of women's rights during the 1970s, when she successfully argued key gender equality cases before the Supreme Court. Appointed to the D.C. Circuit by Jimmy Carter, she acquired the reputation of being a centrist in a court known for its ideological divisions. When Clinton made the surprise announcement on Monday, June 14, 1993, that he intended to nominate Ginsburg, there was strong bipartisan support from senators.⁸ Unlike the contentious and prolonged battle over Clarence Thomas, the Ginsburg hearings went smoothly, and she was confirmed on August 3 by a vote of 96-3.

The president was criticized for prolonging the process, for allowing the leaks of names to the press, for summoning Breyer from a hospital bed

3. For example, Justice William O. Douglas announced his retirement on November 12, 1975, and President Gerald Ford named his successor, Judge John Paul Stevens, little more than two weeks later. On June 18, 1981, Justice Potter Stewart announced his intention to retire at the end of the term and three weeks later, on July 7, President Ronald Reagan nominated Sandra Day O'Connor. Some five years later Chief Justice Warren E. Burger informed President Reagan of his intention to retire at term's end, and within three weeks Reagan announced he was nominating Justice William H. Rehnquist to be elevated to the chief justiceship and Judge Antonin Scalia to the associate justiceship to be made vacant by Rehnquist's elevation.

President George Bush was exceptionally rapid in filling Supreme Court vacancies. Justice William Brennan unexpectedly retired on July 19, 1990, and on July 23 Bush nominated Judge David Souter. Similarly, when Justice Thurgood Marshall informed President Bush of his retirement on June 27, 1991, the president was quick to announce his nominee to replace Marshall, Judge Clarence Thomas, on July 1.

At least since the Roosevelt administration, and before the Clinton administration (with the exception of filling the Warren and Fortas vacancies, which were unique political events), the record time gap between the announcement of a vacancy and the announcement of a replacement was achieved by Richard Nixon in 1971. After illness forced Justice Hugo Black to retire on September 17 and Justice John M. Harlan to retire on September 23, Nixon waited until October 21 to name Lewis Powell and William Rehnquist as their successors. From the Nixon administration through the Bush administration, the average number of days between announcement of an impending vacancy and announcement of the successor was 16 days.

4. See, e.g., N.Y. Times, May 9, 1993, at 22; N.Y. Times, June 15, 1993, at A-22.

5. N.Y. Times, June 11, 1993, at A-18. In general, see Perry, A "REPRESENTATIVE" SUPREME COURT? (New York: Greenwood, 1991).

6. Only Justice Sandra Day O'Connor had been elected to political office prior to her judicial career.

7. N.Y. Times, June 9, 1993, at A-17.

8. See, e.g., N.Y. Times, June 16, 1993, at A-22.

where he was recovering from a bicycle accident, and for leading Breyer to believe that his nomination was likely and then abandoning him for Ginsburg. Nevertheless, commentators and editorial writers said that whatever the flaws of the selection process, the end result was the selection of a superbly qualified justice.

In 1994 Clinton had a second opportunity to fill a Supreme Court seat. Justice Harry Blackmun announced in early April his intent to retire at the end of the term. Once again there was much speculation over possible appointees. Senate Majority Leader George J. Mitchell was considered the leading candidate and in fact was offered the nomination on April 11 but unexpectedly turned it down.⁹

A variety of other names emerged. Hispanic groups urged Clinton to make history by naming the first Hispanic to the Supreme Court. Chief Judge José Cabranes of the federal district court of Connecticut was prominently mentioned as a front runner. Other names included Interior Secretary Bruce Babbitt, but once again Republican senatorial opposition to Babbitt surfaced.¹⁰ Clinton apparently chose not to spend his political capital on a controversial nomination, and Babbitt's name was dropped. The president was persuaded to give Judge Breyer a second look, particularly given the likelihood of a smooth confirmation, and he announced Breyer's nomination on May 13, 1994. After an uneventful hearing before the Senate Judiciary Committee, the full Senate confirmed Breyer on July 29, 1994, by a vote of 87-9.

Clinton's selection process

Judicial selection in the Clinton administration began slowly. The first major decision was that in light of the more than 100 vacancies inherited from the Bush administration, it would be necessary to invest sufficient personnel resources in the selection process to rapidly reduce the backlog. Following an innovation of the Reagan administration, Clinton assigned the task of judicial selection to an office in the Justice Department headed by an assistant attorney general. Reagan's office was the Office of Legal Policy,

whose name was changed by the Bush administration to the Office of Policy Development. Under Bush, however, judicial selection was moved to the attorney general's office. Clinton retained the Office of Policy Development and returned to it the task of judicial selection.

On April 29, 1993, Clinton nominated Eleanor D. Acheson to head the Office of Policy Development. However, she was not confirmed until August 2. Until then, judicial selection activity was centered in the Office of the White House Counsel, where Ronald A. Klain, associate White House counsel (and former Senate Judiciary Committee chief counsel who worked closely with Senate Judiciary Committee Chair Joseph R. Biden Jr.), focused on judicial selection. At the end of 1993 Klain moved to the Justice Department, and Victoria L. Radd became associate White House counsel with responsibility for judicial selection. She devoted nearly all her time to selection during 1994 and worked closely with Acheson and other officials in the Office of Policy Development.¹¹

At the Office of Policy Development, deputy assistant attorney general Peter Erichsen worked full time on judicial selection. As many as 15 people in the Justice Department worked part-time in the selection process.¹² Each judicial candidate was assigned to a Justice Department lawyer who took responsibility for gathering and analyzing the relevant materials, including (for candidates with judicial experience) an analysis of his or her judicial record. The official also coordinated each candidate's visit to the Justice Department, where typically six staff members interviewed the candidate. The interviews focused on professional experience, specific aspects of his or her legal experience as a judge or private practitioner, and the candidate's understanding of the policy issues confronting the federal courts. Justice officials sought to obtain a sense of the person, the individual's temperament, intellect, ability to articulate legal concepts, and the individual's commitment to fairness. On occasion, discussion with candidates touched upon issues such as abortion and the death penalty in or-

der to help determine the candidate's sense of fairness in these and other legal policy areas, the candidate's understanding of the judicial role, and his or her willingness to follow precedent. Like Justice officials in previous administrations, care was taken not to discuss with candidates how they would rule in specific cases.¹³

In the Clinton administration, likely judicial candidates emerge from recommendations and suggestions from Democratic senators and other Democratic politicians. When a strong candidate has been identified and the White House and Justice Department decide to focus on that person, the process generally begins with a telephone call of several hours duration to the candidate by a Justice official. Extensive background information is obtained, and in excess of 60 telephone calls are typically made to various individuals who have interacted professionally with the candidate. About 10 percent of those interviewed are eliminated from further consideration.¹⁴

Acheson's deputy, Peter Erichsen, chairs a judicial selection committee within the Justice Department that meets regularly to discuss candidates and to assess the progress of investigations. At the initial stages, Justice officials focus solely on the professional merits of the candidates while the White House handles the politics. Democratic senators are consulted, and Republican senators are sounded out. An assessment is made as to what political difficulties a candidate will face in the confirmation process.

Each week the Judicial Selection Group (as it is called in the Clinton administration; the Reagan and Bush administrations used a more formal title, the White House Committee on Judi-

9. See N.Y. Times, Apr. 13, 1994, at A-1. Also see, N.Y. Times, Apr. 16, 1994, at 1; N.Y. Times, Apr. 28, 1994, at B-10.

10. See N.Y. Times, May 15, 1994, at A-1.

11. Interview with Associate White House Counsel Victoria L. Radd, December 21, 1994.

12. Assistant Attorney General Eleanor D. Acheson's presentation at the Southern Political Science Association annual meeting, Nov. 6, 1994, Atlanta, Georgia. The description of the process is based on Acheson's presentation, an interview with her later that day, an interview with Victoria L. Radd, Dec. 21, 1994, and a telephone conversation with Peter Erichsen, Apr. 6, 1995.

