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## The Bush Administration and Appeals Court Nominees

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# THE BUSH ADMINISTRATION AND APPEALS COURTS NOMINEES

Carl Tobias\*

On May 9, President George W. Bush announced his first set of nominees for the United States Courts of Appeals. With a White House ceremony which chief executives traditionally reserve for United States Supreme Court designees, the president introduced eleven individuals whom he proposed for vacancies on the federal intermediate appellate courts. Submitting a package of appeals court nominees might seem to be a relatively mundane exercise. However, the developments that led to Bush's recommendations, the staging of this event, and the candidates tendered actually reveal much about contemporary judicial selection, which is a critical feature of constitutional governance. For example, the determination that there should be a ceremony suggests the crucial symbolic and practical importance the nascent Bush Administration assigns to filling empty appellate court seats. The persons whom the president earlier considered but did not nominate on May 9 are similarly instructive.

These propositions mean that the initial batch of Bush Administration nominees for the appeals courts warrants analysis. This essay undertakes that effort. I first examine the background of the May 9th announcement. The essay then evaluates the process that the chief executive and his assistants used to nominate the candidates, as well as the qualifications of the people chosen and those individuals whom the president considered, yet decided against proposing. I next posit numerous lessons that can be derived from assessing the method that the chief executive and his staff employed to select the initial nominees and the persons nominated. The essay concludes with several recommendations for the future appointment of judges.

## I. THE ORIGINS AND DEVELOPMENT OF MODERN SELECTION

The historical developments that preceded President Bush's May 9 announcement of the eleven nominees may appear to deserve somewhat limited examination, partly because this background has received considerable treatment elsewhere.<sup>1</sup> However, rather comprehensive exploration is advisable, as that type

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<sup>1</sup> See, e.g., Carl Tobias, *Choosing Judges at the Close of the Clinton Administration*, 52 RUTGERS L. REV. 827 (2000); *Clinton's Judicial Legacy*, 84 JUDICATURE 224 (2001). See also MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* (2000); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997).

of analysis should inform appreciation of Bush Administration actions and modern judicial appointments. This section emphasizes the controversial Senate rejection of Circuit Judge Robert Bork for the Supreme Court in 1987 and applicable events since this incident, because many phenomena which characterize recent judicial selection can be traced to that confirmation dispute.

#### A. *Selection in the Carter Administration*

A small number of women and very few minorities served on the federal appellate or district courts when President Jimmy Carter won election during 1976.<sup>2</sup> He accorded the appointment of more female and minority judges a high priority and implemented several initiatives to realize this goal. For instance, the chief executive asked that senators search for, delineate, and recommend women and minorities and establish district court nominating panels which would identify and promote their candidacies, while he created the United States Circuit Judge Nominating Commission to identify and foster selection of female and minority appeals court judges.<sup>3</sup> Approximately one-sixth of the judges whom Carter named were women, and more than twenty percent were minorities.<sup>4</sup>

#### B. *Selection in the Reagan Administration*

When Ronald Reagan became president in 1980, he asserted that his election constituted a public mandate to move the judiciary in a politically conservative direction.<sup>5</sup> The chief executive appointed numerous judges with these ideological perspectives; however, he chose tiny numbers of female and minority attorneys. Indeed, fewer than two percent of the judges whom the president selected were African Americans.<sup>6</sup>

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<sup>2</sup> See Robert J. Lipshutz & Douglas B. Huron, *Achieving a More Representative Federal Judiciary*, 62 JUDICATURE 483 (1979); Elliot E. Slotnick, *Lowering the Bench or Raising It Higher?: Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POL'Y REV. 270, 271 (1983).

<sup>3</sup> See, e.g., LARRY C. BERKSON & SUSAN B. CARBON, THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES (1980); ALAN NEFF, THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES, AND CANDIDATES (1981); *Federal Judicial Selection: The Problems and Achievements of Carter's Merit Plan*, 62 JUDICATURE 463 (1979).

<sup>4</sup> See Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 322, 325 (1989); Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. REV. 1257, 1261. For more discussion of the Carter Administration, see GOLDMAN, *supra* note 1, at 236-84.

<sup>5</sup> See, e.g., DAVID M. O'BRIEN, JUDICIAL ROULETTE 60 (1988); Sheldon Goldman, *Reagan's Judicial Appointments at Mid-term: Shaping the Bench in His Own Image*, 66 JUDICATURE 334, 347 (1983).

<sup>6</sup> See Goldman, *supra* note 4, at 322, 325; Tobias, *supra* note 4, at 1269.

