

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. fax	[re: judicial appointments] (57 pages)	ca. 1992	Personal Misfile

COLLECTION:

Clinton Presidential Records
First Lady's Office
Melanne Verveer
OA/Box Number: 20039

FOLDER TITLE:

Judges II [2]

2013-0534-S

ry1588

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- 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]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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]

Withdrawal/Redaction Marker

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THE WHITE HOUSE
WASHINGTON

DATE: 7/10/95

TO: *Melanne Verveer*

FROM: White House Counsel - *Victoria Radd*
Room 125, OEOB, x6-7901

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

free judges

President Clinton's Judicial Nominees

	<u>Court</u>	<u>Nominee</u>	<u>Nom. Date</u>	<u>Conf. Date</u>	<u>Race</u>	<u>Sex</u>	<u>ABA</u>
1.	Supr. Ct.	Ruth B. Ginsburg	06/14/93	08/03/93	W	F	WQ
2.	2nd CCA	Pierre Leval	08/06/93	10/18/93	W	M	WQ
3.	E.D. NY	David Trager	08/06/93	11/20/93	W	M	WQ
4.	4th CCA	M. Blane Michael	08/06/93	09/30/93	W	M	WQ
5.	D. MD	Deborah Chasanow	08/06/93	10/18/93	W	F	WQ
6.	D. MD	Peter Messitte	08/06/93	10/18/93	W	M	WQ
7.	D. MD	Alex Williams	08/06/93	08/17/94	B	M	NQ/Q
8.	E.D. VA	Leonie Brinkema	08/06/93	10/18/93	W	F	WQ
9.	6th CCA	Martha Daughtrey	08/06/93	11/20/93	W	F	WQ
10.	E.D. KY	Jennifer Coffman	08/06/93	09/30/93	W	F	WQ
11.	E.D. AR	William Wilson	08/06/93	09/30/93	W	M	WQ
12.	D. NE	Thomas Shanahan	08/06/93	10/20/93	W	M	Q/WQ
13.	D. SD	Larry Piersol	08/06/93	11/20/93	W	M	WQ
14.	D. NM	Martha Vazquez	08/06/93	09/30/93	H	F	WQ
15.	E.D. NY	Joanna Seybert	09/24/93	11/20/93	W	F	Q
16.	E.D. VA	Raymond Jackson	09/24/93	11/20/93	B	M	WQ/Q
17.	11thCCA	Rosemary Barkett	09/24/93	04/15/94	H	F	WQ
18.	N.D. CA	Claudia Wilken	10/07/93	11/20/93	W	F	WQ
19.	D. NV	David Hagen	10/07/93	11/20/93	W	M	WQ/Q
20.	W.D. PA	Donetta Ambrose	10/25/93	11/20/93	W	F	WQ
21.	W.D. PA	Gary Lancaster	10/25/93	11/20/93	B	M	Q/WQ
22.	E.D. MO	Charles Shaw	10/25/93	11/20/93	B	M	WQ/Q
23.	S.D. FL	Wilkie Ferguson	10/25/93	11/20/93	B	M	WQ
24.	D. MA	Nancy Gertner	10/27/93	02/10/94	W	F	WQ
25.	D. MA	Reginald Lindsay	10/27/93	11/20/93	B	M	WQ/Q
26.	D. MA	Patti Saris	10/27/93	11/20/93	W	F	Q/WQ
27.	D. MA	Richard Stearns	10/27/93	11/20/93	W	M	WQ
28.	S.D. NY	Allen Schwartz	10/27/93	11/20/93	W	M	WQ
29.	W.D. AR	Harry Barnes	10/27/93	11/20/93	W	M	WQ/Q
30.	M.D. FL	Henry Lee Adams	10/29/93	11/20/93	B	M	Q
31.	M.D. FL	Susan Bucklew	10/29/93	11/20/93	W	F	Q
	S.D. FL	Theodore Klein	10/29/93	Returned	W	M	WQ/Q
32.	S.D. FL	Daniel Hurley	11/10/93	03/11/94	W	M	WQ
33.	D.C. CCA	Judith Rogers	11/17/93	03/11/94	B	F	WQ
34.	M.D. PA	Thomas Vanaskie	11/17/93	02/10/94	W	M	WQ/Q
35.	E.D. LA	Helen Berrigan	11/18/93	03/11/94	W	F	WQ
36.	W.D. LA	Tucker Melancon	11/18/93	02/10/94	W	M	Q
37.	D. MA	Michael Ponsor	11/19/93	02/10/94	W	M	WQ
38.	E.D. PA	Marjorie Rendell	11/19/93	02/10/94	W	F	Q/WQ
39.	E.D. TX	John Hannah	11/19/93	03/11/94	W	M	Q/WQ
40.	S.D. TX	Janis Graham Jack	11/19/93	03/11/94	W	F	Q
41.	W.D. TX	Fred Biery	11/19/93	03/11/94	W	M	WQ
42.	W.D. TX	W. Royal Furgeson	11/19/93	03/11/94	W	M	WQ
43.	W.D. TX	Orlando Garcia	11/19/93	03/11/94	H	M	Q
44.	N.D. OH	Lesley B. Wells	11/19/93	02/10/94	W	F	Q
45.	D. MN	Michael Davis	11/19/93	03/28/94	B	M	WQ
46.	D. OR	Ancer Haggerty	11/19/93	03/28/94	B	M	Q/WQ
47.	W.D. WA	Franklin Burgess	11/19/93	03/28/94	B	M	Q/NQ
48.	4thCCA	Diana Motz	01/27/94	06/15/94	W	F	WQ

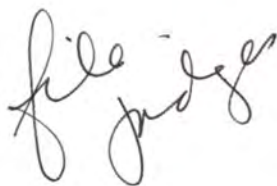
49.	D. SC	Cameron Currie	01/27/94	03/11/94	W	F	WQ
50.	5thCCA	Fortunato Benavides	01/27/94	05/06/94	H	M	Q
51.	5thCCA	Robert Parker	01/27/94	06/15/94	W	M	WQ
52.	5thCCA	Carl Stewart	01/27/94	05/06/94	B	M	Q
53.	D. RI	Mary Lisi	01/27/94	05/06/94	W	F	Q/WQ
54.	S.D.NY	Deborah Batts	01/27/94	05/06/94	B	F	Q
55.	N.D.OH	James Carr	01/27/94	05/06/94	W	M	WQ
56.	N.D.IL	Ruben Castillo	01/27/94	05/06/94	H	M	WQ
57.	C.D.CA	Audrey Collins	01/27/94	05/06/94	B	F	Q/NQ
58.	2ndCCA	Guido Calabresi	02/09/94	07/18/94	W	M	Q/WQ
59.	M.D.GA	W. Louis Sands	02/09/94	05/06/94	B	M	WQ
60.	N.D.GA	Frank Hull	02/09/94	05/06/94	W	F	WQ
61.	10thCCA	Robert Henry	02/09/94	05/06/94	W	M	WQ
62.	E.D.MI	Denise Hood	03/09/94	06/15/94	B	F	Q/WQ
63.	N.D.OH	Solomon Oliver	03/09/94	05/06/94	B	M	Q
64.	C.D.CA	Richard Paez	03/09/94	06/15/94	H	M	WQ/Q
65.	N.D.OK	Terry Kern	03/09/94	06/08/94	W	M	Q/WQ
66.	N/E/W.D.OK	B. Michael Burrage	03/09/94	06/08/94	NAm	M	WQ
67.	N.D.GA	Clarence Cooper	03/09/94	05/06/94	B	M	Q
68.	3rd CCA	Theodore A. McKee	03/22/94	06/08/94	B	M	Q
69.	D.DC	Paul L. Friedman	03/22/94	06/15/94	W	M	WQ
70.	D.DC	Gladys Kessler	03/22/94	06/15/94	W	F	WQ
71.	D.DC	Emmet Sullivan	03/22/94	06/15/94	B	M	WQ
72.	D.DC	Ricardo M. Urbina	03/22/94	06/15/94	H	M	WQ
73.	D.VI	Raymond L. Finch	03/22/94	05/06/94	B	M	Q
74.	S.D.TX	Vanessa D. Gillmore	03/22/94	06/08/94	B	F	Q
	C.D.CA	R. Samuel Paz	03/25/94	Returned	H	M	Q/WQ
75.	E.D.MI	Paul D. Borman	03/25/94	08/09/94	W	M	Q/WQ
76.	S.D.NY	Denny Chin	03/25/94	08/09/94	A	M	WQ/Q
77.	S.D.NY	Harold Baer	04/26/94	08/09/94	W	M	WQ
78.	S.D.NY	Denise Cote	04/26/94	08/09/94	W	F	Q/WQ
79.	S.D.NY	John G. Koeltl	4/26/94	08/09/94	W	M	WQ
80.	E.D.MI	John Corbett O'Meara	4/26/94	09/14/94	W	M	WQ/Q
81.	S.D.NY	Barrington D. Parker	4/26/94	09/14/94	B	M	WQ
82.	N.D.NY	Rosemary S. Pooler	4/26/94	08/09/94	W	F	Q/WQ
83.	C.D.CA	Robert J. Timlin	4/26/94	09/14/94	W	M	WQ
84.	3rd CCA	H. Lee Sarokin	05/05/94	10/04/94	W	M	WQ
85.	D.WY	William F. Downes	05/05/94	06/15/94	W	M	WQ
86.	S.D.NY	Lewis Kaplan	05/05/94	08/09/94	W	M	WQ
87.	N.D.IL	Blanche Manning	05/05/94	08/09/94	B	W	Q
88.	Sup. Ct.	Stephen G. Breyer	05/16/94	07/29/94	W	M	
89.	2nd CCA	Jose A. Cabranes	05/24/94	08/09/94	H	M	WQ
	5th CCA	James L. Dennis	06/08/94	Returned	W	M	Q
90.	S.D.CA	Napoleon A. Jones, Jr.	06/08/94	09/14/94	B	M	Q
91.	S.D.IN	David F. Hamilton	06/08/94	10/08/94	W	M	NQ
92.	E.D.LA	Sarah S. Vance	06/08/94	09/28/94	W	F	WQ
93.	D.C. CCA	David S. Tatel	06/20/94	10/08/94	W	M	WQ
94.	N.D.IA	Mark W. Bennett	06/21/94	08/09/94	W	M	WQ
95.	D.P.R	Salvador E. Casellas	06/21/94	09/28/94	H	M	Q
96.	D.P.R.	Daniel R. Dominguez	06/21/94	09/28/94	H	M	Q
97.	Fed. CCA	William C. Bryson	06/22/94	09/28/94	W	M	WQ
98.	9th CCA	Michael D. Hawkins	07/13/94	09/14/94	W	M	WQ
99.	S.D.GA	William T. Moore, Jr.	07/13/94	10/08/94	W	M	Q/WQ