13. Acheson, Radd, and Erichsen, *id.*, and the questionnaires completed by the nominees for the Senate Judiciary Committee.

14. Acheson presentation, *supra* n. 12.

cial Selection) meets to decide which candidates to take to the president for his consideration, which candidates to investigate further, and how to balance political realities with the desire to appoint the best qualified people.¹⁵ The committee is a joint White House-Justice Department committee, and its membership is similar but not identical to those of the Reagan and Bush administrations.

The chair of the committee is the White House counsel (Bernard W. Nussbaum until he left office on April 5, 1994; Lloyd N. Cutler, who served from April 5 through September 1994; Abner J. Mikva since October 1, 1994). Other members of the committee from the White House include associate White House counsel Victoria Radd (who replaced Ronald Klain when he moved to Justice), deputy White House counsel Joel Klein and then his replacement James Castello, and deputy Bruce R. Lindsey. Also serving are a representative of the Office of Legislative Affairs, the vice president's counsel, and the deputy chief of staff for the First Lady who is also an assistant to the president. Members from the Justice Department include Eleanor Acheson, her deputy Peter Erichsen who spends full time on judicial selection, another deputy, Roslyn Mazer, and a former deputy and now counselor and chief of staff in the Civil Rights Division, Susan Liss. Attorney General Janet Reno is also welcome to attend but typically does not.

The president receives a memo from the White House Counsel's office suggesting one or more individuals for particular positions. President Clin-

ton, who once was a constitutional law professor, is actively engaged in the selection process and will sometimes suggest names or even ask for more. He is consulted at several stages in the process.

There is a division of labor within the administration depending upon the level of judgeship. The Justice Department handles district court judgeships, and the principal screening is done in the Office of Policy Development. For courts of appeals judgeships, the initiatives tend to come from the Office of White House Counsel, although here, too, the Justice Department will often conduct the screening and investigation. For the two Supreme Court vacancies, selection and screening were done primarily in the White House with the Department of Justice playing a supporting role.

When Clinton was elected, there were 85 vacancies on the district courts and 15 on the courts of appeals of general jurisdiction. By the time he took office, the number of judicial positions to be filled had jumped to 113. The backlog of unfilled positions on the district courts in particular was considered a judicial crisis, and the Clinton administration gave it high priority. During Clinton's first two years, 118 people were nominated for lifetime judgeships on the district courts. Of these, 107 were confirmed (about a 91 percent confirmation rate).¹⁶ A total of 21 nominations to the courts of appeals with general jurisdiction were made. Of these, 18 were confirmed (about an 86 percent confirmation rate).¹⁷ In total, about 70 percent of the vacancies on the lower courts were

filled. If all nominees had been acted upon and confirmed by the Senate, the proportion would have been 78 percent. Of the 14 nominees who were not acted upon, 9 had been nominated in the closing weeks of the 103rd Congress, and there was no indication that they had run into any problems.¹⁸

Notable features

There are several notable features about the Clinton judicial selection process. First, there was the determined effort not to screen nominees ideologically. The president told Democratic senators and other officeholders that there should be no ideological screening. Excellence in intellectual ability and judicial temperament were of paramount importance as well as a firm understanding of the role of district courts to follow precedent and to be fair.¹⁹

Another important feature of the Clinton selection process was the close cooperation and working relationship between the Office of White House Counsel and the Justice Department's Office of Policy Development. There was no evidence of interagency rivalry or tension. Justice officials focused on the professional credentials of the candidates and let the White House handle the politics.

And finally the Clinton administration is the first to place responsibility for judicial selection in a Justice Department led by a female attorney general and in an office headed by a female assistant attorney general. The associate White House counsel concerned with judicial selection in 1994 was also female. Given the commitment of the administration to diversify the bench, the placement of women in top posts in which to carry out that commitment, and the corresponding commitment on the part of Senate Judiciary Committee Chair Joseph R. Biden Jr. and of many Democratic senators, it is no surprise that women and minorities had opportunities for judicial positions at a selection rate unparalleled in history.

District court appointees

Tables 1 and 2 present data on persons appointed to lifetime positions on the federal district courts. Table 1 com-

15. Acheson interview, Radd interview, *supra* n. 12.

16. Note that these figures are for lifetime appointments only. One territorial judge, Raymond Finch, was confirmed to the U.S. District Court for the Virgin Islands but is not included in the statistics presented here. There were 11 nominees to lifetime positions on the federal district courts whose nominations were not acted upon by the Senate. Six of them were resubmitted within the first weeks of the 104th Congress.

17. Note that these figures are for lifetime appointments to courts of general jurisdiction only. William Bryson was confirmed to the U.S. Court of Appeals for the Federal Circuit, a court of specialized jurisdiction, but is not included in the statistics. There were three nominees to appeals courts of general jurisdiction whose nominations were not acted upon by the Senate. All three were resubmitted within the first weeks of the 104th Congress.

18. Three of the 14 nominees had hearings, two (R. Samuel Paz nominated to the federal district

bench in the Central District of California and James Dennis of Louisiana nominated to the U.S. Court of Appeals for the Fifth Circuit) were rated *qualified* by the American Bar Association, and one (Theodore Klein, nominated to the Southern District of Florida) was rated *well qualified*. However, the Senate Judiciary Committee did not act on these nominations apparently because of some opposition by Republicans. It would seem neither the Democrats in control of the Senate nor the administration chose to force the issue. Only one of the three, James Dennis, was subsequently renominated. The administration's decisions, in consultation with Senator Barbara Boxer, not to resubmit Paz and Judge Judith McConnell (nominated to the Southern District of California) are discussed in "Controversial nominations," page 288, which draws from Biskupic, *Facing Fights on Court Nominees*, *Clinton Yields*, Washington Post, Feb. 13, 1995, at A-1 and a press release from Senator Barbara Boxer, Jan. 20, 1995.

19. Acheson presentation, *supra* n. 12.

Table 1 Clinton's nontraditional appointees compared to his traditional appointees to the federal district courts (confirmed in 1993 and 1994)

	Nontraditional % (N)	Traditional % (N)
Occupation		
Politics/government	13.9% (9)	7.1% (3)
Judiciary	55.4% (36)	26.2% (11)
Large law firm		
100+ members	6.1% (4)	19.0% (8)
50-99	6.1% (4)	4.8% (2)
25-49	1.5% (1)	9.5% (4)
Moderate size firm		
10-24 members	3.1% (2)	11.9% (5)
5-9	3.1% (2)	7.1% (3)
Small firm		
2-4 members	6.1% (4)	9.5% (4)
Solo	1.5% (1)	—
Professor of law	3.1% (2)	2.4% (1)
Other	—	2.4% (1)
Experience		
Judicial	61.5% (40)	28.6% (12)
Prosecutorial	35.4% (23)	35.7% (15)
Neither	23.1% (15)	47.6% (20)
Undergraduate education		
Public	46.1% (30)	38.1% (16)
Private	38.5% (25)	47.6% (20)
Ivy League	15.4% (10)	14.3% (6)
Law school education		
Public	40.0% (26)	35.7% (15)
Private	40.0% (26)	35.7% (15)
Ivy League	20.0% (13)	28.6% (12)
Gender		
Male	47.7% (31)	100.0% (42)
Female	52.3% (34)	—
Ethnicity/race		
White	41.5% (27)	100.0% (42)
African American	41.5% (27)	—
Hispanic	13.9% (9)	—
Asian	1.5% (1)	—
Native American	1.5% (1)	—
ABA rating		
Well qualified	53.8% (35)	71.4% (30)
Qualified	44.6% (29)	23.8% (10)
Not qualified	1.5% (1)	4.8% (2)
Political identification		
Democrat	90.8% (59)	85.7% (36)
Republican	1.5% (1)	4.8% (2)
Independent	7.7% (5)	7.1% (3)
Other	—	2.4% (1)
Past party activism	44.6% (29)	66.7% (28)
Net worth		
Less than \$200,000	21.5% (14)	7.1% (3)
\$200,000-499,999	30.8% (20)	21.4% (9)
\$500,000-999,999	29.2% (19)	26.2% (11)
\$1+ million	18.5% (12)	45.2% (19)
Average age at nomination	47.0	51.4
Total number of appointees	65	42

