

Chapter 3

Federal Judicial Nominations and Confirmations During the Last Two Years of the Clinton Administration

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Introduction

During the last two years of the Clinton Administration (1999–2000), the problems that had surfaced previously during the administration with respect to federal judicial nominations and confirmations became even worse. The delays in affording hearings and votes to nominees, particularly female and minority nominees, continued and increased. In several instances, nominees literally waited more than four years. Only 15 nominees were confirmed to the courts of appeals during this period, less than half the number nominated. For the first time in more than a decade, the full Senate voted to reject a federal judicial nominee, as Republican Senators delivered a party-line vote against an African American state supreme court judge nominated to fill a district court seat. A prominent law professor pointedly asked in a *New York Times* op-ed in August, “Why has the G.O.P. kept blacks off federal courts?”²

The political forces that underlie these developments were similarly disturbing. Both inside and outside the Senate, some conservatives strongly pushed a strategy of opposition and delay, in part to save more judicial seats for the President to be elected in November 2000. The Clinton Administration sought to push for votes for its nominees, although some saw those efforts

as too little and too late. The administration continued to nominate primarily “centrist” individuals considered easier to confirm, but soon found that virtually any candidate, particularly for the courts of appeals, ran into problems in the Senate. And after the November elections, early actions by the Bush Administration strongly suggested that conflicts and dangers to civil rights would continue to plague the judicial nomination and confirmation process.

This chapter will review the record of the Clinton Administration and the Senate in nominating and confirming judges for the federal bench during 1999–2000. First, it describes the procedures used to select and process candidates, which remained similar to the procedures used since 1995. Second, it analyzes the record of President Clinton in making nominations and the Senate in processing and confirming them, including such factors as quality, experience, diversity, and ideology. Finally, the chapter will include a brief look at the nominations and confirmations process during the first six months of the Bush Administration, and will discuss the outlook for judicial nominations over the next several years, including suggestions for helping promote excellence, diversity, and commitment to equal justice in the federal judiciary.

I. Procedures for Nominating and Processing Federal Judgeship Candidates in 1999–2000

During 1999–2000, the procedures for nominating and then processing nominees for federal judgeships remained essentially the same as since the Republican party assumed control of the Senate in November, 1994. Although the rhetoric and the results altered somewhat, most of the technical procedures used by the President and the Senate did not materially change.

A. Criteria for Selection

The overall criteria utilized by the Clinton Administration for selecting judges remained relatively constant throughout the administration's two terms. President Clinton continued to express his interest in increasing diversity on the federal bench, particularly in light of the extremely low number of women and minorities previously appointed by Presidents Reagan and Bush. He also stated that he sought to appoint as judges "men and women of unquestioned intellect, judicial temperament, broad experience, and a demonstrated concern for, and commitment to, the individual rights protected by our Constitution, including the right to privacy."³ For a number of years, moreover, an additional criterion appears to have been added: a desire to avoid significant controversy over judgeships. As one administration official candidly admitted, "[w]e've steered clear of a few people who might have been fabulous judges but who would have provoked a fight that we were likely to lose."⁴ As 1999–2000 continued, the administration increasingly found that even apparently non-con-

troversial candidates encountered significant problems in securing confirmation.

B. Overall Method of Selection

The general method used by the Clinton Administration to select nominees remained similar throughout its two terms. At the district court level, the administration primarily followed the historical practice of "senatorial courtesy." Under this procedure, the senior Democratic Senator from the state with a judicial vacancy recommended between one and three candidates for the position. Where there have been two Democratic Senators from a state, they have divided up responsibility for suggesting nominees in an agreed-upon fashion. In states represented by both a Democratic and Republican Senator, the two Senators have generally worked out a method in which each plays some role in the selection. Where there was no Democratic Senator, the recommendation was made by the ranking Democrat in the state's House delegation, the Governor, the Representative from the specific area, or another official selected in consultation with the White House, and informal methods have generally been worked out to provide some input from the Republican Senators for such states. The Justice Department and the White House screened candidates, and the President made the final selection.

As during the earlier part of the Clinton Administration and during previous Republican administrations, the White House reserved a larger role in finding and selecting nominees to the federal courts of appeals. A significant role was played by the Office of Counsel at the White House. A variety of sources have provided input, including Senators and other officeholders, and again the President made the final selection after screening took place.

Even more than during the first part of the Clinton Administration, the White House consulted Senate Judiciary Committee chairman Orrin Hatch as well as other Republican Senators prior to submitting nominations. This represented a noticeable change from the practice under the first President Bush, when the Republican Party controlled the Presidency and the Democrats controlled the Senate. Sometimes, the Clinton Administration was criticized for taking the advice of Republican Senators on nominations, as when President Clinton accepted the recommendation of Senator Slade Gorton and nominated Barbara Durham, who later withdrew for health reasons, for a seat on the 9th Circuit court of appeals in 1999.⁵

C. Investigations and Interviews

1. The Justice Department and the White House

Although some of the individual names have changed, the basic procedures for the extensive process of investigating and interviewing candidates for the federal bench did not alter significantly during the last two years of the Clinton Administration. As before, both the Justice Department and the White House played important roles, with the activity at Justice centered in the Office of Policy Development, headed by Assistant Attorney General Eleanor D. Acheson. The focal point for judicial nominations activity at the White House remained in the Office of Counsel, where the leading role was played by Mark Childress and then by Sarah Wilson. As before, the Attorney General, White House Counsel, and other administration officials participated in the process.

