

# APPELLATE JUDICIAL APPOINTMENTS DURING THE CLINTON PRESIDENCY: AN INSIDE PERSPECTIVE

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## INTRODUCTION

This essay provides an overview of the federal judicial nomination and confirmation processes from the perspective of a former Clinton administration attorney involved in the judicial selection process from 1997 to 2001. It then focuses on judicial appointments to the United States Courts of Appeals for the Fourth and the Ninth Circuits to illustrate the complex political and historical dynamics of appellate appointments during the divided-government phase of the Clinton presidency, when the legislative and executive branches were controlled by opposing parties. This essay is intended to provide practitioners and judges with a better understanding of how the judicial appointment process functions, and to add a participant observer account to more detached scholarly analyses of the process.

## THE JUDICIAL APPOINTMENT PROCESS

Oliver Wendell Holmes's observation that the life of the law is rooted less in logic than in experience<sup>1</sup> applies equally to the judicial appointment process. The interdependent and sometimes competing roles of the legislative and executive branches are described in general terms in the constitutional

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1. Oliver Wendell Holmes, *The Common Law* 1 (Little, Brown & Co. 1881).

text,<sup>2</sup> but the inner workings of the nomination and confirmation processes are the product of the gradual accretion of executive and legislative practices and prerogatives developed over time, and with some regional differences.

### *The Executive Branch*

Presidential administrations have traditionally handled appellate and district court nominations somewhat differently. During the Clinton administration, the White House exerted greater control over the selection of appellate judges, while home-state senators who shared the president's party recommended candidates who served as presumptive nominees for district court vacancies. With the exception of President Carter, who established a merit selection commission system that was all but mandatory for appellate judgeships and recommended for district court vacancies, most modern presidents have adopted this shared system of nomination authority.<sup>3</sup> This essay will focus on the selection of appellate judges.

Upon the submission of a resignation or retirement letter from an active appellate judge, members of the administration's judicial selection team, headed by the White House Counsel, developed brief biographical profiles for a list of potential candidates from which a few leading contenders were selected for interviews. Candidate sources included the candidates themselves, home-state Senators, prominent lawyers, government and Democratic party officials from the relevant state, members of the judicial selection team, and federal and state judicial almanacs. There was rarely a shortage of candidates; the term "short list" was a misnomer in jurisdictions with large and talented legal communities. However, on

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2. See U.S. Const. art. II, § 2 (authorizing the President to appoint judicial officers with the advice and consent of the Senate).

3. For an overview of President Carter's commission system, see Griffen B. Bell, *Federal Judicial Selection: The Carter Years* 27, in Henry J. Abraham, Griffen B. Bell, Charles E. Grassley, Eugene W. Hickok, Jr., John W. Kern III, Steven J. Markman & Wm. Bradford Reynolds, *Judicial Selection: Merit, Ideology, and Politics* (Nat'l. Leg. Ctr. for the Public Interest 1990) (indicating that judicial-selection commissions were established during the Carter Administration in every state except West Virginia).

occasion, the selection team reached out to lawyers in the relevant region to solicit additional names to deepen the pool.

Consultation with home-state senators was a critical part of the pre-nomination stage of the appointment process. Pursuant to the longstanding tradition of senatorial courtesy, home-state senators from both parties had veto power over the President's judicial nominees from their states, through the "blue-slip" policy. Following the nomination of a candidate, the Senate Judiciary Committee chair distributed a blue form to each home-state senator seeking approval of the nominee as a prerequisite to scheduling a confirmation hearing. Failure to return a blue slip, or the return of a blue slip bearing an indication that a senator opposed the nomination, would doom a nominee's chances of confirmation. Consequently, pre-nomination consultation with a prospective nominee's home-state senators was an essential, if time-consuming, part of the judicial selection team's work.

During the Clinton presidency, consultation ranged from merely notifying home-state senators of a nominee's identity to the selection of a consensus candidate approved in advance by home-state senators as well as the President. In states represented by two Democratic senators, consultation generally took the form of seeking recommendations from the senators. Such consultation did not confer an entitlement to select, but rather assisted the White House in identifying qualified candidates from the state represented by the senators and secured important support for their confirmation.

The scope of consultation regarding appellate court nominees became increasingly contested in states represented by one or two Republican senators after the Republicans gained a Senate majority in 1994. In 1997, a conservative faction of the Republican caucus attempted to institute consultation criteria that would have shifted the balance of appointment power heavily toward the Senate by requiring more formal consultation with Republican senators on appellate nominees. For example, under a proposed circuit-wide blue-slip scheme, the President would have been required to consult with all of the Republican senators within the circuit, not just home-state senators, before nominating a candidate.