Perhaps most important to the issues treated in this essay was Reagan's 1987 choice of Judge Bork to replace retiring U.S. Supreme Court Justice Lewis F. Powell, Jr., because the controversial battle which ensued over Bork's confirmation substantially changed modern judicial selection, and the event's repercussions continue.<sup>7</sup> The sharply-contested nomination, and attempted confirmation, of Judge Bork help explain the increasingly partisan, contentious state of appointments.<sup>8</sup>

President Reagan's nomination of Judge Bork triggered a protracted, bitter confirmation fight, in part because many observers perceived the Supreme Court to be evenly divided along ideological lines.<sup>9</sup> The chief executive and Judge Bork's supporters contended that his service as solicitor general, as a member of the United States Court of Appeals for the D.C. Circuit, and as a respected professor at Yale Law School made Bork eminently qualified for the Supreme Court. The nominee's opponents argued that his views on numerous important issues were outside the mainstream of American jurisprudential thought. A majority of the American Bar Association Standing Committee on the Judiciary rated Bork as qualified, but some of the entity's members found him unqualified.<sup>10</sup> A broad range of interest groups waged public relations campaigns for and against Bork's candidacy and intensively lobbied senators. After contentious Judiciary Committee hearings and rancorous floor debate, the Senate rejected Bork by a significant margin.<sup>11</sup> Most senators who voted against Bork, and some members of the public, believed that his perspectives were too extreme. In contrast, senators who voted for the nominee and others in the public found that Bork was an exceptional choice, that the Senate had rejected him on ideological grounds, and that opponents had misrepresented the judge's record.

### C. *Selection in the Bush Administration*

After George Bush won the 1988 election, he promised to honor President Reagan's pledge by making the bench more conservative.<sup>12</sup> Bush chose numerous

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<sup>7</sup> See ETHAN BRONNER, *BATTLE FOR JUSTICE* (1989); STEPHEN CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994).

<sup>8</sup> See GERHARDT, *supra* note 1, at 76-77; PAUL SIMON, *ADVICE AND CONSENT: CLARENCE THOMAS, ROBERT BORK, AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES* (1992).

<sup>9</sup> See, e.g., BRONNER, *supra* note 7; CARTER, *supra* note 7; GERHARDT, *supra* note 1, at 71-73, 76-77, 125-26, 196-97, 219-21, 239-40; MARK GITENSTEIN, *MATTERS OF PRINCIPLE* (1992).

<sup>10</sup> See BRONNER, *supra* note 7, at 205; CARTER, *supra* note 7, at 163-64; GERHARDT, *supra* note 1, at 73. See also *infra* note 33 and accompanying text.

<sup>11</sup> See BRONNER, *supra* note 7, at 327; CARTER, *supra* note 7, at 124-25; GERHARDT, *supra* note 1, at 183. For more discussion of the Reagan Administration, see GOLDMAN, *supra* note 1, at 285-345; O'BRIEN, *supra* note 5, at 60-64.

<sup>12</sup> See, e.g., Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282 (1993) [hereinafter Goldman, *Final*]; Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294 (1991); Tobias, *supra* note

rather conservative members of the judiciary and comparatively few minorities, although he did appoint a significant number of women.<sup>13</sup> Quite relevant to this essay are many developments implicating judicial selection that seemingly derived from the Bork confirmation fight. For example, certain dynamics similar to those which attended the Bork controversy accompanied the divisive appointments process that ensued when President George Bush nominated D.C. Circuit Judge Clarence Thomas for the Supreme Court.<sup>14</sup> The nominee's advocates and opponents, particularly from interest groups, proffered certain arguments analogous to those presented during the dispute over Judge Bork.<sup>15</sup> Following tumultuous hearings, which included charges against the nominee by Professor Anita Hill, the Senate confirmed Thomas on a 52-48 vote.<sup>16</sup>

President Bush, as well as Republican and Democratic senators, apparently instituted efforts to increase cooperation in judicial selection after this controversial fight.<sup>17</sup> For instance, Justice David Souter's confirmation proceeded rather smoothly.<sup>18</sup> Nonetheless, when President Bush left the White House, there were approximately 100 federal court vacancies.<sup>19</sup> Democrats claimed that these openings resulted from the chief executive's failure to nominate at a steady pace individuals whom Democrats deemed acceptable.<sup>20</sup> In contrast, Republicans attributed the numerous empty seats to Democrats' inexpedient consideration of Bush Administration nominees.<sup>21</sup>

#### D. *Selection in the Clinton Administration*

When Bill Clinton captured the White House in 1992, some students of the federal judicial appointments process claimed that he emphasized competence and diversity and accorded political ideology less importance in appointing judges.<sup>22</sup>

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4, at 1270-74.

<sup>13</sup> See, e.g., Tobias, *supra* note 4, at 1270-74.

<sup>14</sup> See JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994); TIMOTHY PHELPS & HELEN WINTERITZ, *CAPITOL GAMES* (1997).

<sup>15</sup> See CARTER, *supra* note 7, at 137; GERHARDT, *supra* note 1, at 238-41.

<sup>16</sup> Goldman, *Final*, *supra* note 12, at 283.

<sup>17</sup> See *id.*; Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309, 314 (1996).

<sup>18</sup> See CARTER, *supra* note 7, at 81-82, 162; GERHARDT, *supra* note 1, at 73; Tobias, *supra* note 4, at 1273.

<sup>19</sup> VACANCIES IN THE FEDERAL JUDICIARY (1992). See also Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 265 (1999); Tobias, *supra* note 17, at 314.