100.	E.D.LA	Stanwood R. Duval, Jr.	7/15/94	09/28/94	W	M	Q
101.	E.D.MO	Catherine D. Perry	7/15/94	10/08/94	W	F	WQ
102.	E.D.NY	Frederic Block	7/22/94	09/28/94	W	M	WQ
103.	E.D.NY	John Gleeson	7/22/94	09/28/94	W	M	WQ
104.	E.D.NY	Allyne R. Ross	7/22/94	09/28/94	W	F	WQ
105.	8th CCA	Diana E. Murphy	7/28/94	10/08/94	W	F	WQ
106.	D.CT	Dominic J. Squatrito	7/28/94	10/08/94	W	M	WQ/Q
107.	S.D.NY	Shira A. Scheindlin	7/28/94	09/28/94	W	F	WQ
108.	D.CT	Robert N. Chatigny	8/05/94	09/28/94	W	M	WQ
	S.D.CA	Judith D. McConnell	8/05/94	Returned	W	F	Q/NQ
109.	N.D.OH	David A. Katz	8/12/94	10/08/94	W	M	NQ
110.	W.D.PA	Robert J. Cindrich	8/12/94	10/08/94	W	M	WQ
111.	W.D.PA	Sean J. McLaughlin	8/12/94	10/08/94	W	M	Q
112.	N.D.IL	Elaine P. Bucklo	8/16/94	10/08/94	W	F	WQ
113.	N.D.IL	David H. Coar	8/16/94	10/08/94	B	M	WQ
114.	N.D.IL	Robert W. Gettleman	8/16/94	10/08/94	W	M	WQ
115.	S.D.IL	Paul E. Riley	8/16/94	10/08/94	W	M	WQ
116.	2nd CCA	Fred I. Parker	8/25/94	10/08/94	W	M	WQ
117.	D.HI.	Helen Gillmor	8/25/94	10/08/94	W	F	Q
	D.ID.	John R. Tait	8/25/94	Returned	W	M	Q
118.	E.D.LA.	Okla Jones, II	8/25/94	10/08/94	B	M	Q
119.	E.D.LA.	G. Thomas Porteous	8/25/94	10/08/94	W	M	Q
120.	M.D.NC.	James A. Beaty	8/25/94	10/08/94	B	M	WQ
121.	W.D.TX.	David Briones	8/25/94	10/08/94	H	M	Q
122.	D.AZ.	Roslyn Moore-Silver	9/14/94	10/08/94	W	F	WQ
123.	D.CT.	Alvin W. Thompson	9/14/94	10/08/94	B	M	Q
124.	D.DC.	James Robertson	9/14/94	10/08/94	W	M	WQ
125.	W.D.KY.	Thomas B. Russell	9/14/94	10/08/94	W	M	WQ
126.	D.NJ.	William H. Walls	9/14/94	10/08/94	B	M	Q
127.	N.D.OH	Kathleen M. O'Malley	9/20/94	10/08/94	W	F	WQ
128.	N.D.OK	Sven E. Holmes	9/22/94	10/08/94	W	M	Q
129.	W.D.OK	Vicki Miles-LaGrange	9/22/94	10/08/94	B	F	Q
	M.D.PA	Patrick J. Toole, Jr.	9/23/94	Returned	W	M	Q/NQ
130.	1st CCA	Sandra L. Lynch	1/11/95	03/28/95	W	F	WQ
131.	E.D.TX	David Folsom	1/11/95	03/28/95	W	M	WQ/Q
132.	E.D.TX	Thad Heartfield	1/11/95	03/28/95	W	M	WQ/Q
133.	N.D.AL	James D. Snodgrass	1/11/95		W	Q	
134.	S.D.NY.	Sidney H. Stein	1/11/95	03/28/95	W	M	WQ
135.	W.D.NC	Lacy H. Thornburg	1/11/95	03/28/95	W	M	WQ/Q
136.	D.CT.	Janet Bond Arterton	1/23/95	03/28/95	W	F	WQ/Q
137.	N.D.GA.	Willis B. Hunt, Jr.	1/23/95	03/28/95	W	M	WQ
138.	N.D.CA.	Susan Y. Illston	1/23/95	05/25/95	W	F	WQ
139.	D.SD.	Charles B. Kornmann	1/23/95	03/28/95	W	M	Q/WQ
140.	6th CCA	Karen Nelson Moore	1/24/95	03/28/95	W	F	Q/WQ
141.	N.D.CA.	Maxine M. Chesney	1/24/95	05/08/95	W	F	WQ
142.	5th CCA	James L. Dennis	1/31/95		W	M	Q
143.	E.D.LA	Eldon E. Fallon	2/03/95	05/08/95	W	M	WQ
144.	E.D.TN	Curtis L. Collier	2/13/95	05/08/95	B	M	WQ
145.	N.D.OH	Peter C. Economus	2/28/95	06/30/95	W	M	WQ
146.	S.D.WV	Joseph R. Goodwin	2/28/95	05/08/95	W	M	WQ
147.	10th CCA	Mary Beck Briscoe	3/14/95	05/25/95	W	F	WQ
148.	10th CCA	Carlos F. Lucero	3/23/95	06/30/95	H	M	WQ
149.	S.D.IL	Wenona Y. Whitfield	3/23/95		B	F	