The Republican caucus defeated the proposals. However, in an April 1997 letter to White House Counsel Charles Ruff, Senate Judiciary Committee chair Orrin Hatch “spell[ed] out some of the circumstances which demonstrate an absence of good faith consultation,” including what he characterized as “failure to give serious consideration to individuals proposed by home-state Senators as possible nominees.”<sup>4</sup> As the Clinton presidency progressed, White House concerns about the confirmability of potential nominees and the adequacy of consultation came to permeate the selection process. Republican allegations of inadequate consultation stalled or permanently obstructed a number of appellate nominees. Toward the end of the administration, key Republican senators invoked the circuit-wide blue slip as a rationale for not processing particular candidates even though they had home-state Republican support. As the following discussion illustrates, Republican senators’ insistence on levels of consultation that amounted to pre-nomination consent, and their willingness to block nominees not supported by Republican home-state senators, led to extensive negotiations over some appellate nominations.

### *The FBI and the ABA*

Once the White House identified a potential nominee, it initiated two separate but simultaneous investigations by the Federal Bureau of Investigation and the American Bar Association. The FBI investigation included criminal and other personal background database searches, as well as interviews with local attorneys, judges, and community members. White House officials relied on the FBI reports, along with their own candidate interviews, to satisfy themselves that the prospective nominee did not have any personal background issues that would preclude a lifetime appointment, such as drug or alcohol abuse, domestic violence, non-compliance with tax laws, and serious financial problems.

By contrast, the ABA’s investigation focused on judicial temperament, integrity, and professional qualifications.

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4. Letter from Orrin G. Hatch, U.S. Sen., to Charles F. C. Ruff, White House Counsel (Apr. 16, 1997) (copy on file with author).

Administration officials initiated an ABA investigation by communicating the name of the potential nominee to the chair of the ABA's Standing Committee on Federal Judiciary. The member of the committee who represented the circuit for which the candidate was being considered conducted the investigation. Relying as a starting point on a questionnaire identifying the candidate's ten most significant litigated cases and his or her other legal work and published writings, the circuit representative completed interviews with the candidate, the attorneys and judges who participated in or presided over the litigated matters, and other members of the legal community. The results of the field investigation were then compiled in a written report that culminated in a recommended rating of well qualified, qualified, or not qualified. The rating was ratified—or sometimes changed—after committee discussion and a full committee vote, and then transmitted orally and in writing to the White House.

The Clinton administration followed the longstanding practice of submitting the names of candidates to the ABA prior to the nomination.<sup>5</sup> With one or two exceptions, the President declined to nominate any candidate who received a “not qualified” rating from the ABA. To avoid embarrassment to the candidate, the ABA Standing Committee chair gave the White House or Justice Department informal advance notice of a potential rating of “not qualified.” In some cases, the White House or the candidate chose to withdraw his or her name from consideration in these circumstances. In other cases, the White House sought further review of the candidate's record by submitting additional references and further examples of the candidate's written work to the ABA, which sometimes resulted in elevating the rating to qualified.

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5. Shortly after taking office, President George W. Bush announced, through his White House Counsel, that he would not submit nominees to the ABA for evaluation, because he believed that the ABA took positions on social and political issues that compromised its neutrality. See Amy Goldstein, *Bush Curtails ABA Role In Selecting U.S. Judges*, Wash. Post A1 (Mar. 23, 2001). When Democrats regained control of the Senate in June 2001, Senate Judiciary Committee chair Patrick Leahy, Democrat of Vermont, resumed the practice of submitting names to the ABA for ratings, albeit after rather than before nomination. Consequently, the ABA has lost its power to stop an allegedly unqualified candidate from being nominated by means of a “not qualified” rating.

Significantly, both the ABA and the administration generally considered prior litigation experience a more important prerequisite for district court positions than for appellate judgeships. Demonstrated accomplishment as an academic or a significant record of public service was considered an adequate substitute for courtroom experience in the case of an appellate nominee. The relative weights given these criteria in initial screenings of potential nominees worked effectively for the administration. Overall, more than 75 percent of President Clinton's judicial nominees received the highest ABA rating.<sup>6</sup>

Although the ABA investigation consumed a significant amount of pre-nomination time and required much effort, a nominee's ABA rating appeared to have little impact on the Senate confirmation process. While a negative rating could and almost uniformly did preclude a candidate's nomination, a well-qualified rating did not ensure any speedier confirmation than did a merely qualified rating. Indeed, more than half of the appellate nominees not acted upon during the second term of the Clinton presidency had received the ABA's highest rating.