<sup>20</sup> See Goldman, *Final*, *supra* note 12; Tobias, *supra* note 4, at 1273; Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477 (1991).

<sup>21</sup> *Id.*

<sup>22</sup> See Goldman & Slotnick, *supra* note 19; Tobias, *supra* note 17. See also Joan Biskupic, *Clinton Given Historic Opportunity to Transform Judiciary*, WASH. POST, Nov.

The president chose very talented lawyers who increased the bench's gender, racial, and political balance while naming unprecedented numbers of female and minority judges.<sup>23</sup>

During President Clinton's first year in office, judicial confirmation progressed somewhat slowly.<sup>24</sup> However, in 1994 the chief executive worked closely with the Democratically-controlled Senate, and this effort led to the approval of more than 100 judges.<sup>25</sup> After the Republican Party recaptured the Senate in 1994, the processing of judicial nominees slowed considerably.<sup>26</sup> Senator Orrin Hatch (R-Utah), who became the Judiciary Committee Chair, promised to confirm nominees who were in good health, competent, and understood the role of judges.<sup>27</sup> He pledged that the Committee would hold one hearing every month Congress was in session and would consider one appeals court, and five district court, nominees during each hearing.<sup>28</sup>

Despite this promise, processing remained quite slow and the Senate approved fewer than twenty judges in 1997, the initial year of Clinton's second term.<sup>29</sup> Democrats claimed that the confirmation pace could be ascribed to delayed Senate Judiciary Committee consideration and inexpeditious scheduling of floor debates and votes.<sup>30</sup> Republicans, for their part, asserted that Clinton submitted names erratically and that an insufficient number of lawyers tendered were acceptable to Republicans because, for example, the nominees might be "judicial activists."<sup>31</sup>

Accordingly, during 1997 there were some 100 vacancies on the appeals and district courts.<sup>32</sup> This situation prompted Chief Justice William H. Rehnquist and

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19, 1996, at A19.

<sup>23</sup> See, e.g., Goldman & Slotnick, *supra* note 19, at 276-77, 281-88; Tobias, *supra* note 1, at 839, 846.

<sup>24</sup> See Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254 (1997); Carl Tobias, *Keeping the Covenant on the Federal Courts*, 47 SMU L. REV. 1861 (1994). See also Tobias, *supra* note 1, at 829-47.

<sup>25</sup> See Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276 (1995); Carl Tobias, *Increasing Balance on the Federal Bench*, 32 HOUS. L. REV. 137 (1995).

<sup>26</sup> This was especially true in 1996, which was a presidential election year. See Goldman & Slotnick, *supra* note 24; Tobias, *supra* note 1, at 836-39; Tobias, *supra* note 25.

<sup>27</sup> See Goldman, *supra* note 25; Tobias, *supra* note 17, at 314-21; Neil A. Lewis, *New Chief of Judiciary Panel May Find an Early Test With Clinton*, N.Y. TIMES, Nov. 18, 1994, at A31.

<sup>28</sup> *Id.*

<sup>29</sup> See Goldman & Slotnick, *supra* note 24, at 265-68; Carl Tobias, *Fostering Balance on the Federal Courts*, 47 AM. U. L. REV. 935 (1998).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> VACANCIES IN THE FEDERAL JUDICIARY (1997). See also Goldman & Slotnick, *supra* note 19, at 267; Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741 (1997).

several national bar organizations to urge that the president and senators of both political parties institute measures which would expedite appointments.<sup>33</sup> These remonstrations apparently had a tonic effect, because the Senate confirmed 60 judges in 1998.<sup>34</sup> However, the pace of selection subsequently slowed. During 1999, President Clinton's impeachment significantly delayed processing.<sup>35</sup> Moreover, confirmation of judicial nominees proceeded quite slowly in 2000, as normally occurs during a presidential election year.<sup>36</sup> Thus, when President Bush was inaugurated in January 2001, more than 100 vacancies, including nearly 30 on the appeals courts, existed.<sup>37</sup>

## II. CURRENT JUDICIAL SELECTION

In the 2000 presidential election, Governor Bush secured a narrow electoral college victory and lost the popular vote. Moreover, the 2000 Congressional results left the Republican Party with a razor-thin Senate majority and, therefore, control of the Judiciary Committee that assumes major responsibility for the confirmation process. The Bush Administration assembled a judicial selection team which principally operated under the auspices of the White House Counsel's Office, in part because its members do not require Senate confirmation.<sup>38</sup> During March, Alberto Gonzales, Counsel to the President, announced that the administration would not solicit ABA ratings of candidates' qualifications before their nomination, a responsibility discharged by the Bar Association for a half-century.<sup>39</sup> Although

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<sup>33</sup> WILLIAM H. REHNQUIST, YEAR-END REPORT ON THE FEDERAL JUDICIARY (1997); Letter from N. Lee Cooper, ABA President, et al. to President William Jefferson Clinton & Senate Majority Leader Trent Lott (July 14, 1997), reprinted in 143 CONG. REC. S8046 (daily ed. July 24, 1997). See also Viveca Novak, *Empty-Bench Syndrome*, TIME, May 26, 1997, at 37.

