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# JUSTICE HELD HOSTAGE

## *POLITICS AND SELECTING FEDERAL JUDGES*

THE REPORT OF THE CITIZENS FOR INDEPENDENT COURTS  
TASK FORCE ON FEDERAL JUDICIAL SELECTION

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# TASK FORCE RECOMMENDATIONS

## RECOMMENDATIONS FOR EXECUTIVE AND LEGISLATIVE BRANCH REVIEWERS ON IDEOLOGY IN FEDERAL JUDICIAL SELECTION

1. Candidates for judgeships should be committed to deciding cases based on the law and facts of particular cases, without the intrusion of any rigid ideological precommitments to certain results or approaches to the law.
2. Reviewers should investigate a candidate's experience, qualifications, temperament, character, and general views of the law and of the judicial role. Selecting a federal judge is not just a matter of picking a legal technician, for a person's judgments may well reflect one's broad values and commitments.
3. Reviewers must refrain from asking candidates for particular precommitments about unresolved cases or issues that may come before them as judges.
4. The limit on questions seeking precommitments should be applied by reviewers in a common-sense fashion. In particular, this limit should not be allowed to prevent a fully deliberative investigation into the backgrounds, qualifications, and judicial philosophies of candidates for judgeships.

5. The limit on questions seeking precommitments should be respected equally by the president and other executive branch reviewers as well as by senators and other legislative branch reviewers, despite differences in the roles played by the two branches in the appointment process.
6. The limit on questions seeking precommitments should apply with respect to candidates for courts at all levels of the federal judiciary.
7. Reviewers seeking to assess a candidate's views should exercise caution when evaluating a person's current or former clients, memberships, and writings or speeches.
8. The value of judicial independence is consistent with pursuing diversity on the federal bench.
9. The value of judicial independence is consistent with active involvement by bar associations in the selection process.

#### RECOMMENDATIONS FOR EXECUTIVE AND LEGISLATIVE BRANCHES ON DELAY IN FEDERAL JUDICIAL SELECTION

1. The president and other executive branch officials should make it a high priority to choose nominees for federal judgeships in a more expeditious manner.
2. The president and other executive branch officials should routinely engage in advance planning for possible vacancies on the federal bench. Such advance planning should include developing lists of available, qualified candidates for judgeships, while coordinating early in the process with concerned senators.
3. Senators and other legislative branch officials should make it a high priority to take final action on nominees in a more expeditious manner.

4. Once a nomination is made, the Senate process should proceed expeditiously to a committee hearing, committee review and voting, and floor consideration and voting. The Task Force is especially concerned about the use of holds by individual senators that have the effect of preventing collective deliberation about and voting on candidates, either in committee or on the Senate floor. Respect for the views of individual senators, while vital, should not be allowed to undermine collective decision-making in an open, deliberative process.
5. Both executive and legislative branch officials should avoid engaging in delays to obtain strategic advantage during the judicial selection process.
6. Both executive and legislative branch officials should devote adequate staff resources to the task of reviewing candidates for federal judgeships so that the process is not delayed due to lack of staff.
7. Both executive and legislative branch officials should make decisions about a candidate in light of the person's own merits. Such decisions should not be linked with unrelated business that is the subject of bargaining between the legislative and executive branches of government.
8. The Task Force endorses as aspirational ideals the time-related goals set forth in the Miller Center Report, the most recent prior study of delay in federal judicial selection. The goals are the following: nominations within 180 days of vacancies and confirmations within 60 days of nominations—for an average total of 240 days, or about eight months. By endorsing these goals, the Task Force underscores the need for executive and legislative branch officials to make strong commitments to reversing the trend of increasing delay in federal judicial selection.
9. Public records that provide reliable and meaningful information about the federal judicial selection process should be maintained, regularly updated, and made easily accessible to all persons wishing to study such issues as delay in the process. It is the responsibility of executive and legislative branch officials to see that these steps are taken as soon as possible.

10. The data on judicial appointments show that the average number of days between nomination and final action for women is greater than the number of days for men. (Adequate data on race of nominees were not available.) We recommend that the responsible officials address this matter to assure that candidates for judgeships are not treated differently based on their gender.