Following the completion of the FBI and ABA investigations, and barring the revelation of any serious issues, the White House nominated candidates after notifying home-state senators and Senate Judiciary Committee staff and preparing a press release. From that point forward, the Senate primarily controlled the fate of a judicial nomination.

### *The Legislative Branch*

In the Senate, the confirmation process consisted—then as now—of three major steps: a confirmation hearing before the Senate Judiciary Committee, a vote by that committee, and a vote of the full Senate. Immediately after the Senate's receipt of the nomination, the Senate Judiciary Committee chair distributed blue slips to home-state senators on which to indicate their endorsement or disapproval of the nomination. President Clinton could usually count on positive blue slips from senators

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6. Sheldon Goldman, Eliot Slotnick, Gerard Gryski & Gary Zuk, *Clinton's Judges: Summing Up the Legacy*, 84 *Judicature* 228, 249 (Mar.-Apr. 2001) (tbl. 6).

from the same party; the more critical key to confirmation was a positive blue slip from a majority party home-state senator.

Hearings were generally held once a month, and a typical hearing considered the nominations of one or sometimes two appellate court nominees and three or four district court nominees. During the second term of Clinton's presidency, the chair scheduled thirty-eight hearings for a total of 182 nominees.

Members of the Department of Justice's Office of Policy Development, which was charged with overseeing the district court nominations process for the White House and helping to select appellate nominees, prepared all judicial nominees—including candidates nominated to the courts of appeals—for hearings by sending them transcripts of past hearings, reviewing hearing procedures with them, and mooting each nominee with questions from past hearings and hypothetical questions related to unique aspects of his or her legal career.

This preparation was important, for the paramount concern of the Republican members of the Senate Judiciary Committee during this period was judicial activism, which they defined as judicial decision-making based not on settled law but rather on the personal political beliefs and ideological views of the nominees. Republican senators interrogated nominees about several "hot button" social issues that have been the subject of controversial appellate or Supreme Court rulings, most notably abortion, the death penalty, affirmative action, discrimination on the basis of sexual orientation, mandatory minimum sentencing, prison litigation reform, and voter initiatives. Senators also sometimes pursued these subjects by means of written questions propounded after the hearings, which could extend the time during which the committee considered a nomination prior to a committee vote.

Following the hearing and submission of responses to written questions, a nominee had to be voted out of committee by a majority, generally no earlier than the next business meeting of the committee, but often much later or not at all. Nominees who passed through the committee were then placed on the executive calendar for a full Senate vote that could in theory be taken either by unanimous consent or by roll call. The Republican leadership in the Senate required all Clinton

appellate nominees to be subjected to a roll call vote, however, which meant that each individual senator's vote was recorded.

As this overview indicates, the nomination and appointment processes can be complex, and a nominee may be challenged at any one of a number of critical junctures. Indeed, the political and other factors affecting the viability of a judicial nomination are so varied that they are best illustrated in the context of specific nominations. The next sections of this essay focus on Fourth and Ninth Circuit nominations that required extensive pre-nomination negotiations and the mounting of full-scale confirmation campaigns.

### DIVERSIFYING THE FOURTH CIRCUIT

One of President Clinton's primary goals in the area of judicial appointments was to diversify the judiciary by race, gender, and ethnicity. His most significant achievement toward this end was the appointment of the first African American judge to the Fourth Circuit.

The Fourth Circuit, which handles appeals of district court rulings from Maryland, Virginia, West Virginia, and North and South Carolina, has the largest African American population of any circuit.<sup>7</sup> It is also widely regarded as one of the nation's most philosophically conservative appellate courts. Throughout the Clinton presidency, the majority of active judges on the court were appointed by the Republican presidents who had preceded him.<sup>8</sup>

Although President Clinton's belief in a representative federal judiciary was strongly held, his diversity agenda never took the form of an explicit or mandatory affirmative action plan

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7. According to the White House, African Americans comprised 22 percent of the population within the Fourth Circuit in 2000. See Dan Eggen, *Clinton Names Black Judge to Appeals Court; Recess Choice for Richmond Circuit is Challenge to GOP*, Wash. Post A1 (Dec. 28, 2000).

8. That majority would have been even more substantial had the then-Democratically controlled Senate confirmed two of President George H.W. Bush's Fourth Circuit nominees, District Judge Terence Boyle of North Carolina and University of Virginia law professor Lillian BeVier, in 1991. Significantly, the Republican majority on the Circuit would have become a Democratic majority if all of Clinton's Fourth Circuit nominees had been confirmed. See Brooke A. Masters, *A Chance to Tip Scales of Justice: Clinton Has Opportunity to Reshape Conservative 4th Circuit*, Wash. Post B5 (Apr. 26, 1998) (noting that "a couple of new Clinton appointees could tip the balance").



for the federal bench.<sup>9</sup> His goal of racially integrating the Fourth Circuit took the duration of his two-term presidency to fulfill, and both provoked the strongest political opposition, and inspired him to adopt the boldest political strategy, of his presidency in the area of judicial appointments. Although the story of Clinton's historic appointment of the first African American to the Fourth Circuit is unique in many respects, it provides a useful lens through which to view the myriad social and political forces that affect the judicial appointment process in general.