<sup>34</sup> See Goldman & Slotnick, *supra* note 19, at 266; Tobias, *supra* note 1, at 841-44; Carl Tobias, *Leaving a Legacy on the Federal Courts*, 53 U. MIAMI L. REV. 315, 325-27 (1999).

<sup>35</sup> Tobias, *supra* note 1, at 844-47. See generally MICHAEL GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (2d ed. 2000); RICHARD POSNER, AN AFFAIR OF STATE (1999).

<sup>36</sup> See Sheldon Goldman et al., *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228 (2001); Carl Tobias, *Judicial Selection at the Clinton Administration's End*, 19 LAW & INEQ. 159 (2001).

<sup>37</sup> VACANCIES IN THE FEDERAL JUDICIARY (2000). See also Carl Tobias, *Dear President Bush*, 67 MO. L. REV. (forthcoming Mar. 2002); Nick Anderson, *Democrats Look to Battles After Ashcroft*, L.A. TIMES, Feb. 1, 2001, at A14.

<sup>38</sup> See Thomas Edsall, *White House Prepares Judicial Nominating Blitz*, WASH. POST, Apr. 25, 2001, at 29A; Neil A. Lewis, *President Moves Quickly on Judgeships*, N.Y. TIMES, Mar. 11, 2001, § 1, at 34.

<sup>39</sup> Letter from Alberto Gonzales, Counsel to the President, to Martha W. Barnett, President, American Bar Association (Mar. 22, 2001), at <http://www.whitehouse.gov/news/releases/2001/03/20010322-5.html>. See also AMERICAN BAR ASS'N, THE ABA STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS (1991);

the chief executive and his aides privately conducted much work, which culminated in the May 9 announcement of eleven appellate court nominees, it is possible to construct a rather reliable descriptive account from newspaper and other sources, such as individuals who are familiar with the developments that transpired.

The judicial selection team, which included Gonzales, Tim Flanigan, the Deputy White House Counsel, and other lawyers in this office, accorded the choice of federal judges, especially for the appeals courts, a high priority.<sup>40</sup> The team, in conjunction with President Bush, articulated the administration's appointments goals and developed effective procedures for securing those objectives. The chief executive requested that possible nominees have great experience and intellect as well as "appreciate the separation of powers and understand and believe in judicial restraint."<sup>41</sup> The office developed lists of candidates for each vacant seat primarily by contacting: senators and additional political leaders from the regions affected; organizations, such as the Federalist Society, with strong interests in judicial selection; and judges, attorneys and others who might be familiar with the professional qualifications or personal qualities of individuals under consideration.<sup>42</sup> Once the team narrowed the lists of potential nominees, it invited those who remained to interview in Washington, D.C. Gonzales stated: "we ask them questions about their philosophy . . . how do they construe statutes, how do they resolve disputes and what they believe is the appropriate role of judges," observing that President Bush agrees that the "role of judges should be fairly limited."<sup>43</sup>

The team then selected finalists whom it recommended to the chief executive. If the president concurred and the Federal Bureau of Investigation (FBI) "background check" was positive, the individual received nomination. During the spring, various media accounts reported that the White House was considering the possible nomination of many persons to the appeals courts.<sup>44</sup> On May 9, the chief executive nominated numerous people mentioned; however, he did not choose

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Terry Carter, *Squeeze Play: Bush Acts to Limit ABA Role in Screening Judicial Nominations*, A.B.A. J., May, 2001, at 18.

<sup>40</sup> Edsall, *supra* note 38, at 29A.

<sup>41</sup> See David Savage, *Bush Picks 11 for Federal Bench*, L.A. TIMES, May 10, 2001, at A1; Deirdre Shesgreen, *White House Begins Work on Filling Judgeships; Appointments Could Transcend Tax Cuts as Bush's Legacy*, ST. LOUIS POST-DISPATCH, Mar. 4, 2001, at A5.

<sup>42</sup> See Amy Bach, *Movin' on Up With the Federalist Society: How the Right Rears Its Lawyers*, THE NATION, Oct. 1, 2001, at 11; Terry Carter, *The In Crowd*, 87 A.B.A. J. 46 (Sept. 2001); Edsall, *supra* note 38, at 29A; Crystal Nix Hines, *Young Liberal Law Group is Expanding*, N.Y. TIMES, June 1, 2001, at A17; Lewis, *supra* note 38, at 34.

<sup>43</sup> Lewis, *supra* note 32. See also Thomas Edsall, *Democrats Push Bush for Input on Judges*, WASH. POST, Apr. 28, 2001, at A4; Amy Goldstein, *Bush Will Nominate 11 U.S. Judges*, WASH. POST, May 9, 2001, at A1; *supra* note 41 and accompanying text; *infra* note 62 and accompanying text.