2. The American Bar Association

During the last two years of the Clinton Administration, the American Bar Association's Standing Committee on the Federal Judiciary maintained its traditional role of evaluating the qualifications of potential nominees for the federal bench prior to their nomination, continuing a practice with a 50-year bipartisan pedigree of providing input prior to a final decision on nomination. Although Senator Hatch had ended the ABA's formal role at the Senate Judiciary Committee level, its crucial function prior to nomination continued until the early days of the Bush Administration, as discussed below. Most of President Clinton's nominees during this period received the ABA's highest "well qualified" rating; overall, as of 1999, Clinton's appointees received "the highest ABA ratings among the past four Presidents."⁶

3. The Senate Judiciary Committee

The Senate Judiciary Committee plays a key part in the Senate's "advice and consent" function on judicial nominations by investigating, holding hearings, and voting in committee on nominees. Since 1995 and until 2001, the committee was chaired by Republican Senator Orrin Hatch.

The period of 1999–2000 saw an increase in the problems of delay and slowdown in the work of the Senate Judiciary Committee. During the first half of 1999, not a single confirmation hearing was held. Only a total of seven hearings were held in 1999, and only eight in 2000, compared to 11 in 1998.⁷ Thirty-seven nominees, almost one-third of the eligible nominees submitted during the period, never received hearings at all, including more than half of the President's nominees to the courts of appeals.⁸ This included one nominee, Helene White for the 6th Circuit court of appeals, who literally

waited more than four years and received no action whatsoever on her nomination.

A primary reason for these problems was the clear abuse by some Republican Senators of the process of placing “holds” on judicial nominees, particularly the “blue slip” process. The purpose of the “blue slip” policy is to encourage an administration to consult both home state Senators prior to a candidate’s nomination, as the Clinton Administration carefully did during its tenure. Under the policy, each home state Senator literally receives a blue slip of paper when a candidate from that state is nominated and that slip is to be returned in order for a nomination to proceed. Despite extensive pre- and post-nomination consultation by the Clinton Administration, however, a number of Republican Senators refused to return their blue slips for extensive periods of time, blocking any action on nominees for years. Although the process was a confidential one during this period, reports indicated, for example, that Senator Spencer Abraham’s refusal to return his blue slip was responsible for much of the four years of delay on Helene White’s nomination. In an even more troubling move, reports indicated that beginning in 1995, Senator Jesse Helms used his refusal to return blue slips to block hearings or any action for almost five years on African American nominees to the 4th Circuit court of appeals. This was despite the fact that until President Clinton’s recess appointment of Roger Gregory of Virginia, who also did not receive a hearing during 2000 after he was nominated, no African American had ever served on the 4th Circuit court of appeals. Although the blue slip process remains an important one, there is little question that it was seriously abused during the latter part of the Clinton Administration.⁹

II. The Record on Judicial Nominations during the Last Two Years of the Clinton Administration

During 1999–2000, President Clinton made 74 nominations to the federal bench that were voted upon by the Senate. Three additional nominees were withdrawn, and 41 nominations were made and not acted upon by the Senate, more than twice the number as during the previous two years.¹⁰ Although progress continued to be made in improving the diversity, quality, and commitment to equal rights of judicial nominees compared to the situation in the Reagan–Bush Administrations, observers reported serious problems concerning judicial nominations during this period.

A. The Overall Record

As the late Judge Leon Higginbotham has written, a diverse federal judiciary is important in order to ensure that all litigants “benefit from the experience of those whose backgrounds reflect the breadth of the American experience, as well as to help ensure that the bench is “both substantively excellent and respected by the general population.”¹¹ In this key area, significant progress clearly was made under President Clinton. Out of some 570 judges nominated in 1981–92 by Presidents Reagan and Bush, less than 4% were African American and less than 8% were minority. In sharp contrast, more than 16% of President Clinton’s appointees were African American and more than 24% have been minority, including the first Japanese-American judge nominated for the federal courts of appeals. In fact, the number of African Americans appointed by President Clinton in his eight years in office was

greater than the total number appointed during the 23 years of the first Bush, Reagan, Carter, and Ford presidencies put together. During the last two years of his presidency, approximately 27% of Clinton's nominations were minorities.¹²

President Clinton also made significant progress with respect to gender diversity. Overall, just over 29% of his judicial appointments have been women, again representing a larger number than the previous four presidencies. During 1999–2000, just over 31% of President Clinton's federal judicial nominees were women.