# REPORT OF THE TASK FORCE ON FEDERAL JUDICIAL SELECTION

## INTRODUCTION

This report of Citizens for Independent Courts' Task Force on Federal Judicial Selection follows a distinguished line of recent blue-ribbon studies of the federal courts and federal judicial selection in particular."<sup>1</sup> It is striking that, despite the earlier reports' powerful calls for reform, very little has changed in the federal judicial selection process.<sup>2</sup> Indeed, there is scant evidence that officials in charge of judicial selection have taken seriously the critiques that have been offered.<sup>3</sup> The Task Force strongly believes that the pattern of inaction must be broken.

In particular, executive and legislative branch officials responsible for judicial selection—the president, the chair and members of the Senate Committee on the Judiciary, the Senate majority leader, and others—have a pressing responsibility both to moderate the role of partisan ideology and to reverse the trend of increasing delay in order to promote the independence of the federal courts. The purpose of our report is not to criticize or second-guess any particular administration or Congress. Rather, we suggest what we consider, after careful deliberation, to be in the best interests of the Constitution, the constitutional actors, and the public, which relies on the federal courts to resolve important disputes. We call upon present

and future officials in the executive and legislative branches to react publicly to the proposals we put forward, for such an open dialogue would benefit the process and the public.

After discussing the background of our central concerns about moderating the role of partisan ideology and decreasing delay in federal judicial selection, we will consider each matter in turn.

## I. BACKGROUND: CONTEMPORARY CONFLICTS ABOUT FEDERAL JUDICIAL SELECTION

In the last few years, a number of senators have complained that at least some of President Clinton's judicial nominees have been unduly activist in their orientation toward judging. Critics of the Senate have argued that legislative branch actors have been unacceptably partisan in their opposition to the administration's nominees. Others have claimed that President Clinton has nominated excessively conservative judges largely in response to political pressures. These controversies have not been confined to official actors, for private interest groups also have been deeply involved in the judicial selection process.

Moreover, conflicts have arisen concerning the increasing amount of time consumed by the selection process. Some have charged that the Senate's leadership has indulged in strategies of delay in order to support partisan views. Others have alleged that the president has shown insufficient attention to the problem of filling judicial vacancies in an expeditious manner.<sup>4</sup>

What the country has recently witnessed, therefore, is heightened partisan wrangling about judicial selection.<sup>5</sup> In the Task Force's view, it is time to lower the temperature of the debate considerably. The responsible officials need to move away from a perspective of short-term political advantage toward a longer-term effort to improve the process in the name of good government.

One should bear in mind that current debates are not entirely new. Indeed, this decade's partisan conflicts about judicial appointments are reminiscent of those of the last decade. During the 1980s, Republicans assailed Democratic opposition to President Reagan's nominations, notably including that of Robert Bork to the Supreme Court in 1987. During the 1990s, Democrats

have decried the Republican Senate's handling of President Clinton's nominees, especially after power in Congress shifted away from the Democrats in 1995.

We encourage executive and legislative branch officials responsible for federal judicial selection to move beyond the stalemate created by these partisan charges and countercharges. The highly political "blame game" does not serve the values of judicial quality, impartiality, and independence that the involved actors should promote.<sup>6</sup>

The nomination and confirmation of federal judges requires careful, on-the-merits deliberation by the executive and legislative branches, separately as well as together. The political branches have the important constitutional responsibility thoughtfully to review the backgrounds, qualifications, and judicial philosophies of persons considered for the federal bench. At the same time, the selection process needs to show greater respect for the principle of judicial independence, which is among the most fundamental underpinnings of constitutionalism in the United States. The core of judicial independence is decisional independence, which is the principle that judges must be free to make decisions independently, without regard to outside pressure or any obligation other than to the governing law.

Decisional independence is protected by the "good behavior" clause of Article III of the U.S. Constitution, which guarantees federal judges continued tenure during good behavior.<sup>7</sup> This protection frees judges to make decisions without having to face elections or other challenges to their tenure resulting from unpopular decisions. Once in office, federal judges can retain their positions for life, subject only to possible removal following impeachment and conviction for "treason, bribery, and other high crimes and misdemeanors."<sup>8</sup> In addition, the Constitution guarantees that federal judges are to receive a compensation that shall not be diminished during their continuance in office.<sup>9</sup>

Chief Justice Rehnquist has stated that the independent judiciary is one of the "crown jewels" of the nation's system of government.<sup>10</sup> Certainly, judicial independence is an essential ingredient of the protection of individual liberty and equality in our constitutional system.<sup>11</sup> Moreover, the independent judiciary checks the legislative and executive branches of the federal government, thereby helping to maintain our constitutional commitments both to separation of powers at the national level and to federalism in nation-state relations.