During his first term, President Clinton's goal of diversifying the Fourth Circuit was thwarted by Republican opposition to filling either of the two North Carolina vacancies. Senior North Carolina Senator Jesse Helms refused to return favorable blue slips for either of President Clinton's first North Carolina nominees, one of whom was a Clinton-appointed African American district court judge.<sup>10</sup> Helms suggested that he might support at least one of Clinton's nominees if the President also nominated the first President Bush's North Carolina nominee for the Fourth Circuit, District Judge Terence Boyle, who had not been confirmed. The White House rejected Helms's proposal at the time.

In February 1997, Chief Judge J. Harvie Wilkinson III testified before Congress that the Fourth Circuit's caseload did not justify the filling of either of the two North Carolina vacancies. According to Chief Judge Wilkinson, unrestrained growth in judicial personnel exacerbated caseload growth and

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9. President Carter, in contrast, issued executive orders establishing merit selection commissions for appellate court nominees and mandating affirmative action for women and minority candidates. Executive Order No. 12097, for example, established the principle that in assisting with the nomination process, the attorney general should make "an affirmative effort . . . to identify qualified candidates, including women and members of minority groups." Moreover, in an Oval Office meeting with African American leaders from throughout the south, President Carter committed to appointing an African American judge to every district court in a former Confederate state. With the exception of Mississippi and Virginia, he fulfilled that commitment. See Bell, *supra* n. 3, at 28.

10. President Clinton nominated Bankruptcy Judge J. Rich Leonard and U.S. District Judge James Beaty Jr., to fill Fourth Circuit vacancies on December 22, 1995. See White House Press Release, *President Nominates James Beaty, Jr. and J. Rich Leonard to U.S. Court of Appeals for the Fourth Circuit* (Dec. 22, 1995) (available at <<http://lectlaw.com/files/jud29.htm>>) (copy on file with Journal of Appellate Practice and Process).

contributed to a decline in the predictability and consistency of circuit law and collegiality. An increase in the number of judges, he believed, created many new possible panel compositions, which in turn led to more individualized decisions.<sup>11</sup> But former Chief Judge Sam Ervin III testified in favor of filling the vacancies, which, as he pointed out, were created in 1990 in response to requests for additional judgeships by the Fourth Circuit judges themselves, in accordance with the application of the Judicial Conference's methodology for assessing the need for additional judgeships.<sup>12</sup> With only eleven of the fifteen authorized judgeships filled, and five of the active judges over the age of seventy, Ervin testified that leaving the judicial seats unfilled would create problems in administering justice in the circuit.

In an effort to break the Fourth Circuit logjam during Clinton's second term, White House officials again met with Senator Helms to negotiate a compromise that included the possible nomination of Judge Boyle from North Carolina. However, this time, Senator Helms rejected the possibility of a compromise and categorically opposed the filling of the vacancies during the remainder of the Clinton presidency on the ground of inadequate caseload. Helms's opposition did not change even after the Fourth Circuit lost its last active North Carolina judge with the death of Judge Ervin in 1999. For only the second time since the circuits had come to include all of the American states, one of them lacked any judicial representation from a member state.

The goal of diversifying the Fourth Circuit achieved new urgency following President Clinton's nomination of a district judge appointed by the first President Bush to a South Carolina vacancy on the circuit in 1998. Civil rights groups expressed displeasure with White House acquiescence in the joint recommendation of South Carolina Senators Strom Thurmond, a Republican, and Earnest Hollings, a Democrat, in light of the slim Republican majority on the circuit. They lobbied

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11. For a detailed discussion of Wilkinson's views, see J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 Emory L.J. 1147 (1994).

12. Sen. Jud. Comm., Subcomm. on Administrative Oversight and Cts., *U.S. Appeals Cts. & Case Load Ratio*, 104th Cong. (Feb. 5, 1997) (Test. of Sam Ervin III, J.) (available at 1997 WL 45003).

vigorously for the nomination of an African American candidate with an acceptable civil rights record for one of the North Carolina vacancies. In 1999, President Clinton nominated James Wynn, an African American who was serving as a state judge in North Carolina, but Senator Helms's opposition was unwavering, and Wynn never received either a hearing or a vote.