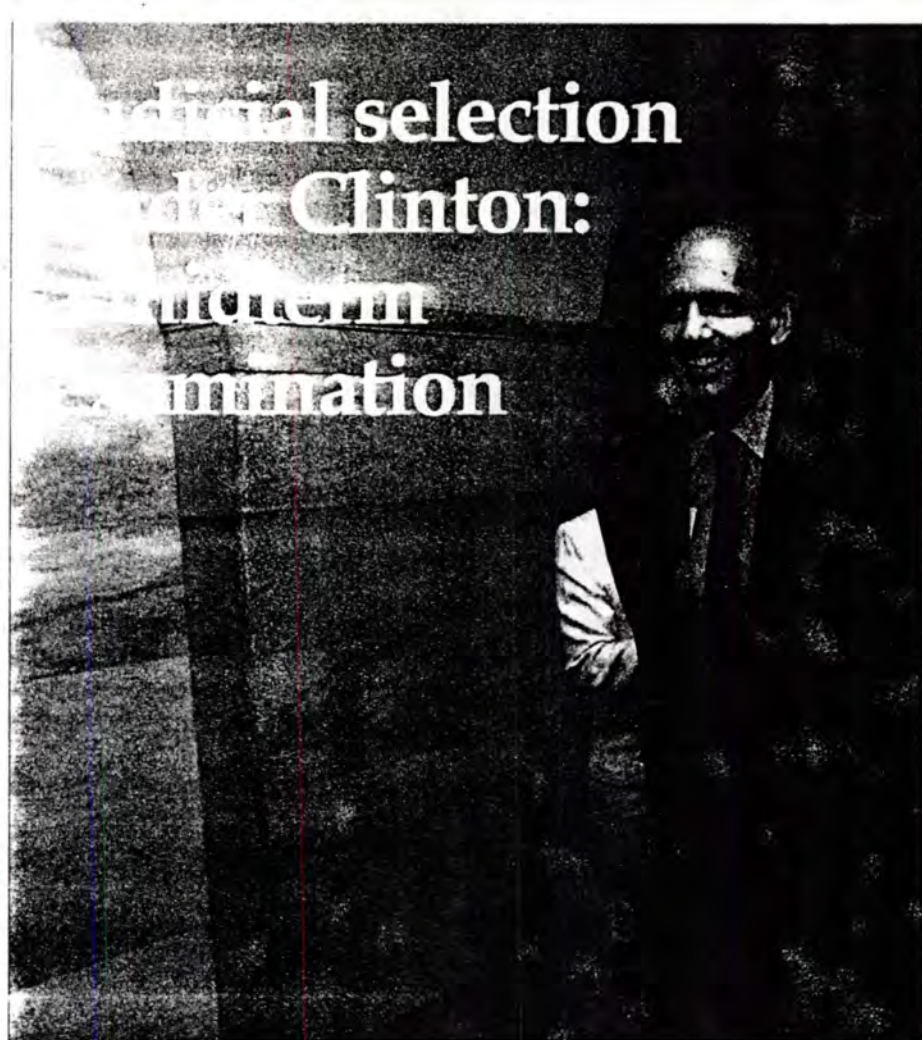
150.	7th CCA	Diane P. Wood	3/31/95	06/30/95	W	F	WQ
151.	D.CO	Wiley Y. Daniel	3/31/95	06/30/95	B	M	Q/WQ
152.	S.D.TX	Nancy F. Atlas	4/04/95	06/30/95	W	F	
153.	D.VT	John G. Murtha	4/04/95	05/25/95	W	M	WQ
154.	D.MA	George A. O'Toole, Jr.	4/04/95	05/25/95	W	M	WQ
155.	W.D.MO	Leland M. Shurin	4/04/95		W	M	
156.	9thCCA	A. Wallace Tashima	4/06/95		A	M	WQ
157.	7thCCA	Terence T. Evans	4/25/95		W	M	WQ
158.	9thCCA	William A. Fletcher	4/25/95		W	M	WQ
159.	C.D.CA	George H. King	4/27/95	06/30/95	A	M	WQ
160.	N.D.OH	Donald C. Nugent	4/27/95	06/30/95	W	M	WQ
161.	D.MD	Catherine C. Blake	5/04/95		W	F	WQ
162.	D.MD	Andre M. Davis	5/04/95		B	M	WQ
163.	W.D.KY	Joseph H. McKinley, Jr.	5/24/95		W	M	Q
164.	E.D.WA	Robert H. Whaley	5/24/95	06/30/95	W	M	WQ
165.	D.ID	B. Lynn Winmill	5/24/95		W	M	WQ
166.	D.UT	Tena Campbell	6/22/95	06/30/95	W	F	WQ
167.	CIT	Evan J. Wallach	6/27/95		W	M	Q/NQ
168.	M.D.TN	Todd J. Campbell	6/27/95		W	M	Q/WQ
169.	E.D.AR	James M. Moody	6/27/95		W	M	WQ
170.	6thCCA	R. Guy Cole, Jr.	6/29/95		B	M	WQ
171.	CIT	Donald C. Pogue	6/30/95		W	M	WQ/Q
172.	S.D.CA	Barry Ted Moskowitz	6/30/95		W	M	WQ
173.	D.NJ	Stephen M. Orlofsky	6/30/95		W	M	WQ
174.	D.VT	William K. Sessions, III	6/30/95		W	M	WQ
175.	W.D.MO	Ortrie D. Smith	6/30/95		W	M	Q
176.	D.MN	John R. Tunheim	7/10/95		W	M	WQ

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 Commit-

tee, 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

SHELDON GOLDMAN is a professor of political science at the University of Massachusetts at Amherst.

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-

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.

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

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

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.

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-

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

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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

vard. From 1979 to 1982, he was a trustee in bankruptcy, and from 1986 until appointed to the U.S. District Court for the Northern District of Illinois, he was a U.S. bankruptcy judge.

Denny Chin was born in Hong Kong and received his undergraduate education at Princeton and his legal education at Fordham University School of Law, where he was a member of the law review. He served as an assistant U.S. attorney for nearly 3 1/2 years before joining a well-regarded law firm. He was president of the Asian American Bar Association of New York from 1992 to 1994. He was appointed to the federal district bench for the Southern District of New York.

David H. Coar, a native of Birmingham, Alabama, earned law degrees at Loyola University Chicago and Har-

vard. From 1979 to 1982, he was a trustee in bankruptcy, and from 1986 until appointed to the U.S. District Court for the Northern District of Illinois, he was a U.S. bankruptcy judge.

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-

paign 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; Covle, *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*, 36 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. 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

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

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:

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

file judges

Let's Play 'Whose Judges Are Tougher on Crime?'

A 13-year-old boy is murdered by four young men because he catches them stealing a bike worth \$5. The four men stomp the boy to death and stifle his screams by shoving stones down his throat. All four are convicted of second-degree murder, and their convictions are affirmed by a state appellate court.

Then a federal judge decides that the trial transcript suggests that one of the defendants' constitutional rights had been violated. The judge reverses the conviction and criticizes the police for what he says are "troubling" inconsistencies between detectives' written reports and their trial

Rule of Law

By Jack Quinn

testimony. Annoyed at the prosecution's decision to file an appeal, the judge then orders the defendant freed on \$3,000 bail. Despite evidence that convinced a jury, the judge calls the prosecution's appeal "preposterous." A unanimous appeals court affirms the judge's decision.

Is this another Clinton appointee who, according to this newspaper's editorial page, is the sort of judge willing to "put a murderer back out on the streets" because of technical trial errors? No, in fact, the judge was appointed to the bench by President Reagan. And the three appeals court judges who affirmed his decision? You guessed it; they were all Reagan judges—the ones who, in this newspaper's view, are supposed to be "willing to overlook a technical violation in order to protect the rights of the community."

Or take another instance plucked at most at random from recent federal cases: One of the participants in the notorious "911 murders" in Detroit, in which a husband and wife were shot 22 times by burglars, asked a federal judge to let him go

16 years after the crime, on the basis of comments the sentencing judge made more than a decade after the trial. The federal judge orders the man freed unless the state is willing to resentence him. Why? Because the after-the-fact comments by the African-American judge might have revealed bias against the African-American defendant in a case in which the victims, the prosecutor and the defense counsel were also African-Americans.

The president who appointed this judge? George Bush.

The point, of course, is not whether these Reagan or Bush judges had it right or wrong. Unlike me or the editor of this newspaper, they had reviewed the records of the cases and reached conclusions based on their view of the facts. The point is that it is unfair to evaluate any judge on the basis of any single case. Federal judges hear hundreds of motions each year and decide not to suppress evidence and to reject constitutional arguments in the overwhelming majority of cases. But there is no doubt that once judges are on the bench, any president—Democrat or Republican—will find individual cases decided by each of his appointees with which he strongly disagrees.

Which brings us to the recent decision by Judge Harold Baer of New York to suppress evidence in a drug case. Like so many Americans, President Clinton believes Judge Baer's decision was wrong—not only in the result he reached but also in his unjustified attack on the police. Immediately after the decision, the president instructed me to ascertain that his Justice Department was prepared to challenge the judge's decision vigorously. Hence, the president's chief law enforcement appointee in New York, U.S. Attorney Mary Jo White, whose office brought the prosecution in the first place, immediately filed a 55-page motion for reconsideration that described as "unwarranted" and "misguided" Judge Baer's conclusion that

there was nothing unusual about young men running from police on a deserted street in the middle of the night.

The Clinton-appointed prosecutor also warned the judge that adoption of this approach would cripple "law enforcement in Washington Heights and other similar communities, because it would prevent the police from pursuing those who flee in those neighborhoods, and make it that much more difficult for the police to stop the people who threaten

Once judges are on the bench, any president—Democrat or Republican—will find individual cases decided by each of his appointees with which he strongly disagrees.

the safety and well-being of all law-abiding people in the community." Recently the president's prosecutor convinced the judge to rehear the case before rendering a final judgment.

It is simply ridiculous for critics to assert that Judge Baer's decision reflects a new approach to criminal justice by President Clinton or his judges. The old shibboleth that Democratic judges are more interested in setting criminals free than punishing them and that Republican judges have the opposite predilection is untrue today, as it always has been. For every decision like Judge Baer's, I could point to another Reagan or Bush judge's decision like the ones I have described.

Furthermore, when you look at the whole record of President Clinton's judicial appointments—rather than one case plucked from thousands—you quickly see that the president's picks will serve the

American people well. Fully 64% of the president's judicial appointments have been rated "well qualified" by the American Bar Association, a higher percentage than any of his three predecessors, while the president has diversified the federal bench to an unprecedented degree.