In general, the President's nominees have demonstrated high quality, as measured by such factors as prior experience with the judicial system as a judge, prosecutor, or public defender as well as ABA ratings as discussed above. Most have listed at least some *pro bono* or public interest experience, although, as the Alliance for Justice has noted, the use by conservative Senators of some nominees' public service work as a basis for opposing or delaying nominations has clearly been detrimental.¹³ Several 1999–2000 nominees have distinguished records of helping provide legal assistance to the disadvantaged. For instance, Judge George Daniels now of the Southern District of New York worked at the Legal Aid Society, served on the board of a program for youth crime prevention, and was awarded the Thurgood Marshall prize for his death penalty-related advocacy work.

Throughout this period, some conservatives inside and outside the Senate continued to attack President Clinton for allegedly nominating "liberal" and "activist" judges. The available facts, however, clearly belie these claims. Academic studies of Clinton's appointees, focusing both on their previous records concerning partisan activism and on their voting behavior after appointment, demonstrate that, as the co-author of several of the studies put it, critics'

claims are "a bunch of nonsense." The studies suggest, in fact, that Clinton's appointees have generally been less liberal than those of other Democratic Presidents and most resemble the judicial appointments made by President Gerald Ford.¹⁴ As Professor Herman Schwartz of American University explained, Clinton's appointments "show a surprising indifference to trying to undo the sharp tilt to the right of the Reagan and Bush Administrations' judges . . . His judges have been quite middle of the road, and I wouldn't call them liberals."¹⁵

B. The Problem of Delay and Inaction and the Impact on Female and Minority Nominees

Overall, the 1999–2000 period was characterized by significant delay and inaction by the Senate on many Clinton nominees. As discussed above, 41 nominations made by the President during this period were never acted upon, more than twice the number as during the previous two years. Specifically, the Senate confirmed only 69% of the President's district court nominees during this period, compared with 84% during 1997–98, and confirmed only about 40% of his court of appeals nominees, a significant drop from the 68% two years earlier.¹⁶ One report estimates that, overall, more than 35% of President Clinton's nominees to the appellate courts were not approved, compared with less than 15% under President Reagan.¹⁷

Even those Clinton nominees who were confirmed during this period often faced long delays. For example, although it took 77 to 81 days for an appeals court nominee to receive a hearing during the first Bush Administration and Clinton's first term, that figure ballooned to 231 days during 1997–98 and even further to 247 days during 1999–2000.¹⁸ As nominations expert Sheldon Goldman and his colleagues put it, a process

that had previously been routine for most nominees was “turned into an obstacle course fueled by partisan and ideological divisions to which only a minority of nominees were immune.”¹⁹ Indeed, current White House counsel Alberto Gonzalez recently conceded that the “conduct of the Republican Senators” in delaying nominees for as long as four years “was wrong.”²⁰

Perhaps even more troubling was the fact that delay and inaction had a particularly significant impact on female and minority nominees. Of the 41 nominees not acted upon by the Senate during this period, 22 (or more than 53%) were women or minorities.²¹ Even those female and minority nominees who were ultimately confirmed were delayed much longer than other Clinton nominees. At the district court level, female and minority nominees in 1999–2000 waited on average six weeks longer than white male nominees, taking an average of four months to get a hearing on their nominations. At the appellate court level, female and minority nominees had to wait for an average of more than 9 months for a hearing, nearly two months longer than white male nominees. The total confirmation process took nearly five months longer for female and minority appellate court nominees.²² One study indicated that overall, minority nominees were more than twice as likely to fail to receive confirmation as white nominees.²³ Goldman and his colleagues concluded, “[e]mpirically, as we have demonstrated, the nominees who did not move or who moved only after great delay during Clinton’s tenure in the presidency, were disproportionately nontraditional [i.e., female and minority] judgeship candidates.”²⁴ As President Clinton more graphically put it, a number of his minority nominees were “being held in political jail because they can’t get a hearing from this Republican Senate.”²⁵

An examination of what happened (or failed to happen) to several of the many female and minority nominees who never

received a vote on their nominations is illustrative. During 1999–2000, the 4th Circuit court of appeals had 4 to 5 vacancies, out of a total of 15 authorized judgeships. Moreover, there had never been a nonwhite judge on that court in its entire history. Earlier in his administration, President Clinton had made clear his strong desire to integrate the 4th Circuit and nominated James Beaty for the court in 1995, but Beaty never even received a hearing. In 1999, he nominated another African American candidate, James Wynn, but Wynn also never received a hearing, reportedly due to the “blue slip” hold exercised by Senator Jesse Helms, as discussed above. In June 2000, Clinton nominated African American attorney Roger Gregory of Virginia to the court. Despite strong support from both home-state senators, Gregory also never received a hearing on his nomination in 2000. The 4th Circuit was finally integrated on December 27, 2000, when President Clinton gave a recess appointment to Gregory, and Gregory was renominated by President Bush and promptly confirmed by the Democratic-controlled Senate in 2001. Nevertheless, the treatment of African American nominees to the 4th Circuit by the Republican-controlled Senate in 1995–2000 was extremely troubling and produced significant criticism by other government officials, newspapers, and civil rights groups.²⁶