<sup>44</sup> See generally *supra* note 43 and accompanying text.



several candidates whom the press reports discussed.<sup>45</sup>

President Bush nominated to the D.C. Circuit John Roberts, a former deputy solicitor general and law clerk to Chief Justice Rehnquist, and Miguel Estrada, a former assistant to the solicitor general and clerk to Justice Anthony Kennedy, and the first Latino proposed for that court.<sup>46</sup> The chief executive recommended the elevation to the Second Circuit of Barrington Parker, Jr., an African American whom Clinton named to the Southern District of New York.<sup>47</sup> The president chose for the Fourth Circuit: Roger Gregory, an African American whom Clinton had given a recess appointment; Terrence Boyle, chief judge of the Eastern District of North Carolina and a former staffer for Senator Jesse Helms (R-N.C.); and Dennis Shedd, a judge on the District of South Carolina and a one-time aide to Senator Strom Thurmond (R-S.C.).<sup>48</sup> The chief executive nominated to the Fifth Circuit Edith Brown Clement, who is presently a judge in the Eastern District of Louisiana, and Priscilla Owen, who is now a Texas Supreme Court justice.<sup>49</sup> For the Sixth Circuit the chief executive selected Jeffrey Sutton, who enjoys a national reputation for litigating on behalf of states' rights, and Deborah Cook, an Ohio Supreme Court justice.<sup>50</sup> President Bush nominated to the Tenth Circuit Michael McConnell, a former clerk to Justice William Brennan and a law professor at the University of Utah.<sup>51</sup> In short, the nominees included five current federal judges and two state Supreme Court justices; two African Americans, one Latino and three women; and four experienced Supreme Court advocates.

Several candidates who had received considerable press coverage as potential nominees were conspicuously absent from the list of eleven.<sup>52</sup> They included two possibilities for the Ninth Circuit: Representative Christopher Cox (R-Cal.), an influential member of Congress; and Carolyn Kuhl, a state court judge in Los Angeles and former Justice Department lawyer in the Reagan Administration.<sup>53</sup> Another was Peter Keisler, a former law clerk to Justice Kennedy and Judge Bork, who was mentioned for possible nomination to the Fourth Circuit.<sup>54</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> See Savage, *supra* note 41; *No Rush to Judges; George W. Bush's Nominations for Circuit Court of Appeals Judges*, THE NATION, June 4, 2001, at 4 (hereinafter *No Rush to Judges*).

<sup>47</sup> Goldstein, *supra* note 43, at A1.

<sup>48</sup> *No Rush to Judges*, *supra* note 46, at 4.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*; Savage, *supra* note 41.

<sup>52</sup> Savage, *supra* note 41.

<sup>53</sup> See Neil A. Lewis, *Bush to Nominate 11 to Judgeships*, N.Y. TIMES, May 9, 2001, at A24; Savage, *supra* note 41. See also S.J. Cahn, *Cox Passes on Judicial Seat*, L.A. TIMES, May 26, 2001, at A1; Henry Weinstein, *Rep. Cox and Jurist Carolyn Kuhl Called Likely Nominees*, L.A. TIMES, Apr. 5, 2001, at A1. For further discussion of Carolyn Kuhl's nomination, see *infra* note 80.

<sup>54</sup> *Id.* See also David L. Greene & Thomas Healy, *Bush Sends Judge List to Senate*,

President Bush's remarks in announcing the eleven nominees suggest much about the administration's views of federal judicial selection. The chief executive first acknowledged the critical significance of the duty assigned to him.<sup>55</sup> Bush observed that a president assumes few responsibilities greater than nominating federal judges and that the Constitution and the nation require this power's wise exercise.<sup>56</sup> Members of the bench serve for life in positions of substantial influence and respect, while they are entrusted with the law's authority and majesty.<sup>57</sup>

The chief executive then extolled the qualifications possessed by his nominees. The president asserted that "all have sterling credentials and have met high standards of legal training, temperament and judgment."<sup>58</sup> He further described the nominees:

Four of them serve as United States district judges, all four confirmed by unanimous votes. Two others are sitting judges on State supreme courts. Four have served as law clerks in the Supreme Court of the United States. One has served here as an Associate Counsel to the President. One already holds the position for which I nominate him, by recess appointment of President Clinton.<sup>59</sup>

He characterized the nominees as "individuals of experience and character . . . [who] come from diverse backgrounds and will bring a wide range of experience to the bench."<sup>60</sup> Bush claimed to have tendered the person's names fully confident that they would "satisfy any test of . . . merit" while asserting that those selected "command broad, bipartisan support."<sup>61</sup>

Bush next capitalized on this opportunity to outline his nomination criteria, stating that the people chosen would be of the "highest caliber" and would "clearly understand . . . that the judge's role is to interpret the law, not to legislate from the bench."<sup>62</sup> Bush contended that his nominees would "exercise not the will of men, but the judgment of law" and would appreciate the difference, thereby enabling them to defend constitutional rights, enforce statutes, and dispense justice.<sup>63</sup>

The president concluded by elaborating on the process employed and reflecting

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BALT. SUN, May 10, 2001, at 1A; Neil A. Lewis, *Washington Talk: Road to Federal Bench Gets Bumpier in Senate*, N.Y. TIMES, June 26, 2001, at A16.