compares the backgrounds of Clinton's nontraditional appointees (women and minorities) to traditional appointees (white males).²⁰ Sixty-five nontraditional individuals were confirmed by

the 103rd Senate (three additional nontraditional nominees were not acted upon by the Senate, and their nominations lapsed at the end of the Congress). Forty-two traditional nomi-

nees were confirmed, while eight others were not acted upon. (For brief descriptions of some of those confirmed see "Some appointees with notable credentials," page 282.) Table 2 compares all the confirmed Clinton district court appointees to lifetime positions (a total of 107 individuals) to the lifetime district court appointees of George Bush, Ronald Reagan, and Jimmy Carter.

Occupation. The occupations of the nontraditional appointees at time of appointment tended to be different from those of the traditional appointees. More than two out of three nontraditional appointees were in public service, primarily judicial positions, compared to only one of three traditional appointees. About one in seven nontraditional appointees were practicing law in large law firms compared to one in three traditional appointees (and about one in five traditional appointees were practicing in the super-firms employing more than 100 lawyers). In general, the private practice of law accounted for the occupations of slightly more than one in four nontraditional appointees as compared to well over half the traditional appointees. These findings reflect the reality that professional career opportunities for women and minorities have historically been more plentiful in the public than in the private sector.

When all the Clinton district court appointees are compared to the appointees of Bush, Reagan, and Carter (Table 2), we find that well over half the Clinton appointees were in public service at the time of their appointment, marginally the highest proportion of all four administrations. Of the 47 Clinton appointees serving in a judicial capacity, 11 were U.S. magistrates at the time of appointment to the federal district bench. This is a rate roughly comparable to that of the Bush appointees and a continuation of

20. Note that Goldman and Saronson, *supra* n. 2, compared nontraditional to traditional nominees, but the statistics presented in that article did not separate district from appeals court judges. Also, the statistics in the previous article were for all those nominated, which included some eventually not acted upon. Furthermore, the previous article covered only those nominated as of June 1, 1994. This article encompasses all those confirmed by the Senate of the 103rd Congress to lifetime positions on the lower courts of general jurisdiction.

one trend to promote from within the federal judiciary.²¹ It should also be noted that 8 of the 11 U.S. magistrates promoted to U.S. district judge were nontraditional appointees.

In general, more than two in five Clinton appointees had judicial occupations, continuing the trend of a career judiciary that began with Carter. Looking to the judiciary as a source of district bench candidates is apparently appealing to those involved in the selection process, not necessarily because of a philosophical preference for a career judiciary. Candidates who are judges have judicial track records that can be examined, and their work has been observed by lawyers and other judges who can be asked for their assessments. In addition, judicial philosophy and judicial temperament can perhaps be better discerned for those with a record on the bench.

The ranks of the U.S. attorney's office proved to be an exceedingly modest source of judicial appointments. Only four individuals serving in that office were tapped by Clinton for the federal bench, representing about 4 percent of his district court appointees. By contrast, Bush named close to twice this percentage (or 11 individuals) and Reagan even more, in excess of 10 percent of his appointees.

More than 11 percent of the Clinton appointees came from superfirms (with 100 or more members), a historic record, although a larger proportion of the Bush appointees came from large firms with fewer than 100 members. The large law firms are obviously not the exclusive preserves of Republicans; indeed, significant numbers of Democrats can be found within their ranks.

Law schools were a source of only a handful of district court judges, almost 3 percent, a proportion larger than that for the Bush and Reagan appointees but about the same as for Carter.

Experience. Overall, as shown in Table 2, close to half the Clinton appointees had previous judicial experience, a record second only to that for Carter's appointees. Starting with the Carter administration, a larger propor-

Table 2 U.S. district court appointees compared by administration

	Clinton* % (N)	Bush % (N)	Reagan % (N)	Carter % (N)
Occupation				
Politics/government	11.2% (12)	10.8% (16)	12.8% (37)	4.4% (9)
Judiciary	43.9% (47)	41.9% (62)	37.2% (108)	44.6% (90)
Large law firm				
100+ members	11.2% (12)	10.8% (16)	5.9% (17)	2.0% (4)
50-99	5.6% (6)	7.4% (11)	5.2% (15)	6.0% (12)
25-49	4.7% (5)	7.4% (11)	6.6% (19)	6.0% (12)
Moderate size firm				
10-24 members	6.5% (7)	8.8% (13)	10.3% (30)	9.4% (19)
5-9	4.7% (5)	6.1% (9)	9.0% (26)	10.4% (21)
Small firm				
2-4	7.5% (8)	3.4% (5)	7.6% (22)	11.4% (23)
Solo	0.9% (1)	1.4% (2)	2.8% (8)	2.5% (5)
Professor of law	2.8% (3)	0.7% (1)	2.1% (6)	3.0% (6)
Other	0.9% (1)	1.4% (2)	0.7% (2)	0.5% (1)
Experience				
Judicial	48.6% (52)	46.6% (69)	46.6% (135)	54.5% (110)
Prosecutorial	35.5% (38)	39.2% (58)	44.1% (128)	38.6% (78)
Neither	32.7% (35)	31.8% (47)	28.3% (82)	28.2% (57)
Undergraduate education				
Public	43.0% (46)	44.6% (66)	35.5% (103)	57.4% (116)
Private	42.0% (45)	41.2% (61)	50.3% (146)	32.7% (66)
Ivy League	15.0% (16)	14.2% (21)	14.1% (41)	9.9% (20)
Law school education				
Public	38.3% (41)	52.7% (78)	42.4% (123)	50.5% (102)
Private	38.3% (41)	33.1% (49)	45.5% (132)	32.2% (65)
Ivy League	23.4% (25)	14.2% (21)	12.1% (35)	17.3% (35)
Gender				
Male	68.2% (73)	80.4% (119)	91.7% (266)	85.6% (173)
Female	31.8% (34)	19.6% (29)	8.3% (24)	14.4% (29)
Ethnicity/race				
White	64.5% (69)	89.2% (132)	92.4% (268)	78.7% (159)
African American	25.2% (27)	6.8% (10)	2.1% (6)	13.9% (28)
Hispanic	8.4% (9)	4.0% (6)	4.8% (14)	6.9% (14)
Asian	0.9% (1)	—	0.7% (2)	0.5% (1)
Native American	0.9% (1)	—	—	—
Percentage white male	39.2% (42)	73.0% (108)	84.8% (246)	68.3% (138)
A.B.A. rating				
Exceptionally well/well qualified	60.7% (65)	57.4% (85)	54.1% (157)	51.0% (103)
Qualified	36.4% (39)	42.6% (63)	45.9% (133)	47.5% (96)
Not qualified	2.8% (3)	—	—	1.5% (3)
Party				
Democrat	88.8% (95)	5.4% (8)	4.8% (14)	92.6% (187)
Republican	2.8% (3)	88.5% (131)	93.1% (270)	4.4% (9)
Independent	7.5% (8)	6.1% (9)	2.1% (6)	3.0% (6)
Other	0.9% (1)	—	—	—
Past party activism	53.3% (57)	60.8% (90)	58.6% (170)	60.9% (123)
Net worth				
Less than \$200,000	15.9% (17)	10.1% (15)	17.6% (51)	35.8%** (53)
\$200-499,999	27.1% (29)	31.1% (46)	37.6% (109)	41.2% (61)
\$500-999,999	28.0% (30)	26.4% (39)	21.7% (63)	18.9% (28)
\$1+ million	29.0% (31)	32.4% (48)	23.1% (67)	4.0% (6)
Total number of appointees	107	148	290	202
Average age at nomination	48.7	48.1	48.7	49.7

* Appointees confirmed in 1993 and 1994.