As the Clinton presidency entered its final years with no realistic hope of diversifying the Fourth Circuit through the usual processes of consultation, nomination, and confirmation, White House officials decided to take more dramatic steps. The judicial selection team made two critical decisions in the last weeks of 1999 and the beginning of 2000. First, to raise the visibility of Republican opposition, the White House decided that the Administration would respond to every current and future vacancy on the Fourth Circuit with an African American nominee. Second, and even more critically, the White House decided to move one of the North Carolina seats to another state in order to circumvent Senator Helms's home-state blue-slip veto power.<sup>13</sup> After surveying possible candidates and consulting senators in West Virginia and South Carolina, the White House settled on Virginia as the ideal state within the circuit for a transferred seat.

Virginia was attractive as an alternative venue for a variety of reasons. First, the state produced one of the highest appellate caseloads in the circuit. Second, the Fourth Circuit convened every month to hear oral argument in Richmond, the capitol of the former Confederacy, which offered unparalleled symbolic value. Moreover, Republican Senator John Warner of Virginia had a record of cooperation with respect to Clinton judicial nominees and was considered likely to support the goal of diversifying the Circuit with an acceptable nominee. Finally, but perhaps most importantly, Senator Charles Robb strongly supported the goal, had already recommended candidates to the White House, and, in an election year, was likely to exert considerable effort to secure the nominee's confirmation.

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13. One of the so-called North Carolina seats was actually an unallocated seat created in 1990 that had never been filled. It was perceived by the White House and, most importantly, by Senator John Edwards, the North Carolina Democrat, as a North Carolina seat by virtue of President Clinton's nomination of a North Carolina candidate for the seat in 1995.

After several months of deliberation between the White House, Senator Robb, and civil rights groups over possible candidates, Senator Robb and former Virginia governor Douglas Wilder recommended Richmond lawyer Roger Gregory for the seat. Gregory, who had once practiced law with Wilder, had bipartisan ties in the Richmond community and a poignant life story. The first person in his family to finish high school, Gregory graduated from Virginia State University, where his mother had earlier worked as a dormitory janitor. He then graduated from the University of Michigan Law School.

The White House had initially planned a presidential announcement of Roger Gregory's nomination from the Oval Office in late June, 2000. However, the struggle between Senator John Edwards, the Democratic senator from North Carolina, and the White House over transferring the seat from North Carolina to Virginia intensified in the days immediately preceding the proposed nomination, and President Clinton announced the nomination of Norman Mineta for Secretary of Commerce instead. Gregory was nominated a few days later with less fanfare after Edwards secured a written commitment from the White House to return the seat to North Carolina when the next vacancy occurred.

Despite the swift return of positive blue slips from Virginia Senators Warner and Robb, the Senate Judiciary Committee never scheduled a hearing or vote for Gregory. Meanwhile, over the objection of civil rights advocates, who feared that nominating additional African Americans to other Fourth Circuit vacancies would harm Gregory's confirmation chances, the White House persisted, and nominated African American district judge Andre Davis for a Maryland vacancy on the Fourth Circuit in October 2000, bringing the total number of African Americans nominated by Clinton for the Fourth Circuit to four.

By the fall of 2000, it had become clear that none of the three still-pending African American nominees to the Fourth Circuit were going to be granted a hearing. White House officials began deliberating over the possible recess appointment of Roger Gregory. As recess appointees do not receive lifetime appointments, but rather serve until the end of the next congressional session, this was not necessarily a long-term fix

for the Fourth Circuit, but it appeared to have promise as an initial strategy.

Recess appointments, particularly of federal judges, can be controversial. Originally utilized as a method to temporarily fill vacancies in the days when Congress adjourned for much longer periods, the recess appointment has gradually evolved into a method of circumventing Senate opposition to presidential nominees. During the Clinton presidency, Senate Republicans threatened to retaliate for the recess appointment of controversial non-judicial officers by refusing to confirm federal judges.<sup>14</sup>

However, weighing in favor of a recess appointment was the large number of Clinton appellate nominees pending before the Judiciary Committee who would never be confirmed. A few White House officials and Senators felt that the number of unconfirmed appellate nominees warranted recess appointments of more than a single pending appellate judicial nominee. In addition, Department of Justice research revealed that four of the first five African American circuit court judges—including Third Circuit judge William Hastie and Second Circuit Judge Thurgood Marshall—had originally been recess appointed and later confirmed. The recess appointment of Roger Gregory, then, would follow the path of several groundbreaking African American judicial appointments by other presidents. Finally, the recess appointment of the first African American to the Fourth Circuit seemed justified in the wake of Senator Helms's intractable opposition and the defeat that then-Senator John Ashcroft engineered on the Senate floor of district court nominee Ronnie White, the first African American justice to ever serve on the Missouri Supreme Court.

