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Carl Tobias  
1@1.com

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*Carl Tobias*

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## PRESIDENT CLINTON AND THE FEDERAL JUDICIARY

CARL TOBIAS\*

Four years ago, I examined the crucial duty to appoint federal judges that the Constitution imposes upon the President of the United States.<sup>1</sup> I observed that the Chief Executive nominates and, with the Senate's advice and consent, appoints these officers who serve for life and resolve controversies that involve Americans' most essential liberties. Because 1992 was an election year, I assessed the judicial selection record that President George Bush had compiled during his four years in office.

I found that the Bush Administration had named 182 lawyers to the federal bench. Nearly nineteen percent of those appointees were women and five and one-half percent were African-Americans. I observed that President Bush's judicial selection record surpassed that of President Ronald Reagan and was comparable to the record of President Jimmy Carter. I admonished that there was considerably more to choosing judges than simply counting the percentages of women and minorities named. For instance, some evidence indicated that the Bush Administration's female and minority appointees had political and philosophical viewpoints and judicial temperaments that closely resembled those of the judges whom they joined on the federal bench.

Now that another presidential election year has commenced, it is important to evaluate the record of choosing judges that President Bill Clinton has compiled. Moreover, the Clinton Administration's judicial selection record can be profitably compared with the campaign promises regarding judicial selection that Candidate Clinton made when he was running for the presidency and with the records of his predecessors.

Four years ago, the Democratic nominee pledged to name women and men who were highly intelligent, had balanced judicial temperament, and were committed to protecting individual rights in the Constitution while increasing gender and racial diversity on the bench.<sup>2</sup> During President Clinton's initial three

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\* Professor of Law, University of Montana. B.A., 1968, Duke University; LL.B., 1972, University of Virginia.

1. See Carl Tobias, *The President and the Federal Bench*, 1992 WIS. L. REV. 1329.

2. See, e.g., Bill Clinton, *Judiciary Suffers Racial, Sexual Lack of Balance*, NAT'L L.J., Nov. 2, 1992, at 15-16; *Bush v. Clinton: The Candidates on Legal Issues*, A.B.A. J., Oct. 1992, at 57-58; see also Stephen Labaton, *Clinton May Use Diversity Pledge to Remake Courts*, N.Y. TIMES, Mar. 8, 1993, at A1.

years in office, he has appointed 182 lawyers to the federal courts. Fifty-seven (thirty-one percent) of those judges are women and fifty-two (twenty-nine percent) are minorities.<sup>3</sup>

President Clinton's appointees have compiled the highest rankings for excellence by the American Bar Association since the ABA began rating candidates' qualifications more than four decades ago.<sup>4</sup> Nearly all of the appointees appeared to be extremely competent and to possess the requisite independence, intelligence, industriousness, and balanced judicial temperament that are critical to excellent service on the bench. For example, Judge Guido Calabresi served as Dean of the Yale Law School before his appointment to the Second Circuit, while Judge Diane Wood served as Deputy Assistant Attorney General in the Antitrust Division of the Justice Department before being named to the Seventh Circuit.

A significant percentage of the appointees had previously served as judicial officers either in the federal or state systems. For instance, Judge Pierre Leval was widely regarded as one of the preeminent federal district court judges before his elevation to the Second Circuit, while Judge Martha Daughtrey served with distinction on the Tennessee state courts before her appointment to the Sixth Circuit.

Competence seems to be the hallmark of the vast majority of judges whom President Clinton has named. Indeed, some observers have criticized the Chief Executive for failing to appoint attorneys whom they perceived to be more politically partisan, particularly as a counterbalance to the express intent of Presidents Reagan and Bush to make the courts more conservative by naming lawyers with explicit doctrinaire views.<sup>5</sup>

President Clinton has kept his campaign promise to name highly qualified jurists to the federal bench, although his ap-

3. See Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 *SMU L. REV.* 309, 314 (1996); Carl Tobias, *Increasing Balance on the Federal Bench*, 32 *HOUS. L. REV.* 137, 145 (1995); Carl Tobias, *Keeping the Covenant on the Federal Courts*, 47 *SMU L. REV.* 1861, 1866 (1994); see also Telephone Interview with Deborah Lewis, Alliance for Justice, Washington, D.C. (Mar. 7, 1995).

4. See Henry J. Reske, *Judicial Vacancies Declining*, *A.B.A. J.*, Jan. 1994, at 24; DEPARTMENT OF JUSTICE, CLINTON ADMINISTRATION JUDICIAL RECORD, ANALYSIS OF JUDICIAL NOMINATIONS (1994) (copy on file with author).

5. See, e.g., Ted Gest, *Disorder in the Courts? Left and Right Both Gripe About Clinton's Taste in Judges*, *U.S. NEWS & WORLD REP.*, Feb. 12, 1996, at 40; Joan Biskupic, *Clinton Avoids Activists in Judicial Selections*, *WASH. POST*, Oct. 24, 1995, at A1; see also Sheldon Goldman, *Reagan's Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image*, 66 *JUDICATURE* 335, 337 (1982) (affording Reagan intent); Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, *N.Y. TIMES*, Apr. 10, 1990, at A1 (affording Bush intent). See generally Sheldon Goldman, *Judicial Selection Under Clinton: A Mid-term Examination*, 78 *JUDICATURE* 276 (1995).

pointees have been judges for an insufficient period to ascertain exactly what type of judicial service they will ultimately render. The Clinton Administration has implemented a systematic, effective process for selecting nominees who have earned the highest ratings ever assigned by the ABA. The Chief Executive has dramatically enhanced gender and racial diversity on the federal courts and has apparently increased political balance. When members of the American public cast their votes for president in November, voters should remember the critical responsibility that presidents have for selecting Article III Judges.