** These figures are for appointees confirmed by the 96th Congress. Professor Elliot Slotnick of Ohio State University generously provided the net worth figures for all but six Carter district court appointees (for whom no data were available).

21. See Smith, *Former U.S. magistrates as district judges: the possibilities and consequences of promotion within the federal judiciary*, 73 JUDICATURE 268 (1990).

tion of judges had judicial than prosecutorial experience. For the Clinton appointees, these figures are a result primarily of the backgrounds of the nontraditional appointees. As seen in Table 1, more than 60 percent of the nontraditional appointees had judicial experience, but only 35 percent had prosecutorial experience. (Some, of course, had both.) In contrast, about 28 percent of the traditional appointees had judicial experience, and about 35 percent had prosecutorial experience.

Close to half the traditional Clinton appointees had neither judicial nor prosecutorial experience. Fewer than a quarter of the nontraditional appointees had neither judicial nor prosecutorial experience. In terms of the entire group of Clinton appointees compared with the appointees of Bush, Reagan, and Carter, the Clinton appointees lacked judicial and prosecutorial experience at about the same rate as the Bush appointees and at a higher rate than the Reagan and Carter appointees.

Judicial experience continues to be the single most dominant experiential variable. Like the findings for occupation, it is clearly suggestive of a movement toward a career judiciary. Recent Supreme Court appointments put a prominent face on this trend. Clinton's two Supreme Court appointments were elevations from the appeals courts. Before that, the six preceding appointments to associate justice also went to individuals with judicial experience.

Education. The undergraduate and law school education of the nontraditional and traditional Clinton appointees was similar, although a higher proportion of nontraditional appointees attended public-supported educational institutions than did the traditional appointees, and a larger proportion of traditional than nontraditional appointees had an Ivy League law school education. The undergraduate educational profile of the Clinton appointees is about the same as that for the Bush appointees but differs from the Reagan and Carter appointees.

The law school educational profile shows that almost one in four Clinton

(continued on page 285)



Donetta W. Ambrose



Helen G. Berrigan



Elaine E. Bucklo

Some appointees with

Many of President Clinton's appointees to the lower courts have distinguished professional backgrounds. Some also have political backgrounds. Included here are those with and without political backgrounds. Since this is

Orleans at the time of her appointment to the U.S. District Court for the Eastern District of Louisiana. Among her professional accomplishments was service as president of the American Civil Liberties Union of Louisiana



David H. Coar



Martha C. Daughtrey



William F. Downes

a sampling, no adverse implication should be drawn about the quality of appointees not mentioned. All of the following were rated *well qualified* by the ABA Standing Committee on Federal Judiciary.

Donetta W. Ambrose, a graduate of Duquesne University School of Law, served as an assistant attorney general in the Pennsylvania attorney general's office and as an assistant district attorney before successfully running for a state judicial position in 1982, the position she held when named to the U.S. District Court for the Western District of Pennsylvania.

Helen G. Berrigan, born in New Rochelle, New York, received her law degree from Louisiana State University. She was in private practice in New

from 1989 to 1993.

Elaine E. Bucklo was born in Boston and received her law degree at Northwestern University, where she was articles editor of the law review. After serving for nine years as a U.S. magistrate judge, she was elevated by Clinton to a district court judgeship on the Chicago-based federal district court.

José A. Cabranes, born in Puerto Rico, earned an undergraduate degree at Columbia and law degrees at Yale and Cambridge. He was a founding member and subsequently chairman of the Puerto Rican Legal Defense and Education Fund. In 1979, Jimmy Carter appointed Cabranes to the federal district bench, the post he occupied at the time of his elevation by Clinton to the U.S. Court of Appeals



Jose A. Cabranes

Guido Calabresi

Denny Chin

notable credentials

for the Second Circuit.

Guido Calabresi was born in Italy and received his undergraduate and legal education at Yale. He had a distinguished legal academic career at Yale before becoming dean of the Yale

Law School in 1985, the post he held at the time of his appointment to the U.S. Court of Appeals for the Second Circuit by his former student.

Martha C. Daughtrey graduated



W. Royal Furgeson Jr.



Robert W. Gettleman



Frank M. Hull

from Vanderbilt University School of Law and served as an assistant U.S. attorney for a short period before moving to the district attorney's office, where she served from 1969 to 1972.

Her judicial career began in 1975 on the Tennessee Court of Criminal Appeals on which she served until 1990 when she joined the Tennessee Supreme Court as an associate justice, the post she held when appointed to the U.S. Court of Appeals for the Sixth Circuit.

William F. Downes was born in Boston, received his law school education at the University of Houston, and spent his career in private practice in Casper, Wyoming, where he was a member of a prominent law firm. He helped manage the successful cam-

paigned for governor of his law partner **Michael J. Sullivan**, and he was active in Democratic party politics before his appointment to the federal district court for Wyoming.

W. Royal Furgeson Jr. was born and educated in Texas, graduating from the University of Texas School of Law. His professional career before ascending to the U.S. District Court for the Western District of Texas was spent in El Paso as a member of a major law firm. He was active in Democratic party politics, serving in positions of responsibility for the El Paso County Democratic Party. He was active in the Ann Richards for Governor campaign in 1990. He also served as president of the El Paso Bar Association.

Robert W. Gettleman received his legal education at Northwestern University. At the time of his appointment to the U.S. District Court for the Northern District of Illinois he was a member of an established Chicago law firm. In the 1970s, he was active in the congressional campaigns of Abner J. Mikva. From 1973 to 1978 he was a member of the board of directors of the Illinois chapter of the American Civil Liberties Union.

Robert Harlan Henry was born and educated in Oklahoma, earning his law degree at the University of Oklahoma. He served as professor of law and was dean of the law school at Oklahoma City University School of Law at the time of his appointment to the U.S. Court of Appeals for the Tenth Circuit. From 1987 to 1991 he was attorney general of the state of Oklahoma. Before that he served for 10 years in the state legislature. He was closely associated politically with Senator David Boren.

Frank M. Hull, a graduate of Emory University School of Law, was a litigation partner with an Atlanta law firm before her appointment to the state bench in 1984. Hull, a member of the American Judicature Society Board of Directors, was active in various leadership positions in the American Bar Association and the State Bar of Georgia. She was appointed to the U.S. District Court for the Northern District of Georgia in 1994.