Another example is provided by the 6th Circuit court of appeals. As noted above, Clinton nominee Helene White waited more than four years and never received even a hearing on her nomination. In 1999, Clinton also nominated Kathleen McCree Lewis, a respected Michigan attorney who received a “well qualified” rating from the ABA and would have been the first African American woman to sit on the 6th Circuit. Nevertheless, Lewis never received even a hearing on her nomination. As Senator Carl Levin explained, these nominees waited “in vain

just for a hearing” despite the fact that “[n]o one has questioned their qualifications for the bench.”²⁷

Similarly, Enrique Moreno was nominated to the 5th Circuit court of appeals in 1999, but was blocked by his two Republican home-state senators from receiving a hearing, despite the fact that the ABA unanimously gave him its highest rating and that Texas state judges had rated Moreno one of the top three trial attorneys in El Paso. Dolly Gee would have been the first Chinese-American woman to serve as a federal judge, but she never even received a hearing on her 1999 nomination to the federal district court in Los Angeles, despite the support of both her home-state senators. Both home state senators, one Democratic and one Republican, supported the nomination of former Iowa Attorney General Bonnie Campbell to the Eight Circuit court of appeals in 2000, and she did receive a hearing, but she was never voted on by the Senate Judiciary Committee or the full Senate. Far-right groups like the Christian Coalition and the Iowa Right to Life Committee opposed Campbell, who had headed the Justice Department’s Office of Violence Against Women.²⁸

In fact, activity by far right groups to delay or oppose Clinton nominees appears to have further contributed to the problems of 1999–2000. In 1999, Phyllis Schlafly’s Eagle Forum began a “Court Alert” campaign that called for conservatives in the Senate to block all of the President’s judicial nominees. Right-wing groups like the Christian Coalition, Free Congress Foundation, and the Family Research Council joined the effort, sometimes opposing individual female and minority nominees like Campbell and sometimes calling for a halt to all confirmations. Such groups stepped up their efforts in 2000, with the Eagle Forum, for example, using email alerts to call on the Senate to confirm “NO MORE CLINTON JUDGES.”²⁹

The delays and failures to act on the nominations of female and minority lawyers

to the federal bench produced widespread condemnation. Congressional Hispanic Caucus chair Lucille Roybal-Allard called the delays to female and minority nominees a “slap in the face.” Nearly 200 law professors signed a letter in late 1999 expressing concern about the threat to “both judicial independence and diversity on the federal bench” posed by the conduct of Senate leaders. Criticism came from the National Bar Association, the Congressional Black Caucus, the Leadership Conference on Civil Rights, and the President of the National Association of Women Judges. Senators Barbara Boxer and Dianne Feinstein condemned the delays as “unfair” and “ridiculous.” Senator Edward Kennedy concluded that the “Republican stonewalling” was “irresponsible and unacceptable” and a “gross perversion of the confirmation process.”³⁰

C. Controversies over Specific Clinton Nominees

During 1999–2000, significant controversies arose concerning several of President Clinton’s female and minority nominees who did receive votes by the full Senate. Most significant were the controversies concerning the nominations of Ronnie White, Richard Paez, and Marsha Berzon.

I. Ronnie White

Ronnie White was originally nominated by President Clinton to the federal district court in St. Louis in 1997. Judge White was the first African American to sit on the Missouri Supreme Court and was highly recommended at his 1998 confirmation hearing both by Republican Senator Christopher Bond and by Democratic Representative William Clay. According to Clay, then-Missouri Senator John Ashcroft

told him that Ashcroft had canvassed the other six members of the state supreme court, all of whom had been appointed by Ashcroft, and “they all spoke very highly of Ronnie White and suggested that he would make an outstanding Federal judge.” Ashcroft was present at the hearing and did not contradict Clay’s account.³¹

Nevertheless, Judge White did not receive a Senate vote on his nomination for more than two years, reportedly due to a hold placed by Ashcroft on the nomination. An agreement was finally reached to hold a vote on White’s nomination in October 1999, as part of an arrangement under which President Clinton agreed to nominate a candidate favored by Senator Orrin Hatch to a federal district court judgeship in Hatch’s home state of Utah. Despite the previous support of Judge White by Senator Bond and several other Republican Senators who voted for him in the Judiciary Committee, Ashcroft spearheaded a fight that defeated the White nomination strictly on party lines, with every Republican Senator voting against him on the Senate floor.