In an election year, it's not surprising that the old myths are hauled out. That's especially predictable at a time when polls show that more Americans trust President Clinton on the crime issue than they do congressional Republicans. The president won passage of a comprehensive crime bill that is helping to put 100,000 new cops on the beat, expanded the death penalty and put three-time violent felons in prison for life without parole. Congressional Republicans voted against putting more police on the beat, against almost 60 new death penalty crimes, against "three strikes and you're out." Now these same Republicans are resorting to the phony issue of whose judges are tougher on crime.

Still, it is in the country's best interest to keep politics out of the selection of federal judges as much as possible. In 1992, the Senate Judiciary Committee, chaired by Joe Biden (D., Del.), confirmed 66 Bush judges, including 10 Court of Appeals judges—fully one-third of all of President Bush's judicial appointments. For the last year the current Senate Judiciary Committee chairman, Orrin Hatch (R., Utah), has acted fairly in evaluating President Clinton's judicial nominees.

Let's not let election year politics bring the old poisonous rhetoric back into the judicial selection process, and let's not play politics with appointments to the federal bench. But that is probably too much to hope for. So the president will just have to go on fighting crime, while the Republicans use judges to fight campaigns.

Mr. Quinn is counsel to President Clinton.

DRAFT USA TODAY OP-ED

Jack Quinn
Counsel to the President

In recent weeks the country has been awash in entirely predictable election-year attacks on the federal judiciary. With one eye on the polls, Republicans are attempting to stick a "soft on crime" label on President Clinton's judicial appointees. Senator Orrin Hatch (R-Utah), Chairman of the Senate Judiciary Committee, has delivered three major speeches on the Senate floor, and the conservative amen choir of columnists and editorialists has obligingly chimed in.

There's only one problem: the "soft on crime" shoe the right wing is peddling doesn't fit President Clinton or his judicial appointees. There just isn't any evidence to support the charges.

What about all those cases we have been hearing about for weeks? Well, when you read through all three of Senator Hatch's speeches, and a recent "study" prepared by a conservative think tank, and all of the syndicated columns I could find on the subject in the *Washington Post*, the *Washington Times*, the *Chicago Tribune*, the *Los Angeles Times* and *USA Today* in the last three months, you find actual discussion of about a dozen criminal cases -- out of thousands that have been decided by the 185 lower court judges the President has appointed since he took office in January 1993.

That's right, a mere dozen out of thousands. That's all the President's right-wing critics have come up with after months of looking. A dozen cases endlessly repeated, rearranged and regurgitated. And if they come up with another dozen, they will be just as meaningless. Just as important, I'll be able to find just as many cases in which Reagan-Bush judges ruled in favor of criminal defendants.

Obviously sensing the weakness of their case, right-wing critics are now making the leap from critique-by-anecdote to the world of pseudo-statistics. The right-wing think tank study discloses ominously that in the five criminal law cases heard by the entire Fourth Circuit Court of Appeals (rather than by panels of three judges, as is customary), Clinton appointees "sided with" the criminals 86% of the time, and non-Clinton judges voted for the defendant only 40% of the time. Where to begin the debunking? How about with the fact that five cases constitute a meaningless sample of the thousands already decided by Clinton judges. Or the fact that only two of Clinton's 185 lower-court appointments are members of the 15-member Fourth Circuit, which makes the whole thing ludicrously unrepresentative. Or that one or both of the Clinton appointees were in the majority in three of the five cases, joined in each case by a healthy collection of Reagan-Bush judges.

The right's other favorite pseudo-statistic of the moment is that Judge Rosemary Barkett of the Eleventh Circuit Court of Appeals has written seven criminal law opinions and "sided with criminal defendants in all seven." Well, three judges, not just Judge Barkett, voted on each of the cases. And all but one were unanimous decisions, with one or more Reagan-Bush appointees voting with Judge Barkett in all but one of those cases.

Professor Robert Carp of the University of Houston has studied all decisions by Clinton appointees in criminal cases -- as opposed to scanning them for a handful that will attract misleading headlines. In fact, Professor Carp has studied all criminal law decisions of all judges appointed by Presidents Nixon, Ford, Carter, Reagan, Bush and Clinton. His conclusion? "There is no empirical evidence," Professor Carp told CNN, "that [Clinton judges] are inordinately disposed toward criminal defendants." In a paper delivered last month, Carp stated his overall view that President Clinton's judicial appointees "exhibit moderate decisional tendencies."

Professor Carp has a lot of company in his assessment. In fact, every nonpartisan observer has concluded that President Clinton's appointees to the bench are moderate, mainstream, highly qualified judges. That's why President Clinton is attacked by liberal groups for not appointing their soulmates to the bench. It's also why over two-thirds of the President's judicial appointments have been given the ABA's highest rating, a much higher percentage than any of his three predecessors' appointees received. In contrast to his Republican predecessors, the President has removed ideology from the process and focused on excellence. He has also appointed women and minorities to the bench in unprecedented numbers, proving that quality need not be sacrificed to achieve diversity. Nearly 40% of the President's judicial appointees are former prosecutors.

So why all this noise about judges? It's simple. Republicans are trying to distract voters from their terrible record on real crime issues. These are the same Republicans, after all, who voted against funds for 100,000 new cops, against the Brady handgun bill, and against the ban on cop-killer bullets. The same Republicans have now voted twice to return assault weapons to our streets and to remove crucial provisions from the President's tough anti-terrorism bill, all because they don't want to offend the NRA.

Senator Hatch has said repeatedly, "Federal judges are every bit as much a part of the federal anti-crime effort as FBI and DEA agents." I wish someone would ask the cops on the beat whether the country is better served by a Republican Congress that takes cheap shots at judges, or a President who works to put 100,000 cops on patrol in our neighborhoods and to make our streets safer by getting rid of vicious assault weapons and cop-killer bullets. I'm confident that the cops -- and the American people -- know the answer.

file judges

THE WHITE HOUSE
WASHINGTON

January 16, 1998

MEMORANDUM FOR DISTRIBUTION

FROM: ANN LEWIS AND STACIE SPECTOR

SUBJECT: REVISED JUDGES PACKAGE

As a follow-up to the materials circulated last week by John Podesta, here is a final, revised package of materials regarding pending judicial nominations. Please take time to review this information and pass it along to appropriate individuals so we can continue our work getting the Senate to confirm these qualified nominees.

Thank you.

JUSTICE DELAYED = JUSTICE DENIED

President Clinton Takes Action on Judicial Vacancies -- Republicans Play Politics

"Judicial vacancies can contribute to a backlog of cases, undue delays in civil cases, and stopgap measures to shift judicial personnel where they are most needed. Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the Federal judiciary....The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down."

-- Chief Justice William Rehnquist
1997 Year-end Report on the Federal Judiciary, 1/1/98

There are currently 87 vacancies in the Federal judicial system. According to Chief Justice William Rehnquist, the current level of vacancies threatens to jeopardize the quality of justice in America. President Clinton responded by nominating 79 judges in 1997. However, Republicans have politicized the judiciary by refusing to act on the President's nominees -- confirming less than half of the President's nominees in 1997. The consequences of these vacancies are felt by the thousands of Americans -- like families seeking life insurance proceeds or a senior citizen trying to collect Social Security benefits -- for whom justice delayed can often mean justice denied. Senate Republicans ought to heed the Chief Justice's call to safeguard the quality of justice in America.

Rehnquist Said 87 Vacancies Threaten To "Erode The Quality Of Justice"

As of January 6, 1998, there were 87 vacancies in the federal judicial system -- 29 of these vacancies are considered emergencies by the Administrative Office of the Courts because they have been empty for over 18 months. According to the *New York Times*, Chief Justice William Rehnquist (who was first appointed by President Nixon and later elevated to Chief Justice by Ronald Reagan) "criticized the Senate for failing to move more quickly on judicial appointments, saying that the 'vacancies cannot remain at such high levels indefinitely without eroding the quality of justice.'" Rehnquist's remarks were made in his annual year-end report of the state of the judiciary. [*New York Times*, 1/1/98]

President Clinton Responded With Action; Republicans Played Politics

While President Clinton Took Action and Nominated 79 Judges ...

In response to this growing crisis created by increasing judicial vacancies, President Clinton took action and nominated 79 judges in 1997. The President even called on the Senate to confirm more of his nominees in the September 27, 1997, radio address, saying:

"So today I call upon the Senate to fulfill its constitutional duty to fill these vacancies. The intimidation, the delay, the shrill voices must stop so the unbroken legacy of our strong, independent judiciary can continue for generations to come. This age demands that we work together in bipartisan fashion -- and the American people deserve no less, especially when it

comes to enforcing their rights, enforcing the law, and protecting the Constitution.”
[President Clinton’s Saturday Radio Address, 9/27/97]

...Republicans Confirmed Less Than Half of The President’s Nominees In 1997

In 1997, Senate Republicans confirmed only 36 -- 46 percent -- of the President’s judicial nominees. In fact, the 46 percent confirmation rate in the first year of the 105th Congress is the lowest rate for all Congresses dating back to the 95th Congress in 1977-78.