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Gladys Kessler



Diana E. Murphy



Lawrence L. Piersol



James Robertson

Daniel T. K. Hurley, a native of Fitchburg, Massachusetts, graduated from the law school at George Washington University. His legal experience included working in Florida as an assistant county solicitor and as executive assistant state attorney in Palm Beach County. He began his career on the state bench in 1975 and was a state judge at the time of appointment to

sota, where she was an editor of the law review. She was president of the Minneapolis League of Women Voters (1969-1971) and a member of the board of directors of the Civil Liberties Union of Minnesota (1973-1975). She served briefly on the state bench before being appointed by Jimmy Carter in 1979 to the federal district bench, the position she held upon her eleva-

the University of South Dakota, where he was editor-in-chief of the law review. He was active in Democratic party politics, serving for four years in the state house of representatives (from 1972 to 1974 he was majority leader). At the time of appointment to the South Dakota federal district bench he was a member of a noted Sioux Falls law firm.



Charles A. Shaw



Roslyn O. Silver



Martha A. Vazquez



Claudia Ann Wilken

the U.S. District Court for the Southern District of Florida.

Gladys Kessler graduated from Harvard Law School, served as a legislative assistant to Senator Harrison A. Williams (1964-1966) and Congressman Jonathan B. Bingham (1966-1968). She helped form a public interest law firm in 1969 in which she served until appointed in 1977 by Jimmy Carter to the Superior Court for the District of Columbia. She was reappointed by George Bush in 1992 and was serving on that bench when elevated to the U.S. District Court for the District of Columbia in 1994.

Diana E. Murphy was born and educated in Minnesota, earning her law degree from the University of Minne-

sota, where she was an editor of the law review. She was president of the Minneapolis League of Women Voters (1969-1971) and a member of the board of directors of the Civil Liberties Union of Minnesota (1973-1975). She served briefly on the state bench before being appointed by Jimmy Carter in 1979 to the federal district bench, the position she held upon her eleva-

Richard A. Paez, born and raised in Salt Lake City, earned his law degree from the University of California at Berkeley. He was active in the Mexican-American Bar Association of Los Angeles County, serving as a member of the board of trustees. He began his judicial career in 1981 on the Los Angeles Municipal Court, where he served when appointed to the U.S. District Court for the Central District of California.

Lawrence L. Piersol, a native of South Dakota, received his undergraduate and law school education at

James Robertson, a native of Cleveland, earned his law degree from George Washington University. From 1969 to 1972 he was chief counsel for the Lawyers Committee for Civil Rights Under Law in Jackson, Mississippi, and subsequently served as national executive director. In 1973 he joined the prestigious Washington law firm of Wilmer, Cutler & Pickering, where he was a member at the time of his appointment to the U.S. District Court for the District of Columbia. In 1992 he worked on the Clinton-Gore campaign.

Judith W. Rogers was born in New York City and received her undergraduate and law school education at Harvard University. She was an assis-

tant U.S. attorney in the District of Columbia and later worked as a trial attorney in the Criminal Division of the Justice Department. In 1983 Ronald Reagan appointed her to the District of Columbia Court of Appeals, from which she was elevated by Clinton to the U.S. Court of Appeals for the District of Columbia Circuit.

Shira A. Scheindlin, a Cornell Law School graduate, was an assistant U.S. attorney (1977-1981), U.S. magistrate (1982-1986), and a member of a large New York law firm before her appointment to the federal district bench for the Southern District of New York.

Charles A. Shaw, who received his law degree from Catholic University, served as an assistant U.S. attorney from 1980 to 1987, when he was appointed and then subsequently elected to a state court judgeship. He was serving on the state bench in St. Louis when named to the federal district bench for the Eastern District of Missouri.

Roslyn O. Silver, an Arizona native, received her legal education at the University of Arizona. She served as an assistant U.S. attorney from 1980 to 1984 and then returned to the U.S. attorney's office in 1987. At the time of her appointment to the U.S. District Court for the District of Arizona she was serving as chief of the criminal division in the office of the U.S. attorney.

Martha A. Vazquez received her undergraduate and law degrees from Notre Dame. She served in the county prosecutor's office, and from 1981 to her appointment to the federal bench in New Mexico she was a member of a well-regarded Santa Fe law firm.

Claudia Ann Wilken earned her law degree at the University of California at Berkeley. From 1975 to 1978 she was an assistant federal public defender. From 1983 until ascending the federal district bench for the Northern District of California she was a U.S. magistrate judge.

—Sheldon Goldman

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appointees attended an Ivy League law school, a modern record. If we include prestigious non-Ivy League law schools such as Berkeley, Chicago, Duke, Georgetown, Michigan, New York University, Northwestern, Stanford, Texas, Vanderbilt, and Virginia, the proportion of Clinton appointees with a prestige legal education rises to about 43 percent (34 percent of the Bush appointees graduated from such prestigious law schools).

Gender and ethnicity. The Clinton record on diversifying the bench by gender and ethnicity is well known.²² During his first two years in office, Clinton appointed 27 white women, 6 black women, and 1 Hispanic woman, for a total of 34 women, exceeding the 29 women appointed by Bush, the 29 named by Carter, and the 24 women appointed by Reagan during their entire tenures in office. Clinton's proportion of women appointees approached one-third. Thus, both the proportion and absolute numbers of women Clinton appointed to the district court are a historic record.

Clinton appointed 27 African Americans (including six women), 9 Hispanics (including one woman), 1 Asian American (male), and 1 native American (male) to the federal district bench. Clinton named one African American and five Hispanics fewer than Carter. He also named one Asian American fewer than Reagan. However, the proportions of African American and Hispanic appointees are historic records. The proportion of white males appointed was about 39 percent, which meant that for the first time in the nation's history nontraditional appointments constituted a majority of a

president's judicial choices. Yet the total impact of Clinton's nontraditional appointments on the judiciary did not diminish the fact that even after his appointments are taken into consideration, white males still constitute an overwhelming majority of those in active service—about three out of four federal judges. (See "Nontraditional judges in active service," page 290).

ABA ratings. The proportion of nontraditional appointees with the highest rating from the American Bar Association was about 54 percent compared to about 71 percent for the traditional appointees. Although Clinton's traditional appointees proportionally received higher ABA ratings than his nontraditional ones, Clinton's nontraditional appointees still earned the highest ABA ratings in roughly the same or higher a proportion as all judges (traditional and nontraditional combined) appointed by Reagan and Carter. Assuming that the ABA ratings are a measure of quality, the nontraditional appointees were generally high-quality appointments.

The highest ABA ratings for all the Clinton appointees surpass those from the three previous administrations. (See Table 2.) If the district and appeals court appointees are merged, the proportion of Clinton appointees receiving the highest ratings (64 percent) is the highest since the ABA began rating federal judicial appointees.²³

Three Clinton appointees (two traditional and one nontraditional) were rated *not qualified*. Bush and Reagan did not name anyone rated *not qualified*. The Clinton proportion of those rejected by the ABA was the highest since the Kennedy administration.²⁴

22. Goldman and Saronson, *supra* n. 2; Tobias, *Keeping the Covenant on the Federal Courts*, 47 SMU L. REV. 1861 (1994). Also see, e.g., Epstein, *More Minorities, Women Named Federal Judges*, The Plain Dealer, Sept. 25, 1994, at A-1; Cannon, *Clinton reshaping federal bench with female and minority picks*, The Miami Herald, Oct. 13, 1994, at A-12; Labaton, *President's Judicial Appointments: Diverse, but Well in the Mainstream*, N.Y. Times, Oct. 17, 1994, at A-15; Coyle, *Clinton's Judicial Choices Change the Bench's Face*, National Law Journal, Oct. 24, 1994, at A-16. For a discussion of Carter's nontraditional appointees see Slotnick, *The paths to the federal bench: gender, race, and judicial recruitment variation*, 67 JUDICATURE 370 (1984). In general, see Gryski, Zuk, and Barrow, *A Bench That Looks Like America? Representation of African Americans and Latinos on the Federal Courts*, 56 J. POL. 1076 (1994).