Ashcroft’s attack on White centered on his claim that White had a “serious bias” against upholding death penalty verdicts, claiming that White was more “liberal” on the death penalty than any other judge on the Missouri Supreme Court. In fact, these claims significantly distorted White’s record. White voted to uphold death penalty verdicts in 41 out of 59 capital cases, and in most cases in which he dissented, White voted with state court judges who had been appointed by Ashcroft himself when he served as Governor. Indeed, three judges appointed by Ashcroft had voted to reverse death penalty sentences a greater percentage of the time than had Judge White. The death penalty attack was raised by Ashcroft virtually on the eve of the Senate floor debate, with no opportunity for White to respond, despite the fact that White had

already been asked about the death penalty at his hearing and made clear that he has consistently voted to affirm death penalty convictions except in cases of serious constitutional error. Despite Ashcroft’s efforts to solicit opposition, moreover, several Missouri law enforcement officials and organizations supported White’s confirmation.³²

The rejection of White’s nomination was the first time in more than a decade that the full Senate had turned down a judicial nominee and the first time in nearly 50 years that a district court nomination had been voted down. Condemnation of the action was extremely harsh. *The New York Times* called the vote a “judicial mugging.” *The Washington Post* concluded that it showed that “there is no longer even a component of principle in the Senate’s judicial confirmation process.” Representative Clay and California Representative Maxine Waters characterized the behavior of Ashcroft and Bond as racist. Others suggested that Ashcroft’s actions may have been motivated by disagreements with White about abortion or by Ashcroft’s concern about his upcoming reelection battle, in which Ashcroft had raised the issue of support for the death penalty and his opponent had raised the issue of the White nomination. Whatever the reasons, even Republicans later expressed regret about the White vote, with some even making the remarkable claim that they had not known that White was an African American at the time. Indeed, Ashcroft’s role in the attack on White became a major issue in Ashcroft’s own confirmation as Attorney General in 2001. The Congressional Black Caucus concluded that White’s rejection “left profound doubts about fair and unbiased treatment of African American nominees” and “cast a racial cloud over the process.”³³

2. Richard Paez and Marsha Berzon

Richard Paez was nominated for the 9th Circuit court of appeals in January 1996, and was finally confirmed more than four years later in March 2000. By then, Judge Paez had more than eighteen years of judicial experience, including as a federal district judge in Los Angeles. His colleagues on the bench, attorneys who appeared before him, his home state Senators, and officials of both parties praised him highly, and he received the ABA's highest "well qualified" rating. He was approved both in 1998 and in 1999 by the Senate Judiciary Committee, receiving votes from both Republicans and Democrats.³⁴

Nevertheless, a full Senate vote on his nomination continued to be delayed, as some Senate Republicans charged that he was too liberal. Some claimed that he was "soft on crime," despite the fact that he had never been reversed on criminal sentencing and that a Justice Department analysis showed that he was more stringent than most other judges on criminal matters. Some asserted that he had violated the Judicial Code of Conduct by raising concerns about anti-civil rights ballot propositions in California, but Judiciary chair Orrin Hatch himself made clear that this charge was erroneous. Extensive advocacy and negotiations involving the White House and the Senate became necessary to secure a Senate vote on Paez, including discussions and a purported deal around the time of the Ronnie White vote, serious and sustained criticism by Democratic Senators and by Hispanic and other civil rights groups, and finally an agreement between Senator Barbara Boxer and Senate Majority Leader Lott in 2000 to "trade" a vote on Paez for a vote on a friend of Lott who had been nominated to the Tennessee Valley Authority board. Even after all this, several right-wing Senators made final efforts to prevent

a vote, and Senator Bob Smith of New Hampshire began a filibuster against Paez. The filibuster was defeated, however, and Paez was approved by a vote of 59 to 39.³⁵

The story concerning the nomination of Marsha Berzon, who waited more than two years for a vote on her nomination to the 9th Circuit court of appeals, was similar. A nationally renowned California appellate lawyer who specialized in labor matters, she was supported by both her home state Senators, Judiciary chair Orrin Hatch, a former key aide to President Ronald Reagan, and many corporate lawyers who had opposed her in labor cases. As with Paez, the only significant opposition came from far right groups and Senators. Nevertheless, several Republican Senators were able to prevent a full Senate vote on the nomination, necessitating an effort closely paralleling what happened with the Paez nomination. As with Paez, Senator Robert Smith tried to filibuster a vote, but that attempt failed, and Berzon was confirmed on the same day as Paez by a vote of 64 to 34.³⁶

III. The First Six Months of the Bush Administration and the Outlook for the Future

The controversy over judicial nominations did not end with the 2000 election. During the election itself, judicial nominations became an issue; it was raised against now former Senators John Ashcroft and Spencer Abraham, who were charged with delaying and opposing female and minority nominees. It also became an issue discussed during the Presidential election, particularly because of concerns about then-candidate Bush's statements that he would seek to appoint more justices like Antonin Scalia and Clarence Thomas to the Supreme Court.³⁷

In early 2001, President Clinton renominated nine individuals whose nominations had lapsed because of the often long delays in their processing, including six minority and female nominees: James Wynn, Roger Gregory, Enrique Moreno, Helene White, Kathleen McCree Lewis, and Bonnie Campbell. Support of these nominees by President Bush, and confirmation by the Senate, could have been a significant step toward progress and bipartisanship on judicial nominations.