In order to avoid the appearance of fueling election year partisanship, White House officials recommended that the president recess appoint Gregory after rather than before the November 2000 presidential election. The day after Christmas, White House judicial selection attorneys met with presidential speechwriters to draft presidential remarks for an Oval Office announcement of the recess appointment of Roger Gregory. To

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14. See e.g. Philip Shenon, *In Protest, Senator Blocks All Nominations*, 148 N.Y. Times A22 (June 9, 1999) (citing statement of Sen. Inhofe).

avoid leaks, the event was kept off the President's official schedule, and civil rights advocates were called to convene in the Oval Office only on the morning of the planned announcement. On December 28, 2000, before the nominee, his family, and members of the civil rights community, President Clinton announced Gregory's recess appointment to the Fourth Circuit. "It is unconscionable that the Fourth Circuit . . . has never had an African American appellate judge," Clinton stated. "It is long past time to right that wrong. Justice may be blind, but . . . diversity in the courts, as in all aspects of society, sharpens our vision and makes us a stronger nation."<sup>15</sup>

Although Senator Robb was not re-elected, civil rights groups successfully lobbied his successor, Senator George Allen, a Republican, and the Bush White House for Gregory's re-nomination for a lifetime appointment. They were successful. President Bush re-nominated Gregory before his recess appointment expired, and he was confirmed in July of 2001 by a ninety-four to one vote in the Democratically controlled Senate. Although the process of diversifying the Fourth Circuit had taken far longer than anticipated, President Clinton's strategy was vindicated.

The circumstances of Gregory's appointment were in many respects unique. No other appointment during the Clinton presidency required the transfer of a seat from one state to another, and it was President Clinton's sole recess appointment to an Article III court. However, the path charted by Clinton in order to achieve the historic goal of racially diversifying the Fourth Circuit was the product of two opposing political forces—(1) a Republican Senate willing to use its advise and consent power to block judicial nominees considered too liberal by refusing to grant hearings or votes, and (2) civil rights and other interest groups committed to lobbying the President and other White House officials about the use of the judicial appointment power to alter the ideological balance and racial composition of a federal court of appeals. As the nomination discussed in the next section reveals, the same forces produced both compromises and hard-fought confirmation campaigns for Ninth Circuit judicial appointees as well.

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15. See Eggen, *supra* n. 7.

## NINTH CIRCUIT APPOINTMENTS

The political dynamics of Clinton's Ninth Circuit judicial appointments were in some respects the reverse image of those in the Fourth Circuit. Liberals considered the Fourth Circuit a bastion of judicial conservatism, while conservatives considered the Ninth Circuit "the epicenter of judicial activism in this country."<sup>16</sup> President Clinton appointed fourteen judges to the Ninth Circuit during his tenure, which represented half of the authorized active judges on the court. Only two of his Ninth Circuit nominees were not confirmed.<sup>17</sup> Like the struggle to appoint an African American to the Fourth Circuit, however, appointing certain Ninth Circuit judges required extraordinary measures. In the Ninth Circuit, though, these measures took the form not of circumvention but of negotiation and compromise. The case of Judge William Fletcher is illustrative.

Boalt Hall law professor William Fletcher was the first Ninth Circuit nominee to provoke public opposition from conservative interest groups. A well-regarded legal academic, Fletcher was a Rhodes scholar, a Yale Law School classmate of the President and the First Lady, a former law clerk for Supreme Court Justice William Brennan, and co-chair of Clinton's California campaign. However, the source of Republican opposition to Fletcher's nomination was not his relationship to the President but his relationship to another judge—his mother, Ninth Circuit judge Betty Binns Fletcher. Betty Fletcher was one of ten women appointed to federal appellate judgeships by President Carter, which made her part of the largest group of women appointed to the appellate bench up to that time. Republicans viewed the women President Carter had appointed to the Ninth Circuit with disfavor, regarding them as among the most liberal judges in the nation.

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16. 144 Cong. Rec. S11872, S11878 (daily ed. Oct. 8, 1998) (Statement of Sen. Ashcroft) (available at 1998 WL 698670). During the Senate floor debate over Professor Fletcher's nomination, Republican senators also pointed to the Ninth Circuit's relatively high reversal rate in the Supreme Court as a justification for their strict scrutiny of Clinton's Ninth Circuit judicial nominees. *See e.g.* 144 Cong. Rec. at S11874 (daily ed. Oct. 8, 1998) (Statement of Sen. Hatch: "[T]hat circuit is out of line and out of control. . . . It is often reversed.") (available at 1998 WL 698670).