23. The proportion for the Eisenhower appoint-

tees (district and appeals judges together) was 61.7 percent, and for Kennedy appointees, 62.2 percent. Chase, *FEDERAL JUDGES: THE APPOINTING PROCESS* 119 (Minneapolis: University of Minnesota Press, 1972). For the Bush appointees, the proportion was 58.9 percent; Reagan, 55.2 percent; Carter, 56.2 percent; Ford, 48.4 percent; Nixon, 50.9 percent; Johnson, 55.3 percent. Note that beginning in 1989 the ABA Standing Committee on Federal Judiciary eliminated its former four-tier rating system—*not qualified*, *qualified*, *well qualified*, and *exceptionally well qualified* and replaced it with a three-tier system—*not qualified*, *qualified*, and *well qualified*. Thus, for purposes of comparison, the two highest ratings are merged for administrations prior to the Bush administration.

24. Chase, *id.* Also see, Goldman, *Bush's judicial legacy: the final imprint*, 76 JUDICATURE 287 (1993).

Table 3 Clinton's nontraditional appointees compared to his traditional appointees to the U.S. courts of appeals (confirmed in 1993 and 1994)

	Nontraditional % (N)	Traditional % (N)
Occupation		
Judiciary	88.9% (8)	44.4% (4)
Large law firm		
100+ members	—	22.2% (2)
50-99	—	—
25-49	11.1% (1)	—
Moderate size firm		
10-24 members	—	—
5-9	—	11.1% (1)
Professor of law	—	22.2% (2)
Experience		
Judicial	100.0% (9)	44.4% (4)
Prosecutorial	55.5% (5)	44.4% (4)
Neither	—	22.2% (2)
Undergraduate education		
Public	33.3% (3)	66.7% (6)
Private	44.4% (4)	—
Ivy League	22.2% (2)	33.3% (3)
Law school education		
Public	44.4% (4)	33.3% (3)
Private	33.3% (3)	33.3% (3)
Ivy League	22.2% (2)	33.3% (3)
Gender		
Male	44.4% (4)	100.0% (9)
Female	55.5% (5)	—
Ethnicity/race		
White	44.4% (4)	100.0% (9)
African American	33.3% (3)	—
Hispanic	22.2% (2)	—
ABA rating		
Well qualified	66.7% (6)	100.0% (9)
Qualified	33.3% (3)	—
Political identification		
Democrat	88.9% (8)	88.9% (8)
Republican	—	11.1% (1)
Independent	11.1% (1)	—
Past party activism	33.3% (3)	66.7% (6)
Net worth		
Under \$200,000	22.2% (2)	—
\$200,000-499,999	11.1% (1)	—
\$500,000-999,999	11.1% (1)	66.7% (6)
\$1+ million	55.5% (5)	33.3% (3)
Average age at nomination	51.0	53.8
Total number of appointees	9	9

However, it should be pointed out that 11.5 percent of the Bush appointees were rated *qualified* with one or more members of the ABA committee voting *not qualified*. But only 3.7 percent of the Clinton appointees received such split ratings.²⁵ Interestingly, all three Clinton appointees rated *not qualified* received that rating by a divided committee. (See "Controversial nomina-

tions," page 288.) In general, white males received the highest ratings.²⁶

Political party. As expected, a large majority of Clinton appointees, both nontraditional and traditional, consisted of Democrats. The proportion of traditional appointees who were Republican, however small, was larger than the proportion of the nontraditional appointees in that category. Of

greater significance, two-thirds of the traditional appointees had records of past party activism, while fewer than half the nontraditional appointees had such records. As Table 2 suggests, the proportion of Clinton appointees with records of past party activism is lower than that of the Bush, Reagan, and Carter appointees. It appears that, particularly for nontraditional appointees, past party activity was relatively unimportant.

Net worth. Three times the proportion of nontraditional than traditional appointees had a net worth under \$200,000, and less than half the proportion were millionaires. As seen in Table 2, the totals for the Clinton appointees show the second largest proportion of millionaires (the Bush appointees had the largest proportion). But also note that the proportion of those with a net worth under \$500,000 was about the same as for the Bush appointees. About two in five nominees are not wealthy.

Age. The average age at time of nomination of the Clinton nontraditional district court appointees was almost four and a half years younger than that of the traditional appointees. Overall, the Clinton appointees had the same average age as the Reagan appointees. The Bush appointees were the youngest, the Carter appointees the oldest.

The proportion of Clinton appointees under 45 was about 23 percent, the smallest proportion of all four administrations. About 7 in 10 of the Clinton appointees under 45 were nontraditional.²⁷ The relatively small proportion of Clinton appointees under 45 suggests that the Clinton administration has not made a deliberate attempt to extend the Clinton legacy by appointing younger judges. In contrast, the figures for appointees under 45 for Bush's last two years and Rea-

25. The proportion of Reagan's district court appointees with a split *qualified/not qualified* rating was 6.9 percent. The proportion of Carter's district court appointees with such split ratings was 9.9 percent.

26. The proportion of black males receiving the highest ABA rating was 52.4 percent, for women the proportion was 52.9 percent, for Hispanic males 50 percent.

27. The average age of Clinton's women district court appointees was 46.5, which was also the same average age of the Hispanic appointees. The average age of African American appointees was 47.6.

gan's second term were 44 and 37 percent, respectively.

Appeals court appointees

As noted previously, the White House counsel's office took the lead in the selection process for appeals court judges. Thus, Clinton's appeals court appointments during his first two years in office reveal even more than does the selection of district court judges about the administration's selection priorities. Eighteen appeals court judges were confirmed to the numbered circuits and the U.S. Court of Appeals for the District of Columbia (three additional nominations were not acted upon); half the appointees were nontraditional. Because of the relatively small number of appointees, comparisons between traditional and nontraditional judges presented in Table 3 and between the total of Clinton's appeals court appointments and the appeals court appointees of Bush, Reagan, and Carter shown in Table 4 must be treated with caution.

Occupation and experience. All but one of the nontraditional appointees were sitting judges at the time of elevation to the appeals bench, but fewer than half the traditional appointees were members of the judiciary at the time of appointment. Two of the nine traditional appointees were law professors. The composite figures for the Clinton appeals court appointees in Table 4 reveal that two-thirds of the appointees were on the judiciary at the time of elevation, the highest proportion of appointees of all four presidents. Similarly, the Clinton appointees had the largest proportion of appointees with both judicial and prosecutorial experience. About 7 in 10 had judicial experience, and half had prosecutorial experience. While about one third of Bush, Reagan, and Carter's appointees had neither judicial nor prosecutorial experience, only about 1 in 10 Clinton appointees lacked both kinds of experience.