<sup>55</sup> PRESIDENT'S REMARKS ANNOUNCING NOMINATIONS FOR THE FEDERAL JUDICIARY, WEEKLY COMP. PRES. DOC. (May 9, 2001) [hereinafter PRESIDENT'S REMARKS].

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* See also *supra* notes 41, 43 and accompanying text.

<sup>63</sup> PRESIDENT'S REMARKS, *supra* note 55.

on the future. He stated that the administration had continued a constitutional process, which implicates the federal government's three branches, partly because it "sought and received advice from Senators of both parties."<sup>64</sup> The chief executive said that he forwarded the nominees in good faith, trusting the Senate also to operate in good faith.<sup>65</sup> The president admonished that the confirmation system had recently been diverted to other ends, resulting in battles which bore little relationship to the nominee's merits.<sup>66</sup> Bush characterized this activity as harmful "for the Senate, for our courts [and] the country."<sup>67</sup> He urged senators from each political party to reject the past bitterness and provide fair hearings and prompt votes for all nominees, returning "civility and dignity to the confirmation process."<sup>68</sup> Bush reminded observers that there were more than 100 federal court vacancies and that these openings cause "backlogs, frustration and delay of justice."<sup>69</sup>

### III. LESSONS

Numerous lessons can be derived from evaluating the selection procedures which ultimately led to President George W. Bush's nomination of the eleven individuals for the federal appeals courts and from examining the qualifications of the people designated. The system that culminated in the submission of these nominees, the persons chosen, and individuals considered but not proposed concomitantly yield instructive insights on contemporary federal judicial selection.

#### A. *The Bush Administration*

The process implemented and applied, the people nominated, and those considered yet not forwarded inform understanding of the nascent Bush Administration and its perspectives on judicial appointments. Numerous phenomena suggest that the president and his staff who are responsible for identifying candidates generally possess rather sophisticated appreciation of the modern selection process. Perhaps most telling was the ability to assemble less than four months after inauguration eleven highly competent appeals court nominees, who are diverse in terms of race, gender and political views, and who, if confirmed, would cause ten of the twelve regional circuits to have a majority of active Republican appointees.<sup>70</sup> Other factors manifest similarly sophisticated

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Insofar as judges reflect the views of appointing presidents, having a majority is critical to the *en banc* process, which essentially has responsibility for the law of the circuit. See Warren Richey, *Federal Bench at a Tipping Point*, CHRISTIAN SCIENCE MONITOR, May 9,

comprehension of appointments. These are: the expeditious installation of an experienced judicial selection team in the White House Counsel Office; the devotion of substantial resources to the endeavor; the enunciation of clear goals and the development of effective procedures to realize them; the establishment of priorities; and the apparent amenability to capitalizing on the successes and failures of past efforts through dependence on efficacious measures, such as consultation. They also include a willingness to compromise by submitting Clinton appointees and considering, but not nominating, several persons who provoked too much controversy, while tendering a few quite conservative people.

The practices instituted and employed and the individuals chosen specifically reveal much about the Bush Administration. They indicate that the chief executive and those assistants who work on judicial selection understand the substantial symbolic, practical and political importance of the federal judiciary as a general matter, and the appeals courts in particular. For example, reliance on a White House ceremony historically used to announce Supreme Court nominees when introducing the eleven persons shows the great significance accorded by Bush and his aides to appellate court selection and their appreciation of the critical roles which the media and public opinion play.<sup>71</sup> The process and the people chosen indicate that the chief executive and White House personnel consider the regional circuits essentially the courts of last resort in their areas because the Supreme Court hears so few appeals.<sup>72</sup> This phenomenon is accentuated by the perception that appellate judges increasingly resolve highly controversial social policy issues, such as those involving abortion, affirmative action, public school prayer and federalism.<sup>73</sup>

The procedures deployed and the nominees themselves concomitantly suggest that the Bush Administration comprehends the political value of judicial selection. These appointments enable the president to leave a legacy by naming judges who will decide cases long after the chief executive has completed his service.<sup>74</sup> The process also provides a relatively cost-free means of cultivating conservative

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2001, at 1; *No Rush to Judges*, *supra* note 46. See also Michael Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29 (1989).

<sup>71</sup> See *supra* notes 46-69 and accompanying text. See also CARTER, *supra* note 7, at 13-20, 25-31, 37-53, 166-69, 192-95; GERHARDT, *supra* note 1, at 212-49.

<sup>72</sup> See THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL 17 (1994); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403 (1997); Neil A. Lewis, *Bush to Reveal First Judicial Choices Soon*, N.Y. TIMES, Apr. 24, 2001, at A17.

<sup>73</sup> See DONALD SONGER ET AL., CONTINUITY AND CHANGE ON THE U.S. COURTS OF APPEALS (2000); Susan B. Haire et al., *The Voting Behavior of Clinton's Courts of Appeals Appointees*, 84 JUDICATURE 274 (2001); Richey, *supra* note 47. *But see* Savage, *supra* note 70.