However, a closer look at the numbers for last year do offer some hope that by the end of the year, the Senate was finally returning to its traditional role of considering judicial nominees. In the first nine months of 1997 (from January to Labor Day) the Republican Senate confirmed only 9 judges -- an average of a judge a month. But, in the seven weeks prior to the Congressional adjournment -- with public concern mounting about judicial vacancies -- the Republican Senate confirmed 27 judges.

✓ **1996 Republican Senate Set Record Lows for Confirmations.** Republican inaction on judicial confirmations can be traced back to the 1996 election year. During the 1996 Congressional session, the Republican Senate confirmed only 17 judges -- the lowest election year total in more than 30 years. In fact -- for the first time in more than 40 years -- the 1996 Republican Senate did not confirm a single one of the Appeals Court nominees that were pending.

Historical Context: In 1992, Democratic Senate Confirmed 66 Bush Nominees

Recent history provides some context to this historic slowdown in judicial confirmations. During the 1992 election year, the Democratic Senate held 16 hearings on George Bush’s nominees and confirmed 66 of them -- even confirming one nominee as late as one month before the Presidential election. In 1985, during President Reagan’s first year of his second term, a Republican Congress confirmed more than 80 federal judges.

What’s at Stake -- Real People are Hurt by the Judicial Vacancy Crisis

The Human Factor -- Cost of Republican Delays in Confirming Judges: Judge Hug Said Social Security Cases Won’t Be Heard

Ninth Circuit Chief Judge Procter Hug, Jr. has spoken out about the effects of vacancies in the judiciary. Hug claimed in August 1997 that lack of judges forced him to cancel oral arguments in 600 civil cases that year. Judge Hug also says the effects of judicial vacancies will be felt by real people.

Judge Hug: “The person who has a disability claim against social security, that won’t be heard. Persons who have claims against insurance carriers for non-payment of medical expenses, that won’t be resolved one way or the other.” [Nightline, 8/4/97]

Police Group Said There Might Not Be Enough Judges To Try People Police Arrest

Fraternal Order of Police National President Gill Gallegos: “It seems at variance to common sense that after we fought so hard to put more cops on the street, we now confront the possibility that there won’t be enough judges to try the people the police arrest. We want good tough law and order judges, and we want them now. We’re not suggesting that the Senate confirm every nominee that comes before it, but the Senate should vote -- that’s there constitutional responsibility.”

The Real Life Cost of Vacancies in the Judiciary? 180,000 Pending Cases

Over 25,000 Criminal and 150,000 Civil Cases Pending In Federal Courts With Vacancies. There are 25,587 criminal cases pending in federal district and appeals courts with judicial vacancies -- cases in which criminal defendants await trial and victims await justice. There are also 154,153 civil cases pending in the federal courts with judicial vacancies -- cases like those in which families seek life insurance benefits or seniors await social security payments.

President Clinton's Nominees Have Been Well-Qualified, Diverse

Record Number of President Clinton's Confirmed Judicial Nominees Were Rated "Well-Qualified"
President Clinton has nominated and had confirmed the most judges rated "well-qualified" by the American Bar Association, since it has been rating nominees.

The President Nominates Record Numbers of Women and Minority Nominations

President Clinton has gone to great lengths to ensure that his judicial nominations look like America. 34, or 43 percent, of President Clinton's 80 judicial nominees in the last year have been women or minorities.

Republicans Hold Up Minority and Women Nominations. However, the Republican Senate has only confirmed 11 of the women or minorities the President has nominated -- stranding 23. In fact, of the 14 nominees that have been held up the longest 12 (or 86 percent) are women or minorities.
[CQ Weekly, 11/22/97]

Real Life Example of Republican Delays: The Nomination of Margaret Morrow

For more than 20 months Republicans have refused to confirm Margaret Morrow, whom President Clinton originally nominated on May 9, 1996, to fill a vacancy in California's Central District. Morrow is not only any experienced litigator, but was the first president of the California Bar Association and a president of the Los Angeles Bar. Her nomination has bi-partisan support, including the support of Republicans like Los Angeles Mayor Richard Riordan and former Drug Enforcement Administration head Robert Bonner. The Senate Judiciary Committee unanimously approved her nomination in 1996. Republicans should do what's right -- confirm Margaret Morrow.

Republicans Attacked The Independence Of The Judiciary

DeLay Admitted Threats of Impeachment Designed To Intimidate Federal Judges

On March 11, 1997, House Majority Whip Tom DeLay announced that Congressional Republicans would seek to impeach federal judges. In describing the effort, DeLay said, "As part of our conservative efforts against judicial activism, we are going after judges. Congress has given up its responsibility in [overseeing] judges and their performances on the bench, and we intend to revive that and go after them in a big way." In September, DeLay admitted his tactics were designed to intimidate federal judges, saying, "The judges need to be intimidated." [Washington Times, 3/12/97; Washington Post, 9/14/97]

JUDICIAL VACANCIES

As of 1/6/98

CONFIRMATIONS IN 1997	36
NOMINATIONS IN 1997 (Does not include withdrawn nomination of James Ware)	80
CURRENT VACANCIES	91
• Includes 87 Article III & 4 Article I (Claims Court) vacancies	
PENDING NOMINEES	44
• 13 circuit, 29 district, 2 claims	
CURRENT VACANCIES WITHOUT PENDING NOMINEES	47
• 10 circuit, 32 district, 3 cit, 2 claims	

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HEADLINE: Judiciary Report: Congress Is Prodded

BYLINE: By The New York Times

DATELINE: WASHINGTON, Dec. 31

BODY:

Following are excerpts from the 1997 Year-end Report on the Federal Judiciary by William H. Rehnquist, Chief Justice of the United States:

As I review the state of the judiciary this year and compare it with the 11 previous years I have served as Chief Justice, I am impressed by the degree to which our relations with Congress have dominated 1997. Congressional responses and initiatives on judicial issues ranging from funding to salaries, and from Federal jurisdiction to judicial vacancies, all have had a significant influence on the judiciary over the past year.

The results have been mixed, which is scarcely surprising, and therefore we will face some of the same challenges in 1998 that confronted us in 1997. Despite the work that remains to be done, I am encouraged by the judiciary's ability to perform its essential role in our constitutional structure of Government. . . .

I first would like to express my gratitude to Congress for its financial support of the judiciary. In a time of scarce resources, Congress responded favorably to the careful financial plan adopted by the executive committee of the Judicial Conference of the United States. These moneys will be used wisely and economically. The judiciary supports fully the national goal of eliminating the budget deficit and has instituted a formal process to identify and implement initiatives to reduce or avoid costs. . . .

In general, Congress has declined to eliminate the disparity between resources and workload in the Federal judiciary by an expansion of the number of judges. There have been instances, however, in which Congress wisely has acted to reduce this disparity by enacting laws that in effect decrease the number of potential filings in Federal court. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act, which streamlined habeas corpus procedures for both state and Federal prisoners, and the Prison Litigation Reform Act (P.L.R.A.), which did the same for prisoners' civil rights actions. . . .

With limited degree of hindsight available to us -- and keeping in mind that there are many variables that could affect the future rate of prisoner filings in Federal court -- the Effective Death Penalty Act and P.L.R.A. appear to be promising examples of how Congress can reduce the disparity between resources and workload in the Federal judiciary without endangering its distinctive character.

Unfortunately, Congress's effort to enact legislation of this type have been sporadic and inconsistent. I therefore call on Congress to consider legislative proposals that would reduce the jurisdiction of Federal courts. For many years, diversity of citizenship cases have been identified as one such area in which Congress could enact some very useful reforms.

Should Congress, conversely, consider expanding the jurisdiction of the Federal judiciary, it should do so cautiously and only after it has considered all the alternatives and the incremental impact the increase will have on both the need for additional judicial resources and the traditional role of the Federal judiciary.

If Federal jurisdiction remains at its current level -- or, worse, increases -- judicial vacancies will aggravate the problem of too few judges and too much work. Currently, 82 of the 846 Article III judicial offices in the Federal judiciary -- almost 1 out of every 10 -- are vacant. Twenty-six of the vacancies have been in existence for 18 months or longer and on that basis constitute what are called 'judicial emergencies.' In the Court of Appeals for the Ninth Circuit, the percentage of vacancies is particularly troubling, with over one-third of its seats empty.

Judicial vacancies can contribute to a backlog of cases, undue delays in civil cases, and stopgap measures to shift judicial personnel where they are most needed. Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the Federal judiciary. Fortunately for the judiciary, a dependable corps of senior judges has contributed significantly to easing the impact of unfilled judgeships.

The institutions that have the constitutionally assigned powers of nominating and confirming judicial nominees bear some of the responsibility for the current situation, but structural aspects of the appointment process also contribute to the existing high level of vacancies. For example, a larger judiciary increases the average number of retirements per year and the corresponding number of nominees. The additional burdens placed on the appointment process by such an increase may slow it down.