The Task Force seeks to focus public attention on the need for the

key actors in the executive and legislative branches to respect judicial independence by moderating the role of partisan ideology and decreasing the delay involved in judicial appointments. In the Task Force's view, the major way to address concerns about ideology and delay is for the leading actors to exercise leadership and self-restraint. At bottom, the Task Force's recommendations are designed to encourage such behavior.

## II. IDEOLOGY IN FEDERAL JUDICIAL SELECTION

### A. GENERAL CONSIDERATIONS

**1. *What is ideology in this context?*** The first step in discussing ideology in federal judicial selection is to be clear about the meaning of the word itself. *Ideology* has two major, opposed usages in the context of judging.<sup>12</sup>

At one end of the spectrum, the word carries a pejorative meaning. It refers to fixed or rigid ideological commitments to certain results whatever the facts or law of a case. These commitments are often connected to partisan differences. It is unacceptable for judges to be ideological in this sense, for that would undermine their independence and legitimacy. A fixed or rigidly ideological approach to judging contradicts the ideal of the rule of law.<sup>13</sup> This ideal requires that judges follow established legal norms in light of the facts of particular cases, without being led to results by arbitrary ideological factors.<sup>14</sup>

At the other end of the spectrum, the word *ideology* has a much broader, nonpejorative meaning. It refers to "the origin and nature of ideas,"<sup>15</sup> to "the doctrines, opinions, or ways of thinking of an individual" and "the body of ideas on which a particular political, economic, or social system is based."<sup>16</sup> In this usage, ideology plays a role in everyone's thinking about legal issues, including that of judges. Ideology in this broad sense includes a person's views about justice, about key values like liberty and equality, about basic institutional relations like judicial deference to legislatures, and about core constitutional concepts like separation of powers, federalism, and judicial review itself.

**2. *Given ideology's dual meaning, what are the main obligations***

***of the reviewers of candidates for federal judgeships?*** The Task Force believes that the discussion of ideology in judicial selection can be significantly clarified by distinguishing the word's two meanings. When invoking the first, pejorative meaning, it is appropriate to condemn ideology as inconsistent with our ideals of fair, rule-governed behavior by courts.

Yet when the second, broadly descriptive meaning is used, it is appropriate to encourage reviewers to investigate the ideology of candidates for federal judgeships. In our postrealist age, we know that legal materials may well be somewhat indeterminate or conflicting, and that judges often invoke background normative notions in deciding how to rule.<sup>17</sup> Accordingly, it is both appropriate and important for reviewers to ask questions designed to flesh out a candidate's underlying philosophical and normative commitments. These could include, but would not necessarily be limited to, questions about a candidate's general attitudes about justice, about reasoning from precedent, about major constitutional values such as liberty and equality, and about leading cases in our legal culture.

***3. What should be the central limit on questions asked of candidates for federal judgeships?*** There needs to be a definite limit on questions asked of candidates in order to preserve judicial independence. This limit relates to questions that go beyond general inquiries into a candidate's broad views about judging or a candidate's knowledge of leading cases. In particular, a reviewer might ask a candidate how he or she would vote on an unresolved case or issue that could come before him or her as a judge.<sup>18</sup> Such a request for a particularized precommitment should be regarded as wholly inappropriate. One should not ask a candidate to prejudge a matter that might come before him or her as a judge.<sup>19</sup> If such a question is nonetheless asked, we urge that a candidate decline to answer it on the ground that it seeks an inappropriate precommitment.

Political officials should not pressure candidates to make precommitments because such pressure directly undermines the principle of decisional independence. Judges need to be free to decide matters that come before them based on the facts and law of the case, without being worried about commitments made during the selection process.