Education. Table 4 reveals that half the Clinton appointees attended a public-supported undergraduate institution, the highest proportion of all four administrations. As for law school education, the proportion of Clinton appointees who attended an Ivy League

Table 4 U.S. appeals court appointees compared by administration

	Clinton* % (N)	Bush % (N)	Reagan % (N)	Carter % (N)
Occupation				
Politics/government	—	10.8% (4)	6.4% (5)	5.4% (3)
Judiciary	66.7% (12)	59.5% (22)	55.1% (43)	46.4% (26)
Large law firm				
100+ members	11.1% (2)	8.1% (3)	3.9% (3)	1.8% (1)
50-99	—	8.1% (3)	2.6% (2)	5.4% (3)
25-49	5.6% (1)	—	6.4% (5)	3.6% (2)
Moderate size firm				
10-24 members	—	8.1% (3)	3.9% (3)	14.3% (8)
5-9	5.6% (1)	2.7% (1)	6.4% (5)	1.8% (1)
Small firm				
2-4 members	—	—	1.3% (1)	3.6% (2)
Solo	—	—	—	1.8% (1)
Professor of law	11.1% (2)	2.7% (1)	12.8% (10)	14.3% (8)
Other	—	—	1.3% (1)	1.8% (1)
Experience				
Judicial	72.2% (13)	62.2% (23)	60.3% (47)	53.6% (30)
Prosecutorial	50.0% (9)	29.7% (11)	28.2% (22)	32.1% (18)
Neither	11.1% (2)	32.4% (12)	34.6% (27)	37.5% (21)
Undergraduate education				
Public	50.0% (9)	29.7% (11)	24.4% (19)	30.4% (17)
Private	22.2% (4)	59.5% (22)	51.3% (40)	50.0% (28)
Ivy League	27.8% (5)	10.8% (4)	24.4% (19)	19.6% (11)
Law school education				
Public	38.9% (7)	29.7% (11)	39.7% (31)	39.3% (22)
Private	33.3% (6)	40.5% (15)	37.2% (29)	19.6% (11)
Ivy League	27.8% (5)	29.7% (11)	23.1% (18)	41.1% (23)
Gender				
Male	72.2% (13)	81.1% (30)	94.9% (74)	80.4% (45)
Female	27.8% (5)	18.9% (7)	5.1% (4)	19.6% (11)
Ethnicity/race				
White	72.2% (13)	89.2% (33)	97.4% (76)	78.6% (44)
African American	16.7% (3)	5.4% (2)	1.3% (1)	16.1% (9)
Hispanic	11.1% (2)	5.4% (2)	1.3% (1)	3.6% (2)
Asian	—	—	—	1.8% (1)
Percentage white male	50.0% (9)	70.3% (26)	92.3% (72)	60.7% (34)
A.B.A. rating				
Exceptionally well/well qualified	83.3% (15)	64.9% (24)	59.0% (46)	75.0% (42)
Qualified	16.7% (3)	35.1% (13)	41.0% (32)	25.0% (14)
Party				
Democrat	88.9% (16)	5.4% (2)	—	82.1% (46)
Republican	5.6% (1)	89.2% (33)	97.4% (76)	7.1% (4)
Independent	5.6% (1)	5.4% (2)	1.3% (1)	10.7% (6)
Other	—	—	1.3% (1)	—
Past party activism	50.0% (9)	70.3% (26)	69.2% (54)	73.2% (41)
Net worth				
Less than \$200,000	11.1% (2)	5.4% (2)	15.6%** (12)	33.3%*** (13)
\$200-499,999	5.6% (1)	29.7% (11)	32.5% (25)	38.5% (15)
\$500-999,999	38.9% (7)	21.6% (8)	33.8% (26)	17.9% (7)
\$1+ million	44.4% (8)	43.2% (16)	18.2% (14)	10.3% (4)
Total number of appointees	18	37	78	56
Average age at nomination	52.4	48.7	50.0	51.9

* Appointees confirmed in 1993 and 1994.

** Net worth was unavailable for one appointee.

*** Net worth only for Carter appointees confirmed by the 96th Congress with the exception of five appointees for whom net worth was unavailable.

law school was lower than that of the Carter appointees and marginally higher than that of the Reagan appointees. However, if prestigious non-Ivy

League law schools are included (Chicago, Georgetown, New York University, Texas, Vanderbilt, and Virginia), the proportion of Clinton appointees

Controversial nominations

with a prestigious education rises to about 61 percent. This is higher than the proportions for the Bush and Reagan appointees, both of which were about 45 percent. Of the five Clinton appointees with an Ivy League law school education, two were Yale graduates, and three were from Harvard.

Gender and ethnicity. Clinton's record of nontraditional appointments of appeals court judges, although a historic record in terms of proportions (Carter holds the record for absolute numbers), was not as dramatic as his record for the district courts. Clinton placed only three African Americans (including one woman), two Hispanics, and four white women on the appeals courts. As of this writing, African Americans have never sat as permanent members of the courts of appeals for the First, Fourth, Seventh, and Tenth circuits. Clinton's rate of women appointments to the appeals courts was about the same as that of the last two years of the Bush administration,²⁸ although it should be noted that two of the three appeals court nominees not acted upon by the Senate were women. Clinton's impact thus far on diversifying the appeals courts can be seen in "Nontraditional judges in active service," page 290. It will be of interest to see if Clinton will name African Americans to the southern Fourth Circuit and the midwestern Seventh Circuit, and if in absolute numbers he will exceed Carter's record of nontraditional appointments.

ABA ratings. All of the traditional and two-thirds of the nontraditional appointees received the highest ABA ratings. In total, about four out of five Clinton appeals court appointees received the highest ratings. This exceeded the rate of that of the three previous administrations.²⁹

Political party. About 9 of 10 Clinton appointees to the courts of appeals were Democrats. One Republican and one independent made up the balance. These proportions were the mirror image of the Bush appeals court appointees. Carter named the largest

The Clinton administration tended to avoid controversial judicial nominations. Nevertheless, two appeals court nominees were subjected to harsh evaluation by conservative Republican senators.

Florida Supreme Court Justice **Rosemary Barkett**, nominated by Clinton to a position on the Eleventh Circuit, was criticized for her votes on the Florida Supreme Court to overturn death sentences. Her critics called her soft on crime while her supporters defended her judicial record as balanced and fair. Barkett, unanimously accorded the highest ABA rating, was strongly supported by both Florida senators, Democrat Bob Graham and Republican Connie Mack. Graham, when he was governor of Florida, had first appointed Barkett to the state bench. She was eventually approved by the Senate Judiciary Committee after a delay requested by Senator Orrin G. Hatch. Her nomination was sent to the Senate floor, where after debate on April 14, 1994, she was confirmed by a vote of 61-37.

H. Lee Sarokin, a federal district judge in New Jersey, was nominated by Clinton for elevation to the Third Circuit. He unanimously received the ABA's highest rating. Sarokin, however, had angered the tobacco industry with his rulings, and he met with opposition in the Senate from conservative Republicans who accused him of being a liberal judicial activist. His supporters emphasized his distinguished record. Republicans, as part of their strategy to prevent legislation from coming to a vote in the last days of the 103rd Congress, prolonged the debate over Sarokin. On October 4, 1994, the Senate voted 85-12 to stop debate, and Sarokin was approved by a vote of 63-35.

Three nominees to the district bench were opposed by the ABA. **Alexander Williams**, the elected state's attorney for Prince George's County, Maryland, in office for eight years, was opposed by a divided ABA Standing Committee on Federal Judiciary. Williams, an African American, had previ-

ously been a tenured law professor at Howard University. At Williams' confirmation hearing on June 30, 1994, the chair of the ABA committee, Robert P. Watkins, argued that Williams "lacked the professional competence to be a federal district judge," that his "prose is pedestrian," and that his responses to the questionnaires from the ABA committee and the Senate Judiciary Committee showed a "lack of candor." However, Watkins revealed that a second investigator for the ABA committee had recommended a *qualified* rating and that a minority of the ABA committee so voted. All other bar associations rating Williams found him qualified, including the Maryland State Bar Association, the Maryland chapter of the Federal Bar Association, and the National Bar Association. Williams was strongly backed by the administration and by Democratic senators. Conservative Republicans who emphasized their hard-nosed position on crime and the death penalty were hardly in a position to oppose a prosecutor with a reputation for being tough on crime. Williams was approved by the Senate Judiciary Committee and was confirmed without debate.