17. Barry Goode and James Duffy, nominated for California and Hawaii vacancies on the Ninth Circuit, respectively, were never scheduled for confirmation hearings or votes.

Shortly before Professor Fletcher's nomination in April 1995, the White House received word that some Republicans believed that an anti-nepotism statute applicable to federal court officials<sup>18</sup> barred him from serving on the same court as his mother. The Department of Justice's Office of Legal Counsel analyzed the statutory provision, and opined in two separate memoranda—one written prior to Professor Fletcher's nomination in 1995, and the other before his first hearing in 1996—that the provision did not apply to presidential appointments of federal judges.<sup>19</sup> These memoranda provided sufficient ground for the White House to proceed with the nomination, and for Senator Hatch to schedule a hearing.

Ultimately, however, the quagmire over the appointment required a political rather than a legal resolution. Senate Republicans offered to proceed with William Fletcher's nomination on two interdependent conditions: first, that his mother take senior status, and second, that the President nominate for her seat a candidate suggested by Republican Senator Slade Gorton of Washington. The plan, referred to by at least one newspaper as a scheme to "throw mama from the bench,"<sup>20</sup> would enable Republicans to balance Fletcher's appointment with a Republican appointee and ensure the

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18. 28 U.S.C. § 458 (prohibiting the appointment or employment of any court official "who is related by affinity or consanguinity within the degree of first cousin to any justice or judge" of the same court).

19. Memo. from Walter Dellinger, Asst. Atty. Gen., Off. of Leg. Counsel, U.S. Dept. of Justice, to Jack Quinn, Counsel to Pres. of U.S., *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges* (Dec. 18, 1995) (referring to Memo. from Richard Shiffrin, Dep. Asst. Atty. Gen., Off. of Leg. Counsel, U.S. Dept. of Justice, to Eleanor Acheson, Asst. Atty. Gen., *Applicability of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges* (Mar. 13, 1995)) (copy on file with author); see also Letter from Akhil Reed Amir, Southmayd Prof. of L., Yale L. Sch., John C. Jeffries Jr., Emerson G. Spies Prof. of L., U. of Va. L. Sch., Thomas G. Krattenmaker, Prof. of L., Marshall-Wythe Sch. of L., College of William & Mary, Daniel J. Meltzer, Prof. of L., Harvard L. Sch., John B. Oakley, Prof. of L., U. of Cal. at Davis Sch. of L., Thomas D. Rowe Jr., Prof. of L., Duke U. Sch. of L., Thomas O. Sargentich, Prof. of L., Washington College of L., Am. U., David L. Shapiro, William Nelson Cromwell Prof. of L., Harvard L. Sch., Girardeau A. Spann, Prof. of L., Georgetown U. L. Ctr. & Peter L. Strauss, Betts Prof. of L., Columbia U. Sch. of L., to Orrin G. Hatch, U.S. Sen. (May 3, 1996) (noting that the memorandum that accompanied it indicated that 28 U.S.C. § 458 "does not prohibit, and never was intended to prohibit, family members from sitting together as Article III judges") (copy on file with author).

20. See Joan Biskupic, *Panel Votes on Mother-Son Judgeships; Professor Approved After Liberal Parent Agrees to Semi-Retirement*, Wash. Post A3 (May 17, 1996).



retirement of one of the circuit's most liberal members. Democrats, on the other hand, would secure the appointment of a judge whose nomination would otherwise be stalled indefinitely, and would also retain on the bench a dependably liberal judge, albeit in a semi-retired capacity.

Although Professor Fletcher had a hearing in December 1995, and was reported out of committee in the spring of 1996 following the delivery of a letter from Judge Betty Fletcher to Senator Hatch, his nomination became a casualty of election-year politics at the end of the 104th Congress. Under the leadership of presidential contender Senator Robert Dole, Republican senators refused to vote on any Clinton appellate judicial nominees in 1996, and confirmed only seventeen district court nominees, an unusually low number of confirmations even for an election year.<sup>21</sup>

When Congress adjourned in the fall of 1996, Professor Fletcher's nomination was returned to the White House. Following Clinton's re-election, he re-nominated Fletcher, and the confirmation process started—or, more accurately, stalled—all over again. But this time, White House execution of the terms of the Ninth Circuit arrangement ultimately secured his confirmation.