In addition, members of the public, including litigants, need to

have full confidence in the impartiality of courts. Such confidence is eroded if a candidate for a federal judgeship prejudices a case or issue during the process of judicial selection. Moreover, efforts to seek precommitments by reviewing officials in either the legislative or executive branch of government merely encourage officials in the other branch to undertake similar efforts. This dynamic can generate a vicious cycle, further undermining the principle of an independent judiciary.<sup>20</sup>

## B. PARTICULAR RECOMMENDATIONS FOR LEGISLATIVE AND EXECUTIVE BRANCH REVIEWERS

### ***1. Candidates for judgeships should be committed to deciding cases based on the law and facts of particular cases, without the intrusion of any rigid ideological precommitments to certain results or approaches to the law.***

Recall the first meaning of *ideology* discussed above: a candidate for a federal judgeship should not be, nor be asked to participate in a process that is, ideological in a rigid or partisan sense.<sup>21</sup> To the contrary, candidates for judgeships should be dedicated to deciding cases in light of their understanding of the applicable law and facts. A judge should be professionally qualified, intelligent, impartial, committed to equal justice under law, and possessed of a judicial temperament that examines all sides of a case before rendering a decision.<sup>22</sup>

### ***2. Reviewers should investigate a candidate's experience, qualifications, temperament, character, and general views of the law and of the judicial role. Selecting a federal judge is not just a matter of picking a legal technician, for a person's judgments may well reflect one's broad values and commitments.***

Recall the second meaning of *ideology* discussed above: it is appropriate for reviewers to probe a candidate's general normative views and assumptions that make up ideology in the broad, non-pejorative sense.<sup>23</sup> After all, federal judges should be expected to have background understandings about law and society, and about justice and fairness, that can become important when they are called on to make difficult decisions. In addition, candidates for judgeships may have highly developed understandings of a judge's role, of precedent, of leading cases, and of other aspects of the legal sys-

tem that can be significant in reaching judgments in hard cases. Reviewers should investigate such broad understandings in order fully to consider a candidate for a life-tenured position on the federal bench.

***3. Reviewers must refrain from asking candidates for particular precommitments about unresolved cases or issues that may come before them as judges.***

Although questioning directed at a candidate's general views is appropriate, an important line must not be crossed. A reviewer should not ask a candidate how he or she would vote on an unresolved case or issue if that matter were to come before him or her as a judge. Moreover, a candidate should decline to answer a question that, in his or her judgment, calls for an unacceptable precommitment.

There is, of course, no guarantee that a reviewer and a candidate will agree about whether a particular question calls for an unacceptable precommitment.<sup>24</sup> If a candidate and a reviewer disagree, that fact itself would be a good subject for dialogue between the candidate and reviewer. Such a dialogue could be revealing about the candidate's general judicial philosophy. In any event, both reviewers and candidates should be alert to the importance of protecting judicial independence throughout the process.

***4. The limit on questions seeking precommitments should be applied by reviewers in a common-sense fashion. In particular, this limit should not be allowed to prevent a fully deliberative investigation into the backgrounds, qualifications, and judicial philosophies of candidates for judgeships.***

Our recommendation against questions seeking precommitments does not mean that we imagine that a profitable interchange would consist of a bland inquiry into the judicial equivalent of "name, rank, and serial number." In order for there to be a fully deliberative process, executive and legislative branch reviewers need to be able to conduct a probing inquiry into a candidate's background, qualifications, and judicial philosophy.

Nor do we believe that a simplistic bright line can be drawn in advance between sensitive probing of a candidate's qualifications and general views, on the one hand, and inappropriate efforts to seek particular precommitments as to unresolved cases or issues, on the other hand. In each situation, the facts and the context in which a question

is asked will matter a great deal. One important variable involves the generality of a given question: the more general the question, the less likely will be the need to state how one would decide an unresolved issue or case. Another important issue concerns whether the question involves settled, well-established legal principles, or whether the question deals with yet-to-be-decided matters. If a question concerns an unresolved matter, there is a greater risk of precommitment. Again, there is no simple matrix or rule that can clearly identify in advance the range of acceptable, as opposed to unacceptable, questions.

Two hypothetical examples may help to illustrate the distinction, although we underscore that they do not exhaust the possibilities. Let us assume that a recent Supreme Court opinion is being heatedly criticized by some politicians and citizens. Assume that a reviewer asks a judicial candidate how he or she would apply that opinion in deciding a specific controversial issue that is governed by the opinion. In this context, the question seeks an inappropriate precommitment. In contrast, let us assume that a reviewer asks whether a candidate supports the basic holding against segregated public schools in *Brown v. Board of Education*.<sup>25</sup> The purpose of the question, the reviewer states, is to determine whether the candidate accepts the consensus view that *Brown* was an important milestone in U.S. constitutional law. This question does not seek a particularized precommitment as to an unresolved case or issue. The point to be stressed is that participants in the judicial selection process must keep in mind the core obligation to respect the values of judicial impartiality and independence.