The other two nominees who were opposed by the ABA were white males. They, like Williams, also had impressive educational, experiential, and political backgrounds. At the nomination hearing for **David F. Hamilton** on September 21, 1994, Watkins, the now former chair of the ABA committee, testified that a majority had voted Hamilton *not qualified* "because of his limited number of years practicing at the bar" and "his lack of trial experience," thus failing to "meet the minimum professional competence standard" for a federal judgeship. However, at least one member of the ABA Committee had voted Hamilton *qualified* or *well qualified*. Hamilton, 37, a former Fulbright scholar and Yale Law School graduate, who had been counsel to Democratic Indiana Governor Evan Bayh from 1989 to 1991, and who had served as vice president for litigation for the In-

28. Goldman, *supra* n. 24, at 292.

29. Three appointees received a *qualified* rating, with two of the three receiving a minority ABA vote for the *well qualified* rating, and one receiving a minority ABA vote of *not qualified*.



Rosemary Barkett



H. Lee Sarokin



Alexander Williams

proportion of independents and members of the opposition party of all four administrations. Reagan was at the other extreme: he did not name even one Democrat. Mirroring the findings for the Clinton district court appointees, only half of Clinton's appeals court appointees had a record of previous party activism, the lowest proportion for all four administrations.

Net worth. The proportion of Clinton appointees who were millionaires was about the same as that of the Bush appointees. In a marked reversal of the findings for the district bench, more than half the nontraditional appointees were millionaires versus only one-third of the traditional appointees. However, two of the three traditional appointees who were millionaires were not on the bench at the time of appointment. Four of the five nontraditional appointees who were millionaires were on the bench, and all were women. Since net worth includes family income, it is possible that this may account for this finding. Three of the four nontraditional males, judges at the time of elevation to the appeals courts, had a net worth under \$500,000.

Age. Just as with the district judges, the average age of Clinton's nontraditional appeals court appointees was lower than that of the traditional appointees. The average age of all Clinton's appeals court appointees was 52.4, the highest average age since the Nixon appeals court appointees³⁰ and about four years older on average than the Bush appointees. Only about 10 percent of the Clinton appointees had an average age under 45. This compares to close to 25 percent of Bush and Reagan appointees. The Clinton administration is evidently looking at its judicial legacy not in terms of staying power on the bench but almost exclusively on the quality and diversity of its appointees.

What's ahead

At a news conference on March 3, 1995, the president defended his practice of affirmative action and specifically mentioned his record of appointments to the federal bench. He noted:

diana Civil Liberties Union, was confirmed with little difficulty.

David A. Katz was also opposed by a divided ABA committee. At his confirmation hearing on September 28, 1994, the ABA committee member who led the investigation of Katz's credentials, Charles E. English, acknowledged that Katz was "a distinguished member of the Bar of Ohio for over 37 years" but argued that he "has had almost no trial experience in those years." English stressed that while Katz "is a first-rate corporate lawyer...he has shown no evidence of his ability to perform the kind of legal analysis or do the kind of legal writing that would be required of a Federal judge." Katz, a summa cum laude graduate of the Ohio State University College of Law, a recognized leading Ohio attorney, and backed by Senate Judiciary Committee member Howard Metzenbaum, was rapidly confirmed.

It seems that Republicans did not use *not qualified* ABA ratings as a basis for opposition because they did not want to tie their response to judicial nominees to the ABA's ratings. Republican conservatives opposed Barkett and Sarokin despite their unanimous *well qualified* ABA ratings. By supporting Williams, Hamilton, and Katz, all of whom the ABA opposed, Republicans showed they would be consistent and not base their responses on the ABA's ratings. This was also demonstrated with at least two other nominees for whom the administration chose not to put up a fight when conservatives mounted opposition. Judith McConnell, a San Diego Superior Court judge, was opposed by Republican conservatives for a 1987 decision awarding child custody of a teenager to the male partner of his late father rather than to the boy's mother, who

was found to be unfit. McConnell did not have the opportunity to have a Senate hearing to answer the charges against her, and her nomination was doomed by innuendo. McConnell had been rated *qualified* by the ABA.

Another nominee, R. Samuel Paz, also rated *qualified* by the ABA, was opposed by police organizations and Republican conservatives because as a civil liberties lawyer he vigorously represented alleged victims in police brutality suits. Both McConnell and Paz were recommended by California Democratic Senator Barbara Boxer and supported by California Democratic Senator Diane Feinstein, a member of the Senate Judiciary Committee. The 103rd Congress adjourned without any action having been taken on the nominations. In December of 1994 Senator Boxer asked the administration to renominate McConnell and Paz. In January of 1995 the Clinton administration, after being advised of conservative Republican opposition likely to be fatal to the nominations in a Republican-controlled Senate, consulted with Boxer. McConnell also contacted Boxer withdrawing her name from consideration. Boxer agreed with the administration that it would be futile to resubmit Paz, and she subsequently recommended others to fill the two vacancies on the district bench.

Republican senatorial opposition resulted in the administration backing off one nomination before it was made. Peter Edelman was said to be in line for a position on the U.S. Court of Appeals for the District of Columbia Circuit, but his reputation as a Democratic liberal apparently provoked Republican conservatives in the Senate.

—Sheldon Goldman

30. Goldman, *supra* n. 24, at 293.

file judges

Chicago Tribune, Friday, February 21, 1997

Give Clinton his due on judges

Back in 1981, when the Democratic Congress resisted some of the changes in policy and personnel urged by President Reagan, conservatives had a favorite retort: Maybe you've forgotten that we had a presidential election last year and you lost.

Reagan had a mandate to make changes, they argued, and Congress should not stand in the way. But now that it's Bill Clinton who has the mandate and the GOP that controls Congress, Republicans see things a bit differently.

On the matter of judicial vacancies, that means a great deal of conflict lies ahead. Most of the judges now on the federal bench were appointed by Republicans, but before he leaves office Clinton may get to appoint more than any president before—as many as 400, which is nearly half of all the slots.

Aghast at the prospect that Clinton will actually get to fill all these vacancies with candidates reflecting his own philosophy—who does he think he is, Ronald Reagan?—Republicans are mobilizing for obstruction.

This may take three forms. One idea being considered by GOP senators is to demand control over a share of appointments, perhaps as many as half.

Another is delay. Last year, for the first time in this century, the Senate didn't confirm any judges for the appeals courts, and it approved only 17 district

judges. Some Clinton nominees have been on hold for years. Nearly two dozen vacancies regarded as "emergencies" by the Administrative Office of the U.S. Courts have yet to be filled. But Republican leaders indicate they have no intention of speeding things up.

A third, the project of Iowa Sen. Charles Grassley, is to simply refuse to fill some judgeships he regards as unneeded. Grassley thinks the judicial branch, like the rest of the federal government, could use some budget-cutting and downsizing, so he wants the Senate to leave them vacant.

On all three counts, the Republicans are in the wrong. Presidents pick judges, not the Senate, and Reagan would never have given the Senate the right to make judicial selections. The courts are already overburdened—the civil backlog has grown by more than a quarter since 1990—and deliberate foot-dragging by the Senate further frustrates the administration of justice. If some judgeships are unneeded, Sen. Grassley should introduce legislation to abolish them.

In their uncooperative behavior, he and his colleagues are doing the country a disservice and inviting public censure. Someday, Republicans will elect another president, who will have the prerogative of choosing judges more to their liking. Until then, GOP senators should concede Clinton his rightful role.

Editorial