Unfortunately, this did not occur. To the contrary, President Bush's first public action with respect to judicial nominations in March 2001 was to withdraw President Clinton's nominees and to end the role of the ABA for some 50 years in screening potential nominees prior to their nomination. These moves provoked objections from Senate Democrats and many others. In addition, reports indicated that little or no genuine consultation with Democratic Senators occurred on potential nominees. At the same time, reports that the right-wing Federalist Society was directly recommending nominees, coupled with the appointment of a number of lawyers with Federalist Society and other right-wing credentials to key positions in the Justice Department and the White House counsel's office, fueled concerns that Bush would nominate far right candidates with troubling views on civil rights and civil liberties.³⁸

President Bush announced his first set of nominations on May 9, 2001, nominating 11 individuals to appellate court seats, a number of which had been the subject of significant delays under President Clinton. On a positive note, Bush renominated Roger Gregory to the 4th Circuit court of appeals, and also nominated African American Barrington Parker, Jr., a Clinton district court appointee, to the 2nd Circuit. On the other hand, a number of Bush's initial picks, as well as several made later, have come under fire as extreme conservatives with

troubling records on civil rights and civil liberties. For example:

Jeffrey Sutton, nominated to the 6th Circuit court of appeals, has been criticized for extensive efforts as an appellate lawyer to curtail congressional authority and limit federal protections against discrimination and injury based on disability, age, race, religion, and sex. As of July 3, 2001, more than 50 national groups and over 220 regional, state, and local organizations have opposed his confirmation, including the National Rehabilitation Association, the American Association of Persons with Disabilities, the Welfare Law Center, and the National Women's Political Caucus. As the *The Wall Street Journal* reported, Sutton was described even by one of his supporters as the "perfect kind of poster child for what Democrats see as prototypical George W. Bush judges."³⁹

Michael McConnell, a University of Utah law professor nominated to the 10th Circuit court of appeals, has generated significant criticism, focusing on his views on reproductive choice, privacy, and church-state separation. For example, McConnell has called the Supreme Court ruling in *Roe v. Wade* "illegitimate" and "an embarrassment," and signed a 1996 "pro-life" statement that asserted that abortion "kills 1.5 million innocent human beings in America every year" and called for a constitutional amendment to ban abortion.⁴⁰ He has also advocated a "radical" departure from decades of First Amendment decisions by the Supreme Court, such as rulings forbidding government-sponsored prayer at public school graduations.⁴¹

Carolyn Kuhl, a state superior court judge nominated in June 2001 to the 9th Circuit court of appeals, has been severely criticized for her record on civil rights, privacy, and reproductive rights. For example, while in the Reagan Justice Department, she reportedly played a key role in convincing the Attorney General to reverse prior policy

and support a policy that would have granted tax-exempt status to Bob Jones University despite its racially discriminatory practices, an approach rejected by the Supreme Court by an 8 to 1 vote. She also urged the Supreme Court to overturn its *Roe v. Wade* ruling as “flawed.”⁴²

Senate reaction to these nominations has been mixed. Republicans have generally been very positive, switching their views of only several months previously and urging that all the nominees be voted on swiftly with little deliberation. Although Senate Republicans had reportedly been preparing to do just that, the decision by Senator James Jeffords to become an independent and vote with Democrats to organize the Senate, prompted in part by concern about judicial nominations, changed the picture considerably. As of September 1, 2001, the Democratic-controlled Senate had already held hearings on and confirmed several nominees as to whom there was genuine bipartisan consultation and support, including Roger Gregory and several others. As many Senators have made clear, however, careful scrutiny of Bush’s nominees will occur. Even White House counsel Alberto Gonzalez predicted that as few as five of Bush’s nominees would be confirmed by the end of 2001, in part because of the poisoned relations produced by Senate Republican treatment of Clinton nominees over the last several years and in part because of the concern that President Bush is seeking to “stack the federal judiciary with conservatives.”⁴³

In fact, that concern poses a significant danger to civil and constitutional rights. In large measure because of the delays and failures to vote on Clinton nominees, there are now more than 90 vacancies on the federal courts, many on the influential courts of appeals. Projections indicate that if all anticipated vacancies over the next four years are filled by Bush nominees, the majority of judges on each one of the nation’s

circuit courts of appeals will be made up of Republican-appointed judges. Although past Republican Presidents have sometimes appointed moderate judges, the risk is clear if President Bush does not. When the prospect of vacancies on the closely divided Supreme Court is also considered, the danger is even more evident. As a report by People For the American Way Foundation concluded last year, the appointment of just one or two more justices like Scalia and Thomas could “reverse decades of Supreme Court precedents in civil rights” and many other areas, “curtailing or abolishing fundamental rights that millions of Americans take for granted.”⁴⁴ Far right groups recognize the stakes as well, calling the federal judiciary “the top prize” in last year’s election, and pushing the administration and Senate allies to appoint judges and justices that will “tip the judicial balance decisively.”⁴⁵

The prospects for the future, therefore, are clearly troubling. President Bush should be urged to restore the pre-nomination role of the ABA and to seek out moderate, diverse nominees with a demonstrated understanding of and commitment to civil and constitutional rights. In that regard, he should genuinely consult with Democratic as well as Republican Senators prior to nomination. This should include, as President Clinton did, listening to and following advice on nominating specific suggested candidates, particularly some of the nominees treated so unfairly during the latter part of the Clinton Administration.