***5. The limit on questions seeking precommitments should be respected equally by the president and other executive branch reviewers as well as by senators and other legislative branch reviewers, despite differences in the roles played by the two branches in the appointment process.***

All executive and legislative branch reviewers, and especially the president and senators, should respect judicial independence by not asking candidates for precommitments about unresolved cases or issues. Placing such responsibility equally on the president and senators is not meant to deny that there are significant differences in their roles in the appointment process. The president is responsible for choosing a nominee, whereas the Senate gives its advice and consent in reviewing the nominee.<sup>26</sup> Also, it is easier to monitor the questions asked by

senators during public confirmation hearings than it is to monitor the questions asked by presidents, for executive branch interviews with candidates are not public.<sup>27</sup> Despite the differences in the roles and activities of the branches, however, both the president and the Senate share the obligation to respect the independence of the third branch of government.

***6. The limit on questions seeking precommitments should apply with respect to candidates for courts at all levels of the federal judiciary.***

The principle of avoiding questions seeking particular precommitments as to unresolved cases or issues should be followed with candidates for appellate as well as trial courts. To be sure, appellate judges perform some functions that differ from those of trial judges. Nevertheless, the principle against questions seeking precommitments must apply to candidates for judgeships at all levels of the federal judiciary—at the district court, court of appeals, and Supreme Court levels.

***7. Reviewers seeking to assess a candidate's views should exercise caution when evaluating a person's current or former clients, memberships, and writings or speeches.***

There are ways to assess a candidate's orientations other than by asking intrusive questions about how the candidate would vote with respect to unresolved cases or issues. A common method is to assess a candidate's professional background, including his or her experiences as a lawyer, memberships in legal and nonlegal groups, and writings or speeches. Questions about such matters are appropriate, although caution should be exercised in drawing conclusions about a candidate's beliefs based simply on such factors.

With respect to clients, it is a cardinal principle of our adversary system that unpopular or controversial persons, like others, may need lawyers, and that the lawyers for such clients should not be assumed personally to embrace the positions they advanced as advocates.

With respect to memberships, it is inappropriate merely to assume that a lawyer embraces all of the views advanced by organizations with which the lawyer is associated. Candidates should be free to distinguish their views from those of organizations with which they have professional or other ties. In a given case, much may depend on the nature of the organization and the character of the candidate's role in it. Moreover, it is wholly inappropriate to condemn a candidate for participating in organizations serving the public interest. Attacks on

public-service activities tend to discourage publicly-minded candidates from seeking judgeships. In the interest of seeking diversity on the bench and of encouraging volunteer and pro bono service, the process should encourage public-service activities by candidates, assuming that the groups with which candidates participate lie within the broad mainstream of views debated widely in American law and society.

In addition, we endorse the notion that judicial candidates should resign from clubs that intentionally discriminate on the basis of race, color, religion, sex, disability, or national origin. We understand that the practice of the Senate Committee on the Judiciary has been to enforce this norm, pursuant to a 1990 committee resolution that, among other things, excludes from coverage fraternities and sororities as well as religious or ethnic heritage organizations.

With respect to writings or speeches, it is appropriate for a reviewer to ask whether they express a view that the candidate would consider binding or influential in a future context of judging. Some writing, such as by law professors, may be intended to provoke debate by going beyond current understandings of the law. The selection process should not discourage such writing, for it is an important means by which the law evolves. It is reasonable for a candidate to explain, if it is true, that his or her earlier pronouncements do not reflect current views or, even if they do, that they do not reflect how he or she would decide a case as a judge. Of course, a reviewer is free to assess the credibility of any statement distinguishing or disclaiming previously stated views. Reviewers need to have confidence that a candidate can set aside his or her own views and decide cases in light of the applicable law and facts, and should not automatically assume that the candidate cannot or will not do so.

With respect to prior decisions by a judge who is a candidate for another judicial appointment, executive and legislative branch reviewers should not punish a judge for a controversial decision. Judges need to decide cases on their own merits without regard to the popularity of a ruling under the law.

***8. The value of judicial independence is consistent with pursuing diversity on the federal bench.***

The value of judicial independence is consistent with seeking a federal judiciary that reflects diversity on many fronts, including general views of judging as well as such factors as ethnicity, race, gender, sexual orientation, professional background, and geographic origin.

Having people with different views and backgrounds on the bench enriches the judiciary.