<sup>74</sup> See, e.g., GERHARDT, *supra* note 1, at 100-01; Tobias, *supra* note 34; Warren Richey, *Bush Pleas for New Judges, But So Far It's Hardball*, CHRISTIAN SCIENCE MONITOR, May 11, 2001, at 2; Shesgreen, *supra* note 41.

constituencies. For example, the president can solidify his political base when he nominates people with those views; even if they are not confirmed, the chief executive can claim that he attempted to appoint them.

### B. *Modern Selection*

The practices which the Bush Administration implemented and employed and the persons whom the chief executive chose also inform appreciation of contemporary federal judicial selection while affording peculiarly salient insights on the norms, rules and practices which accompany court appointments today.<sup>75</sup> The procedures used and the nominees announced reaffirm the strength of numerous longstanding traditions and confirm the existence and growth of several modern ones.

One clear illustration of conventional understandings is the substantial power to influence the process exercised both by the chief executive as well as the Senate and individual senators, especially senators who represent the state in which judges would sit.<sup>76</sup> Presidential power finds expression in the confirmation presumption that attends nomination and the choice of several quite conservative attorneys among the eleven.<sup>77</sup> These lawyers' inclusion concomitantly honors the tradition that the chief executive may propose individuals whose political views ostensibly resemble his, even as Bush evinced willingness to compromise on this issue by tendering a few moderate nominees.<sup>78</sup> The Fourth Circuit most strikingly evidences Senate power. The nominees, who are sitting district judges in North Carolina and South Carolina, had been aides of the senior Republican senators from those states, while Virginia's Republican senators publicly urged Bush to nominate Judge Roger Gregory.<sup>79</sup> In comparison, the president withheld Peter Keisler's name for that court, partly because the chief executive did not consult the Democratic senators from Maryland where the opening arose.<sup>80</sup> Judge Gregory shows how nominees can be agents for themselves. The jurist had already served on the Fourth Circuit for six months under a recess appointment from President Clinton. Moreover,

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<sup>75</sup> GERHARDT, *supra* note 1; GOLDMAN, *supra* note 1.

<sup>76</sup> See, e.g., GERHARDT, *supra* note 1, at 135-79.

<sup>77</sup> GERHARDT, *supra* note 1, at 81-134; *supra* notes 46, 62 and accompanying text; *supra* notes 41-53.

<sup>78</sup> GERHARDT, *supra* note 1, at 81.

<sup>79</sup> See Jonathan Groner & Jonathan Ringel, *Judicial Nominee Horsetrading Heats Up as Confirmation Process Gets Weighed*, AM. LAW. MEDIA, Sept. 4, 2001; Brooke A. Masters, *Battle Brewing Over 4th Circuit Nominees*, WASH. POST, May 5, 2001, at A6; Savage, *supra* note 41.

<sup>80</sup> See *supra* note 54. A similar lack of consultation with California's Democratic senators seems to explain the decision not to nominate Christopher Cox or Carolyn Kuhl on May 9th. See *supra* note 53; see also David G. Savage, *Bush to Name L.A. Judge to 9th Circuit*, L.A. TIMES, June 22, 2001, at A12.

Virginia's senators may have been reluctant to oppose the first African American appointee to the appellate court which includes the largest percentage of African American residents.<sup>81</sup> Maryland's senators correspondingly emphasized that Peter Keisler was neither a member of the Maryland Bar nor practiced law there.<sup>82</sup>

This process and the people nominated also confirm the rise and development of certain newer conventions and norms. For instance, the group of nominees evidence the federal judiciary's increasing "professionalization" in the sense that persons selected possess prior judicial experience.<sup>83</sup> The package concomitantly evinces the practice of elevation to the appellate bench from the state courts and other federal judicial positions — primarily district, but also bankruptcy and magistrate, judgeships.<sup>84</sup> The individuals nominated, and Bush's characterization of their credentials, similarly suggest that those who receive nomination to the appeals courts must satisfy a quite high standard of competence. These qualifications include previous judicial service, Supreme Court or appellate clerkships, and being a Supreme Court advocate. Moreover, the names submitted indicate that a contemporary president's nominees must be diverse in terms of race and gender and even political views, particularly when government is divided.<sup>85</sup> Furthermore, several factors attest to the important role of interest groups. These include the apparent influence exerted on the nomination process by the Federalist Society as well as affiliation with, or membership in, this organization of many on the White House selection team and of some nominees.<sup>86</sup>

The chief executive's remarks in announcing the eleven persons correspondingly reveal modern constraints on the process. For example, his comments indicate that presidents must be perceived as conciliatory, bipartisan, moderate and willing to compromise. Bush's statements also show that recent chief executives have developed a standard litany which they seem obligated to recite. For instance, these presidents must champion a civil, dignified confirmation process as well as fair hearings and final votes on all nominees for the good of the Senate, the judiciary and the nation because partisan contentiousness erodes respect for

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<sup>81</sup> See Masters, *supra* note 79; Alison Mitchell, *Senators Confirm 3 Judges, Including Once-Stalled Black*, N.Y. TIMES, July 21, 2001, at A16.