For its part, the Senate should insist on such action by the President. It should carefully and thoroughly review the President’s nominees, particularly for the courts of appeals and the Supreme Court, looking for key characteristics like demonstrated commitment to civil and constitutional rights, as more than 200 law professors have recently suggested.⁴⁶ Nominees that reflect genuine bipartisan consideration and

moderation should receive priority in processing. And the Senate should not hesitate to fulfill its constitutional responsibility of rejecting and withholding its consent from those that do not. A recent poll indicates, for example, that a clear majority of the American people believe that Senators should ask judicial nominees about their views on such subjects as civil rights and affirmative action, and should vote not to confirm nominees “if the Senator thinks

the nominees’ views on important issues are wrong.”⁴⁷ As *The New York Times* explained, while the President clearly has the power to nominate judges, Senators should not “move aside passively for confirmation of ideological jurists” who would seriously weaken civil rights and other protections and whose appointment could “distort the balance of the federal judiciary for decades to come.”⁴⁸

Endnotes

¹ Vice President, General Counsel, and Legal and Education Policy Director, People For the American Way Foundation.

² C. Ogletree, "Why Has the G.O.P. Kept Blacks off Federal Courts," *The New York Times*, Aug. 18, 2000.

³ See *ABA Journal* at 57 (Oct. 1992).

⁴ See Gest, "Disorder in the Courts?" *U.S. News & World Report*, at 40 (Feb. 12, 1996) (quoting Assistant Attorney General Eleanor Dean Acheson).

⁵ See People For the American Way Foundation (PFAWF), *The Senate, the Courts and the Blue Slip*, at 2 (2001) ("Blue Slip").

⁶ S. Goldman and E. Slotnick, "Picking Judges Under Fire: Clinton's Second Term Judiciary," 82 *Judicature* 282 (1999) ("Picking Judges").

⁷ See PFAWF, *Status Chart on Judicial Nominees* (Dec. 7, 2000); Alliance for Justice, *Judicial Selection Project Annual Report 1999*, at 5 (Feb. 22, 2000) ("1999 Alliance Report").

⁸ *Id.*

⁹ See *Blue Slip* at 2-3.

¹⁰ See Alliance for Justice, *Judicial Selection Project Annual Report 2000*, at 5 (Mar. 7, 2001); E. Minberg and T. Hahn-Burkett, "Judicial Nominations and Confirmations During the First Half of the Second Clinton Administration," *The Test of Our Progress*, at 61 (Citizens Commission on Civil Rights 1999). (Note: Although the number provided in the Alliance report is 42, the actual number is 41 since one of the nominees listed in the report, Barbara Durham, was actually withdrawn.) ("2000 Alliance Report").

¹¹ L. Higginbotham, "The Case of the Missing Black Judges," *The New York Times*, July 29, 1992, at A21.

¹² These and similar numbers in this chapter were derived from White House reports on judicial nominations dated Oct. 3, 1996 and Oct. 8, 1994, the PFAWF status chart, and the 1995, 1999, and 2000 Alliance reports.

¹³ See 2000 Alliance Report at 10-11.

¹⁴ See *Picking Judges*; S. Goldman and E. Slotnick, "Clinton's Judges," 84 *Judicature* 228, 245, 254 (2001) ("Clinton's Judges"); R. Carp, K. Manning, and R. Stidham, "President Clinton's District Judges," 84 *Judicature* 282 (2001); S. Haire, M. Humphries, and D. Songer, "The Voting Behavior of Clinton's Court of Appeals Appointees," 84 *Judicature* 274 (2001); R. Carp, D. Songer, and R. Stidham, "The Voting Behavior of President Clinton's Judicial Appointees," 80 *Judicature* 16 (1996). The quotation in text is from Professor Ronald Carp, the co-author of two of these articles, in T. Mauro, "Experts Warn that Ranking Jurists Is Risky," *USA Today*, May 7,

1996, at 1A.

¹⁵ See J. Biskupic, "Hill Republicans Target 'Judicial Activism,'" *The Washington Post*, Sep. 14, 1997, at A1.

¹⁶ See Clinton's Judges at 231.

¹⁷ See E. Palmer, "For Bush's Judicial Nominees, A Tough Tribunal Awaits," 59 *Congressional Quarterly Weekly Report* 898, 900 (2001) ("CQ Report").

¹⁸ Clinton's Judges at 235.

¹⁹ *Id.* at 231.