An appointment process that might work well to fill the vacancies of the 700-member judiciary might struggle with a judiciary of 800 or 850 members. Accordingly, increasing the size of the Federal judiciary so that it can handle expanded workloads might have the unintended effect of increasing the vacancy rate, perhaps leaving unaffected the gap between resources and workload that motivated the initial increase in the number of judges. This ironic result strongly supports the common-sense conclusion that, in this country, a bigger Federal judiciary is not necessarily a part of a solution for every public-policy question.

Whatever the size of the Federal judiciary, the President should nominate candidates with reasonable promptness, and the Senate should act within a reasonable time to confirm or reject them. Some current nominees have been waiting a considerable time for a Senate Judiciary Committee vote or a final floor vote. The Senate confirmed only 17 judges in 1996 and 36 in 1997, well under the 101 judges it confirmed during 1994.

The Senate is, of course, very much a part of the appointment process for any Article III judge. One nominated by the President is not "appointed" until confirmed by the Senate. The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote for him up or vote him down. In the latter case, the President can then send up another nominee.

The Washington Post

FRIDAY, JANUARY 9, 1998

The 1995 Seven

IT IS ALMOST unbelievable that one of President Clinton's nominees to the federal bench is still waiting for Senate action on his nomination after almost three years. That is not a typographical error. Nor is William A. Fletcher—a well-reputed law professor who was nominated to serve on the U.S. Court of Appeals for the 9th Circuit—the only one of Mr. Clinton's nominees to live in confirmation limbo for such periods of time. There are actually seven would-be judges who have been waiting for a Senate vote since 1995.

Mr. Fletcher's nomination arguably had some sticking points. Most particularly, his mother, Judge Betty Binns Fletcher, already serves on the 9th Circuit and is a noted liberal. Trotting out a century-old anti-nepotism statute, therefore, Senate Republicans demanded that she resign before they would confirm her son—though other family pairs on federal courts have apparently not offended this particular law. Judge Fletcher agreed to take senior status when her son got confirmed, so Sen. Orrin Hatch, the chairman of the Judiciary Committee, allowed the committee to report Mr. Fletcher's nomination to the Senate floor. That happened a year and a half ago, but Mr. Fletcher has still not seen a vote.

Others have been treated even worse. James Beaty Jr., a district court judge in North Carolina who was nominated in December 1995 to a slot on the 5th Circuit Court of Appeals, has not even received a hearing, nor have Hilda Tagle and Michael Schattman, both of whom were nominated to district court vacancies in Texas. In some of the seven cases, there have been efforts to paint the nominees as potential judicial activists. In other cases, opponents have not even bothered making real objections. They just let the nominees hang.

Even if these seven were wild-eyed judicial radicals itching to use their lifetime tenure to rewrite the Constitution, make up new rights and spring prisoners

from jail—which they are not—this sort of treatment would be unfair. The proper response to nominations that senators decide they simply cannot support is to vote them down. Simple decency demands that nominees get swift hearings and votes so that if they are rejected, they can get on with their lives and the president can submit new candidates. But there is, in fact, no Senate majority for rejecting these nominees. Moreover, the idea that Mr. Clinton's picks have generally been “judicial activists” is a hallucination by conservative senators who place the political goal of minimizing the president's impact on the federal bench above the constitutional role the Senate is supposed to play in the nomination process.

Indeed, the tactic of holding up nominations for years while simultaneously complaining about judicial activism is deeply hypocritical. The conservative complaint about activist judges, after all, has always been that they do not respect sufficiently the limits of the role the Constitution grants them and that they thereby usurp powers that the Constitution gives to legislators. But the constitutional role the Senate plays in judicial nominations is supposed to be very limited too, one of advice and consent. This role clearly allows the Senate to reject nominees it deems unsuitable—maybe even for ideological reasons. But when senators hold up appointments by simply refusing to consider a nominee, they usurp the appointment power that the Constitution explicitly grants to the president. This is not merely hardball politics but a tactic that borders on an illegitimate exercise of power that Republicans will come to loathe when it is next flexed against them. These seven nominees should be voted on swiftly and without further dithering, and all other judicial candidates—even those who are ultimately rejected—should be treated more respectfully than the Senate has treated Mr. Clinton's.

5:12 PM 1/12/1998

JUSTICE DELAYED

GOP should stop playing politics with Clinton's nominees

Chief Justice William Rehnquist is on the mark in criticizing Senate Republicans for their state of inertia regarding President Clinton's judicial nominees.

In addressing the matter, Rehnquist is speaking to a concern held by many Americans -- that is, the potentially harmful effect of doing nothing on the quality of justice in the federal court system. Judging by their inaction to date, that concern has been lost on Senate Republicans.

Rather, Senate Judiciary Committee Chairman Orrin Hatch, R-Utah, and his GOP colleagues are holding Clinton nominees to an ideological litmus test. Nominees judged to be "liberal activists" have been jettisoned to partisan purgatory.

Since taking control of the Senate in 1995, Republicans have confirmed just 53 judges -- 17 in 1996 and 36 last year. By comparison, 101 judges were approved in 1994, the last year Democrats held control. But turnabout is fair play. Republicans are only doing unto the Democrats what the Democrats did to them when they had the power.

Political machinations aside, 86 judgeships still need to be filled. They won't get filled by Republicans holding Clinton's nominees to an ideological standard they can't meet and the administration criticizing Republicans for doing nothing.

As Rehnquist offered in his assessment of the situation: "The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down. Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice."

There are judicial 42 nominations pending before the Senate. Republicans have every right to question their credentials. However, doing it in the media rather than in confirmation hearings serves politics only -- and makes the wheels of justice grind ever more slowly. They should vote them up or down and move on.

BRUCE FEIN

the Washington Times
TUESDAY, JANUARY 6, 1998

Beware! Senate Republicans yahoos are in the saddle.

Their gallop towards a constitutional abyss behind the stern-visaged chairman of the Senate Judiciary Committee through abuse of the confirmation power has alarmed even the unflappable chief justice of the United States, William H. Rehnquist. In his 1997 annual report on the federal judiciary issued on Dec. 31, the disinterested and customarily conservative jurist entered the political fray with an unvarnished complaint, namely, that Chairman Orrin G. Hatch, Utah Republican, and the committee majority were irresponsibly blocking the filling of urgently needed judgeships by killing presidential nominations through malign neglect, a crude tactic that escapes the accountability of an up-or-down vote.

Approximately 10 percent of the nation's more than 800 judgeships remain vacant, and, Chief Justice Rehnquist underscored, "Vacancies cannot remain at such high levels without eroding the quality of justice," a variation of the maxim that justice delayed is justice denied.

The chief justice acknowledged the constitutional role of the Senate in the appointment of federal judges, including a right to reject any particular nominee. But, he insisted, that check on executive power envisioned its assertion through Caesarlike confrontations with the president in the sunshine, not by Fabian tactics hatched in non-smoking dark rooms. Mr. Rehnquist persuasively amplified: "The Senate confirmed only 17 judges in 1996 and 36 in 1997, well

The Chief Justice vs. Hatch



William H. Rehnquist

under the 101 judges it confirmed during 1994 [when the Democrats controlled the body]. The Senate is, of course, very much part of the appointment process for any Article III judge. One nominated by the president is not 'appointed' until confirmed by the Senate.

"The Senate is surely under no obligation to confirm any particular

nominee, but after the necessary time for inquiry it should vote him up or vote him down. In the latter case, the president can then send up another nominee."

Mr. Hatch has defended his lethal temporizing with judicial nominees by accusing President William Jefferson Clinton of nominating would-be "activists" eager to invent laws rather than interpret them: "The No. 1 problem happens to be activist judges who continue to find laws that aren't there and expand the law beyond the intent of Congress."

That defense is as empty as Mr. Micawber's wallet. As the sole elected officeholder with a nationwide constituency, the president is constitutionally entitled to appoint judges entrusted with corresponding nationwide interpretive powers. The Founding Fathers endowed the Senate with a subordinate confirmation power to screen only for competence, corruption or cronyism. They rejected a proposal to lodge the appointment power in the Senate.

Thus, if Mr. Clinton desires "activist" judges who conscientiously pledge adherence to their constitutional oaths, the Senate should bow to his nominating prerogative. Ditto when a Republican occupies the White House and confronts a Senate controlled by Democrats. The rejection of President Ronald Reagan's Supreme Court nominee Judge Robert H.

Bork in 1987 because sporting an interpretive philosophy unfriendly to the latitudinarian druthers of Democrats was constitutional heresy deserving of condemnation, not of imitation.

Moreover, even if "activism" symptoms would justify Chairman Hatch in voting against confirmation, an unspoken constitutional presumption is that the sentiments of the Senate majority will prevail through an official tally. Public and authoritative voting is a bedrock of political accountability. Furthermore, it is the Senate as a whole, not a Napoleonic chairman or a committee of willful men, that the Constitution crowns with the confirmation power.