<sup>82</sup> See, e.g., Greene & Healy, *supra* note 54; Masters, *supra* note 79.

<sup>83</sup> See, e.g., Goldman et al., *supra* note 36, at 241; Goldman & Slotnick, *supra* note 24, at 259.

<sup>84</sup> See *supra* note 56 and accompanying text. President Clinton elevated several Republican appointees, including Judge Sonia Sotomayor and Judge Ann Claire Williams. See Tobias, *supra* note 1, at 842, 846.

<sup>85</sup> See *supra* note 57 and accompanying text. See also Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527 (1998).

<sup>86</sup> See *supra* note 42. Efforts to shape the debate by commenting on candidates before and after nomination also evince the groups' influence. See, e.g., Jonathan Groner, *Left Builds Case Against Bush Judges*, BROWARD DAILY BUS. REV., June 5, 2001, at 1; Richey, *supra* note 70; Savage, *supra* note 41.

participants and the process and because vacancies create backlogs and delay justice.<sup>87</sup>

#### IV. SUGGESTIONS FOR THE FUTURE

This analysis suggests that the procedures employed by President Bush and his aides in tendering the first eleven appeals court nominees and the candidates submitted display much Bush Administration appreciation for contemporary appellate selection. However, subsequent developments, especially the decision of Senator James Jeffords (R-Vt.) to become an independent which accorded the Democratic Party a Senate majority,<sup>88</sup> have dramatically altered the dynamics of judicial appointments. If the president wants to facilitate the selection process, he should consider several possibilities.

One important concept will be bipartisanship. The chief executive's inclusion of two Clinton appointees among the initial eleven nominees is illustrative.<sup>89</sup> Other examples are agreements among leaders in specific states that Democrats may recommend some district court candidates<sup>90</sup> and in Congress that the party might propose a percentage of nominees.<sup>91</sup> Closely related is the notion of compromise, which the first package of nominees exemplified. For instance, the decision to omit, or delay, nomination of candidates who might prove controversial, particularly by engendering opposition from home-state senators, was advisable in May and could prove even more important in the future.<sup>92</sup>

Another practice that has traditionally expedited the judicial selection process is consultation. For example, the chief executive indicated that he had secured advice on individual candidates before their formal nomination from senators of both political parties.<sup>93</sup> Bush should also seek similar future input from Senator Thomas Daschle (D-S.D.), the Senate Majority Leader; Senator Patrick Leahy (D-

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<sup>87</sup> Reversed White House and Senate party control has led each to adopt the other's former ideas; Republicans now urge prompt votes on, and Democrats urge full scrutiny of, all nominees.

<sup>88</sup> See, e.g., Groner, *supra* note 62; Jeffords' Switch Cramps Bush's Judiciary Plans, *TIMES-PICAYUNE* (New Orleans), May 30, 2001, at 1.

<sup>89</sup> They were Judges Gregory and Parker. See *supra* notes 43, 56, 81 and accompanying text.

<sup>90</sup> See Tony Batt, *With Feeling and Fealty, Reid Counsel Helps Guide Judges Through Senate*, *LAS VEGAS REV.-J.*, Aug. 26, 2001, at 1F; Carl Tobias, *Judicial Choices: A Bipartisan Way*, *NAT'L L. J.*, Mar. 12, 2001, at A23.

<sup>91</sup> This idea might be informal or formal. For example, Congress could pass a judgeships bill, which would authorize the 60 new judicial positions that the Judicial Conference has recommended to Congress. See Report of the Proceedings of the Judicial Conference of the U.S., 1999 OFFICE OF PUBLIC AFFAIRS 21-23. See also Tobias, *supra* note 1, at 853; Tobias, *supra* note 32, at 749, 753.

<sup>92</sup> See *supra* notes 53-54, 80 and accompanying text.

<sup>93</sup> See *supra* note 64 and accompanying text.

Vt.) the Senate Judiciary Committee Chair; and individual senators, especially who represent those areas in which judges will be stationed.

The president as well should continue and expand the practice of searching for, identifying, and nominating the most highly competent individuals he can find. The initial eleven nominees, who included five federal judges, two state Supreme Court justices, and four former High Court clerks, demonstrated the type of qualifications that candidates should possess. These characteristics, thus, encompass industriousness, intelligence, independence, and balanced judicial temperament.

Certain propositions above suggest that the chief executive should reassess the significance he attaches to nominees' ideological views. For instance, neither the 2000 presidential election results nor the Senate returns constituted a resounding mandate for making the bench very conservative. Moreover, Democratic control of the Senate will complicate efforts to name jurists with these perspectives. Bush, therefore, might want to consider compromising somewhat on the political views of the candidates he tenders, an idea that the first group of nominees may evince.

#### CONCLUSION

On May 9, President Bush submitted his initial package of nominees for the federal appellate courts. Assessment of the practices applied and the eleven individuals chosen reveals much about the Bush Administration's perspectives on federal judicial selection and about contemporary appointments. If the chief executive and his assistants who are responsible for choosing nominees adopt the suggestions proffered, they should be able to facilitate the selection process.