Sixteen months after Professor Fletcher's second nomination, he was scheduled for his second Judiciary Committee hearing, and a month later, on May 21, 1998, he was voted out of committee. Republicans agreed to schedule a confirmation vote by the full Senate only after the President had gone forward with the candidacy of Washington Supreme Court Chief Justice Barbara Durham, Senator Gorton's choice to replace Judge Fletcher on the Ninth Circuit.<sup>22</sup> William Fletcher was confirmed by a fifty-seven to forty-one vote on October 8, 1998, three and a half years after his initial nomination.<sup>23</sup>

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21. In 1992, for example, the Democratically controlled Senate confirmed sixty-six of President George H. W. Bush's judicial nominees. *See* Goldman, et al., *supra* n. 6, at 233.

22. The White House viewed Justice Durham's judicial record as tough on criminal defendants but relatively moderate on civil matters, and notably supportive of women's rights, which made her an acceptable, if not ideal, compromise candidate.

23. The votes opposing Fletcher represented the largest block of votes against a confirmed federal judicial nominee since Supreme Court Justice Clarence Thomas was confirmed by a fifty-two to forty-eight vote in 1991. Henry Weinstein, *Berkeley Professor Wins Confirmation to Ninth Circuit Court*, L.A. Times A3 (Oct. 9, 1998).

Following the completion of the ABA and FBI investigations initiated several months earlier, the President then nominated Barbara Durham for Judge Betty Fletcher's seat on the Ninth Circuit.<sup>24</sup>

President Clinton's nomination of a Republican for a Ninth Circuit appellate judgeship was not unprecedented. With the exception of Ronald Reagan, every president since Franklin Roosevelt had made between two and four cross-party appointments to appellate judgeships, and all made a larger number of cross-party appointments to the district courts.<sup>25</sup> However, the bipartisan agreement that secured William Fletcher's confirmation was a unique and pivotal event during the Clinton presidency. No other appointment required "maternal sacrifice," as the *Wall Street Journal* described the condition of Betty Fletcher's retirement.<sup>26</sup> Moreover, although Clinton nominated a small number of Republican-appointed district court judges to appellate seats on the recommendation of Democratic home-state senators, the agreement with Senator Gorton about Professor Fletcher's appointment represented the first and only exchange of a Republican for a Democratic judge on a single court of appeals.

During the floor debate over Fletcher's nomination, Republican Senator Jeff Sessions of Alabama, whose own nomination as a federal district judge was defeated by Democrats during the Reagan administration, repeated a rhetorical question posed by Professor Fletcher in a 1991 op-ed piece on the Supreme Court nomination of Justice Clarence Thomas. "Does the Senate have the political will to insist that its constitutional advise and consent role become a working reality?" he asked his Republican colleagues. Quoting Fletcher again, Sessions challenged the Republican Senate "to persuade

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24. Pursuant to her request, the President withdrew Justice Durham's nomination in May of 1999, and substituted the nomination of Richard Tallman, Senator Gorton's next choice for the vacancy. Judge Tallman was confirmed by the Senate, and took his seat on the Ninth Circuit in 2000.

25. Sheldon Goldman, *Picking Federal Judges: Lower Court Selection From Roosevelt Through Reagan* 355 (Yale U. Press 1997) (Tbl. 9.2).

26. *Mother's Semiretirement to Aid Judicial Nominee*, Wall St. J. B5 (May 8, 1996).

the public that an insistence on full participation in choosing judges is not a usurpation of power.”<sup>27</sup>

Whether viewed as a usurpation of power or a legitimate exercise of the Senate’s constitutional duty to advise and consent, the circumstances of Professor Fletcher’s appointment to the Ninth Circuit demonstrate that divided government caused the politics of judicial selection after 1994 to result in unusual bipartisan compromises as well as the exercise of unilateral presidential powers. Perhaps emboldened by the President’s willingness to nominate a Republican for an appellate seat, other Republican senators attempted to broker one-for-one cross-party appellate judge agreements, most notably for the Fifth and Sixth Circuits, during Clinton’s second term. However, the White House rebuffed these overtures, and in both cases, Republican Senators prevented the confirmation of multiple appellate nominees from their circuits in response.

### CONCLUSION

The divided-government period of the Clinton presidency was characterized by unprecedented delays in confirming federal judicial nominees and intense partisan acrimony. However, opposing political forces produced creative strategies of circumvention and novel political compromises. Whether or not the struggle between the executive and legislative branches over Clinton judges reflected the balance of power intended by the founders, the author hopes that this chronicle of Clinton judicial appointments will contribute to public awareness of, and interest in, the important work entrusted to the federal courts of appeals.



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27. 144 Cong. Rec. S11872, S11874 (daily ed. Oct. 8, 1998) (Statement of Sen. Sessions) (available at 1998 WL 698670).