Several informal constitutional rules of the game are binding despite their informality. The Constitution, for instance, declines to stipulate the number of Supreme Court justices. The total has varied from six to 10, but has been fixed at nine for approximately 125 years. President Franklin D. Roosevelt aimed to manipulate the number in his ill-conceived and sinister court-packing plan; the revolutionary gambit was sharply rebuffed both by an overwhelmingly Democratic Congress and the people. It would be possible for Chairman Hatch and his fellow yahoos to emasculate the Supreme Court by killing by committee inaction every nominee selected after the death or resignation of an incumbent. By that

Machiavellian tactic, the Supreme Court would die on Mr. Hatch's installment plan.

A sister enumerated constitutional obligation requires the president with reasonable dispatch to give life to agencies or commissions created by Congress by nominations of their apex officers, for example, the United States Sentencing Commission. Suppose President Clinton balked at nominations because of antagonism to the Sentencing Commission's mission. Wouldn't that neglect violate Mr. Clinton's constitutional duty to faithfully execute the laws? Indeed, Chief Justice Rehnquist rebuked the president's prolonged tardiness in filling commission vacancies in his 1997 annual report.

The Constitution will metamorphose into a feeble scrap of paper unless all three branches operate in good faith in exercising their discretionary and overlapping powers in accord with substratum assumptions. As Paul instructed, "The letter killeth, but the spirit giveth life." And if those considerations are unpersuasive to Senate yahoos, they should ponder a cardinal rule of political life: Never create or assert an official prerogative that could not be safely entrusted to your adversaries.

Bruce Fein is a lawyer and freelance writer specializing in legal issues.

The Chief Justice and Mr. Hatch

No one has ever accused Chief Justice William Rehnquist of bleeding-heart tendencies. It was thus extraordinary for him to get into a confrontation last week with Senator Orrin Hatch and other conservative Republicans over what the Chief Justice said was an inexcusable holdup by the Senate over President Clinton's nominations for the Federal bench. Mr. Hatch, chairman of the Senate Judiciary Committee, dismissed the criticism, blaming President Clinton for the delays and the Federal judges for the problem of overworked courts. His response was disingenuous. The vacancies in nearly 1 out of 10 seats on the Federal bench result from obstructionism by certain members of the Senate.

Politics can never be separated from the confirmation process, but Chief Justice Rehnquist was right to describe Republican behavior as unusual. It is not simply that conservatives are eager for revenge over what they still feel was unwarranted Democratic hostility to the Supreme Court nominations of Robert Bork and Clarence Thomas. More important, Republican strategists have decided that fulminating about liberal judges fires up the faithful and raises money. The charge is absurd, since Mr.

Clinton's appointments have been distinguished by their moderation. In fact, many of the judges reviled in the right-wing fund-raising appeals were appointed by Presidents Reagan and Bush.

Whatever their reasons, Republican obstructionism is worse than anything Democrats did in the past. Mr. Clinton nominated 78 judges last year, the Senate confirmed only 36. Some names have been sent to the Senate floor by the Judiciary Committee only to be held up because one or more right-wing Senators exercised their prerogative to block a vote. At least 11 nominations have been sitting around for more than a year. As the Chief Justice pointed out, if the Senate wants to reject nominations, it should do so with an up-or-down vote.

As the most important Senator on judicial matters, Mr. Hatch has shown independence in the past. He has even endorsed judicial nominees that his own colleagues oppose. Now that Chief Justice Rehnquist has shown the leadership to speak for the institutional needs of the bench, Mr. Hatch should rise to the occasion and address the institutional responsibilities of the Senate rather than surrendering to the petty tactics of the blockading few.

New York Times, 1/5/98

Halt the stonewalling on judicial nominees

By DeWayne Wickham

"Justice delayed is justice denied." That's the point I think Chief Justice William Rehnquist tried to drive home last week when he criticized the painfully slow pace of Senate confirmation of judicial appointments.

The Republican-controlled Senate has given new meaning to the term "all deliberate speed" in its consideration of the judicial nominations of Democrat Bill Clinton. In 1994, the last year Democrats controlled the Senate, 101 of the president's nominees won confirmation. In 1996, the first full year of Republican control, that number dropped to 17 with 28 pending. Only 36 of Clinton's 70 judicial nominees were confirmed last year. Currently, there are 82 vacancies out of 846.

Conservatives are ecstatic at this turn of events. Liberals are in mourning. Orrin Hatch, the Senate Judiciary chairman, says that in giving Clinton's nominees close scrutiny Republicans are just doing their job. GOP senators have a responsibility to keep judicial activists off the federal bench, he says. What he means is that they are obsessed with stopping anyone to the left of Charlton Heston from becoming a federal judge.

Democrats played the same game when Ronald Reagan was president, although they were not nearly as good at it. Democrats blocked the judicial appointments of ultraconservatives like Robert Bork, whose name has now become part of the lexicon of the confirmation process. To fall victim to this form of political tribalism is to be "Borked."

Sadly, this political gamesmanship is not without its victims. Cases are backing up, and the time it takes to get an issue before overworked federal judges is increasing. Ironically, while the Republican-controlled Congress has sharply expanded the number of crimes that will land an accused person in federal court, it has denied the federal system the full complement of judges it needs to take on this heavy workload.

Rehnquist wants this nonsense to stop. Coming when it did, his criticism is seen by some as a finger in the eye to the GOP, which

put him on the high court. I don't think so. More likely, the shortage of federal judges has just reached the boiling point, and Rehnquist wants to sound the alarm.

Presidents — even Republican conservatives — have a right to name who they want to the federal bench. The Senate's advise-and-consent role is better used to keep scoundrels — child molesters, wife beaters, racists and other scalawags — off the court than to enforce the ideological litmus test that now prevails.

Don't expect Rehnquist's criticism, or my exhortation, to change things. The 2000 presidential campaign is already under way. Too many Republicans believe anything they do to weaken Clinton will hurt Vice President Gore, the front-runner for the Democratic nomination.

By slowing down the rate of approval of Clinton's lifetime appointments to the federal courts, Senate Republicans are cutting the political capital he would have gained from the Democratic senators and state party organizations that are the driving force behind many of his nominees.

The fewer political IOUs Clinton has to cash in for Gore two years from now, the greater the chance Democrats will wage a divisive dog fight for the party's presidential nomination. And if Republicans regain the White House at the start of the next century, there'll be the added benefit of a GOP president having all those judicial vacancies to fill.

It's time for Republicans to stop stonewalling Clinton's judicial nominations. When it comes to ambushing would-be federal judges, they have proved they're much better at it than Democrats. Now it is time for them to show they can make peace as well as war. Not because they've beaten Democrats to a pulp on this issue — though it seems they have. Instead, they should call it quits because they're doing a lot more damage to the country than to their political opposition.

But don't take my word for it.

Ask the chief justice of the United States what he thinks.

DeWayne Wickham writes weekly for USA TODAY.

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BODY:

Newspapers and wires.

The Chicago Sun-Times (1/5) wrote: "The time has come for the US Senate to stop playing politics with the American judicial system. ... If Republicans have reason to believe that any of President Clinton's picks for the bench are unqualified for any reason, the lawmakers should vote with their nays, not their silence. ... By leaving these judgeships vacant...politicians are telling voters that it is more important to win a political tug-of-war than to conduct the business of the court."

The Detroit Free Press (1/3) wrote: "Supreme Court Chief Justice William Rehnquist's criticism of the US Senate's use of brazen partisan politics to hinder President Bill Clinton's appointment of judges to the Federal judiciary was a welcome and much needed rebuke of the Senate Judiciary Committee. ...(T)he courts are too important an institution to be a pawn in a game between Senators and the President. If Sen. Hatch truly respected the courts and our democratic system, he would cease his corrosive political games."

The Knoxville News-Sentinel (1/5) wrote: "A few (qualifications) are necessary...even though Rehnquist is correct that the Senate could and should move more quickly in filling 82 vacancies, which account for almost 10 percent of all Federal judgeships. ... (T)here is a substantive, nonpartisan issue here, namely the worry that activist, liberal judges have often disregarded constitutional imperatives and usurped legislative prerogatives, thereby throwing democracy out of kilter. ... It's crucial that the Senate exercise caution in approving President Clinton's nominees. The Senators must find out what legal principles these people stand for, what their constitutional faith is. ... More cooperation by both sides would help, as long as the Republicans do not relinquish their demand that the nominees exhibit respect for Constitutional restraint."

The Los Angeles Times (1/5) wrote: "Chief Justice William H. Rehnquist has tabbed the Senate's petty, partisan game on judicial appointments as what it is: political retribution, pure and simple. ... Rehnquist, while acknowledging that Clinton has been slow to nominate people to fill vacant seats, laid the blame for the delays where it belongs, on Senate Republicans who have sat

on the nominations of worthy men and women while lamely complaining about their 'activist' tendencies. ... To Republicans, still smarting from a Democratic-led Senate's rejection of four nominees (including Robert H. Bork) forwarded by Ronald Reagan or George Bush, turnabout is fair play and tarring Clinton's nominees helps raise support for conservative causes. Sen. Hatch surely knows these are not worthy justifications. In the name of justice, he should move ahead."