²⁰ See "White House Gloomy over Judiciary Prospects," *CNN.com-allpolitics.com* (Aug. 14, 2001) (quoting White House Counsel Alberto Gonzales) ("Gonzales").

²¹ See 2000 Alliance Report at Appendix B.

²² See Clinton's Judges at 234-235.

²³ See J. Biskupic, "Politics Snares Court Hopes of Minorities and Women," *USA Today*, Aug. 22, 2000, at A1 (quoting study by Citizens for Independent Courts).

²⁴ Clinton's Judges at 238.

²⁵ See N. Lewis, "President Criticizes G.O.P. for Delaying Judicial Votes," *The New York Times*, July 31, 2000. See also, e.g., C. Ogletree, "Why Has the G.O.P. Kept Blacks off Federal Courts," *The New York Times*, Aug. 18, 2000.

²⁶ See, e.g., 2000 Alliance Report at 18-19; 1999 Alliance Report at 19.

²⁷ *Congressional Record* S96661-62 (daily ed. Oct. 2, 2000) (statement of Senator Carl Levin).

²⁸ See 2000 Alliance Report at 21-26.

²⁹ See PFAWF, *Ordering the Courts: Right-Wing Attacks on Judicial Independence in 2000*, at 12-14 (Apr. 2001) ("Ordering the Courts").

³⁰ See 1999 Alliance Report at 22.

³¹ See PFAW, *The Case Against the Confirmation of John Ashcroft as Attorney General of the United States—Part One*, at 6 (Jan. 4, 2001) (quoting Senate Judiciary Committee hearing transcript) ("Ashcroft Report").

³² See Ashcroft Report at 7-9; 1999 Alliance Report at 26-29.

³³ See 1999 Alliance Report at 27-29; Ashcroft Report at 8-9; Clinton's Judges at 239-41.

³⁴ See 1999 Alliance Report at 23-24; 2000 Alliance Report at 14-16.

³⁵ *Id.*

³⁶ *Id.* See also *Ordering the Courts* at 12-13.

³⁷ See F. Barnes, "Bush Loves Scalia," *Weekly Standard*, at 16 (July 5/July 12, 1999); *Christian Science Monitor* at 13 (Feb. 1, 2000). For examples of the discussion of the judicial nominations issue in Michigan during Senator Abraham's reelection campaign, see "A Political Travesty," *Detroit Jewish News* (June 16, 2000); "Is the G.O.P. Playing Politics with Judicial Appointments," *Michigan Press* (June 25, 2000).

³⁸ See *Blue Slip* at 3-4; *Ordering the Courts* at 14-15; CQ Report at 898-99; N. Lewis, "Bush to Reveal First Judicial Choices Soon," *The New York Times*, Apr. 24, 2001.

³⁹ R. Greenberger, "As Hearings on Judicial Nominees Begin, Senate Panel Reserves Fireworks for Fall," *The Wall Street Journal*, July 11, 2001. For the list of organizations opposing Sutton, see <www.ncil.org/sutton.htm>.

⁴⁰ M. McConnell, "Roe v. Wade at 25: Still Illegitimate," *The Wall Street Journal*, Jan. 22, 1998, at A18; W. Glaberson, "In New Senate, New Scrutiny of Judicial Nominees," *The New York Times*, May 30, 2001, at A18; "The America We Seek: A Statement of Pro-Life Principle and Concern," *First Things*, May 1996, at 1.

⁴¹ See "Bush Wants to Place Anti-Separationist Law Professor on Federal Court," *Church*

and State, at 15 (June 2001).

⁴² See National Abortion Rights Action League, "Judge Carolyn Kuhl Fact Sheet," available at www.naral.org/media_resources/fact/kuhl_facts.html.

⁴³ Gonzales. See also "Judges and Politics," *Congressional Quarterly Researcher*, at 577-600 (July 27, 2001). In fact, 27 Bush nominees were confirmed in 2001 despite these problems and the serious disruption in the Senate and the country, the same number as were confirmed in the first year of the Clinton Administration in 1993. See *Legal Times* at 31 (Dec. 24, 2001).

⁴⁴ PFAWF, *Courting Disaster*, at 3 (May 2000). See also *Ordering the Courts* at 15-16; E. Fraser, "Tilting the Bench Farther to the Right," *National Journal* 1518-20 (2001); "Long-Term Impact of President Bush's Appointments to the Federal Bench" (2001) (unpublished analysis available from PFAWF); "Bush's Nominees Should Worry Civil Rights Defenders," *Detroit Free Press*, May 11, 2001.

⁴⁵ *Ordering the Courts* at 15 (quoting materials from Courting Justice campaign by Free Congress Foundation).

⁴⁶ "Dear Senator" letter signed by over 200 law professors (July 13, 2001) (available from PFAWF).

⁴⁷ Hickman-Brown Public Opinion Research, *Current Public Opinion on Judicial Confirmation*, at 1, 2 (July 23, 2001).

⁴⁸ "Blocking Judicial Ideologues," *The New York Times*, Apr. 27, 2001.