The Portland (ME) Press Herald (1/3) wrote: "Chief Justice William Rehnquist has grown tired of the US Senate's gamesmanship with regard to nominees to the Federal bench, and who can blame him? ... GOP leaders in the Senate have delayed action on scores of nominees because, they say, they want to ferret out nominees they perceive as 'activist' or, in plain terms, liberal. ... The way the Senators have gone about it is troubling, however. Regardless of their politics...nominees to the Federal bench deserve fair consideration and a vote on their qualifications. Leaving them hanging serves neither the cause of justice nor the political process."

The San Antonio Express-News (1/4) wrote that "the extraordinary criticism by the Chief Justice of the Supreme Court for the Senate's slow pace in approving judicial nominations should draw public attention" and "is harsh criticism for Sen. Orrin Hatch...whose duty is to hold hearings on and confirm or reject" judicial nominees. "Hatch retorted that judges are not overworked because of the judicial vacancies, an argument that strikes us as absurd. ... Clinton nominees whom the Senate finds to be outside the mainstream of legal thought or unqualified should be voted down. The others should be confirmed. Hatch and his fellow Senators should schedule hearings immediately. Enough of simply stonewalling and political posturing."

The St. Paul Pioneer Press (1/4) wrote that the "Senate should quit stalling, start voting." "Rehnquist's focus on the backlog" of judicial nominees "ought to be the catalyst to speed up the process. His directives are sound. ... No one is served by a lengthy wait to get to trial, an obvious outcome of inadequate numbers of judges. In addition, permitting the burden of a case overload to fall on current sitting judges is unwise. Sen. Orrin Hatch...lays the blame on the Clinton Administration for offering 'activist' candidates for the judiciary. 'Activist' by whose standards? Regardless, the nominees deserve a vote."

The Charleston (SC) Post and Courier (1/5) wrote that while "Chief Justice William H. Rehnquist's sharp criticism of the Senate for delaying judicial nominations shouldn't have been all that unexpected," "it should be noted that no apocalyptic breakdown of justice is imminent." "The Republicans could as easily counter" Clinton's claims that they're "playing politics" by asserting "that justice is their concern since the proper role of a judge is at the center of the debate between the President and the Senate. ... The request for more judicial resources seemingly has merit. ... But that is not the whole story. As Sen. Hatch pointed out to the (NY) Times, the extra judicial workload has been accommodated by bringing in retired judges. Still, the Chief Justice is right in warning Congress it cannot go on enlarging the Federal jurisdiction without funding more judges. And he is surely right in asking that the Senate fulfill its duty to vote up or down on the President's nominees without subjecting them to endless delay."

free judge

MARY ELLEN SCHATTMAN

January 9, 1998

To Ann Lewis
From Mary Ellen Schattman
Re Post Editorial etc.

Yesterday, while reading Sheldon Goldman's 1997 tome "Picking Federal Judges" I found the attached information on what happened in the Judiciary Committee when Truman had a Republican Senate. As the ballplayer said, "it's déjà vu all over again."

Ever since I learned that the NRA was opposed to Bork, I knew references to that process were just a smoke screen, but I can't believe the Republicans are using the same script they did in '48.

Have fun.

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come up before the planned recess of the Senate.³⁴ The nomination was sent to the Senate, where Orr was quickly confirmed.

For two of the almost eight years that Truman was president, Congress was controlled by the Republicans (the Eightieth Congress, elected in 1946). This meant that the Senate Judiciary Committee was headed by Republican Alexander Wiley of Wisconsin. Wiley announced even before he assumed the chairmanship that the Republican controlled Senate would not confirm nominees who were "leftists." Early in the first session, he stated that he wanted a political balance in appointments, specifically the appointment of Republicans. He also proclaimed that he would oppose any further appointments of New Dealers.³⁵ The committee under Wiley held up nominations, and the number of confirmations of lifetime appointments to the federal district and appeals courts dropped from sixteen in 1946 to ten in 1947.³⁶ In 1948, with Republicans anticipating the recapture of the White House, confirmations ground to a virtual halt: only two lifetime federal district court nominees and one appeals court nominee were confirmed. After the Democrats regained control of Congress and Truman was reelected in 1948, the Eighty-first Congress confirmed sixty-three district and appeals court nominees. This was a new record, facilitated by the creation of twenty-seven new judgeships in 1949 and seven in 1950.

But even in friendly Democratic hands, the Senate Judiciary Committee could go its own way. On April 26, 1949, the administration submitted to the Senate the nomination of Representative Herman P. Eberharter for a district judgeship in Pennsylvania. The Judiciary Committee held hearings, where allegations of drunkenness and misbehavior were made against Eberharter. The committee decided to take no action on the nomination, and Eberharter eventually withdrew his name.³⁶

Other Considerations in the Appointment Process

Local party leaders often have strong views about who should be named to a federal district judgeship. Taking them into account may prolong the selection process. If the administration prefers someone else, it cannot act quickly lest the local leaders think their preferences were not even considered at all. In 1950, when New Jersey Democrats were split over whom to back for

The *New York Times*, July 1, 1947, p. 14, observed that the Republican-controlled Senate Judiciary Committee "has built a reputation for making full and often lengthy investigations into the backgrounds of judicial and legal nominees."

Footnotes to p81

Notes to Pages 81-90 379

Endorsements A-L; Clark advised Truman: Clark to Truman, July 20, 1945, OF 209 i Ninth.

35. Wiley announced: *New York Times*, December 2, 1946, p. 26; Wanted a political balance: *New York Times*, January 6, 1947, p. 1; He also proclaimed: *New York Times*, January 10, 1947, p. 12.

36. OF 208 m Pennsylvania Western District.

37. Boyle to Connelly, January 13, 1950, OF 208 l New Jersey.

38. See *New York Times*, March 2, 1950, p. 4.

39. *New York Times*, July 15, 1951, sec. 4, p. 7.

40. Hannegan urged Truman: Hannegan to Truman, May 18, 1945, OF 41 g District Court of the U.S. for the District of Columbia; Truman replied: OF 41 g District Court of the U.S. for the District of Columbia.

41. Boyle to Ford, February 7, 1951, OF 208 m Endorsements Western District A-Z.

42. Truman to Mike Mansfield, February 1, 1949, OF 209 i Endorsements M-Z.

43. Minton to Truman, November 26, 1948, OF 209 g Endorsements A-F.

44. Truman to Dawson, November 30, 1948, OF 209 g Endorsements A-F.

45. Richard K. Burke, *The Path to the Court: A Study of Federal Judicial Appointments*, Ph.D. diss., Vanderbilt University (1959), 229.

46. Letter from Collet: Collet to Truman, December 20, 1950, OF 208 l Endorsements A-Z; Truman memo: Truman to McGrath, October 27, 1951, OF 208 l New Jersey.

47. Truman to Taft, November 16, 1949, OF 208 z Northern District of Ohio.

48. Taft to Truman, December 5, 1949, OF 208 z Northern District of Ohio.

49. ABA created: *New York Times*, July 4, 1946, p. 17. Also see Joel B. Grossman, *Lawyers and Judges* (New York: Wiley, 1965), pp. 60-69; Wiley announced: *New York Times*, February 3, 1947, p. 14; delayed consideration: *New York Times*, July 9, 1947, p. 11; opposed the nomination: *New York Times*, July 16, 1947, p. 16.

50. Keenan to Truman, January 18, 1950, OF 208 z Northern District of Ohio; Truman to Keenan, January 21, 1950, OF 208 z Northern District of Ohio; Truman to Dawson, January 21, 1950, OF 208 z Northern District of Ohio.

51. Burns to Dawson, February 12, 1951, OF 208 z Northern District of Ohio.

52. Burns to McGrath, February 29, 1952, OF 208 mm Endorsements of Eastern District A-V.

53. ABA on Hennock: *New York Times*, June 28, 1951, p. 16; ABA on Drucker and Harrington: *New York Times*, August 3, 1951, p. 9; Truman remarked: *New York Times*, October 26, 1951, p. 17.

54. For background to the events that led up to McGrath's firing, see, Dunar, *Truman Scandals*, 96-120; arrangement with ABA: Grossman, *Lawyers and Judges*, 70-71.

55. See the correspondence in OF 208 bb Endorsements A-Z.

56. Patterson also noted: Patterson to McGrath, April 17, 1951, OF 209 b Second Circuit; Fitzpatrick noted: Fitzpatrick to Dawson, June 7, 1951, OF 209 b Endorsements Miscellaneous.

57. See OF 208 o Endorsements Southern District D-Z.

58. Mansfield to Truman, January 30, 1949, OF 209 i Endorsements M-Z.

59. The memo is found in the papers of J. Howard McGrath, Box 57. Additional Judgeships folder, in the Harry S. Truman Library.