***9. The value of judicial independence is consistent with active involvement by bar associations in the selection process.***

In the past, the participation by bar associations in judicial selection has drawn some criticism from both liberals and conservatives. In our view, professional, on-the-merits assessments of judicial candidates by bar associations can contribute significantly to the selection process. At the same time, in order to prevent delay, bar associations need to act expeditiously in sharing their assessments with relevant officials, and they should refrain from making their own political assessments of candidates.

### III. DELAY IN FEDERAL JUDICIAL SELECTION

#### A. GENERAL CONSIDERATIONS

Over many years, there has been generally increasing delay in the processes of nominating and confirming federal judges. In particular, since Jimmy Carter was president, the average numbers of days from vacancy to nomination and from nomination to confirmation or other final action have grown. (See Appendix, Table 1, pp. 40–41.) From 1977 to 1998, the mean number of days from vacancy to nomination was 277; for the same period, the mean number of days from nomination to confirmation or other final action was 100. In these years, the greater increase in delay occurred during the interval from nomination to confirmation or other final action. During his first six years in office, President Clinton took an average of 75 more days to nominate a candidate for the federal judiciary than President Carter took. During the 105th Congress of 1997–98, the Senate took an average of 163 more days to act on a nomination (or to let it expire) than the Senate did in the 95th Congress of 1977–78.

Such increasing delay is an important problem for at least three key reasons. First, delay in filling vacancies on the federal bench slows the process of delivering justice in the United States. The “consumers” of the courts—the litigants with personal stakes in pending cases—are directly affected by delay in selecting judges. Second, the judicial

branch is negatively affected by having to perform with less than a full complement of authorized judges. As Chief Justice Rehnquist has underscored in recent years, the institutional costs of increasing delay are considerable.<sup>28</sup> Third, the two political branches have a constitutional responsibility to select judges for the third branch of government in an expeditious and efficient manner. The failure to do so risks eroding the public's respect for governmental institutions.

The Task Force believes that officials in the executive and legislative branches must commit themselves more actively to counteracting the tendency toward greater delay in judicial selection. To be sure, some time is consumed by virtue of there being a more complicated selection process involving larger numbers of judgeships.<sup>29</sup> Nevertheless, we believe that if both branches make greater commitments of time and effort to address delay, significant improvements could result. Both the president and the Senate need to work together with appropriate self-restraint, as required by the system of checks and balances, to address the problem of increasing delay in selecting federal judges.

To track delay, information on vacancies and the process of filling them must be readily available. However, the Task Force has been disturbed to learn about the lack of easily available and meaningful data concerning the judicial selection process. Surprising as it has been to us, the Task Force has had to walk a long road involving our independent research, data gathering, and data analysis with the assistance of specialized scholars.<sup>30</sup> We were unable to find an authoritative public source with comprehensive, easily understood data about delay in judicial selection, for such records have either not been kept or are not easily or publicly accessible. We strongly urge that a set of public records providing reliable and meaningful information about the judicial selection process be maintained, regularly updated, and made easily accessible, such as on the World Wide Web.

## B. PARTICULAR RECOMMENDATIONS FOR THE EXECUTIVE AND LEGISLATIVE BRANCHES

***1. The president and other executive branch officials should make it a high priority to choose nominees for federal judgeships in a more expeditious manner.***

Statistics show that most of the time expended in judicial selection occurs during the period from vacancy to nomination. There are many factors contributing to this delay. Still, the president should undertake a major and ongoing commitment to reducing delay in judicial nominations.

***2. The president and other involved executive branch officials should routinely engage in advance planning for possible vacancies on the federal bench. Such advance planning should include developing lists of available, qualified candidates for judgeships, while coordinating early in the process with concerned senators.***

***3. Senators and other legislative branch officials should make it a high priority to take final action on nominees in a more expeditious manner.***

The data also show increasing delay over time in the period from nomination to confirmation of federal judges. We believe that the Senate leadership should make a major and ongoing commitment to address the increasing delay in judicial selection.

***4. Once a nomination is made, the Senate process should proceed expeditiously to a committee hearing, committee review and voting, and floor consideration and voting. The Task Force is especially concerned about the use of holds by individual senators that have the effect of preventing collective deliberation about and voting on candidates, either in committee or on the Senate floor. Respect for the views of individual senators, while vital, should not be allowed to undermine collective decision-making in an open, deliberative process.***

***5. Both executive and legislative branch officials should avoid engaging in delays to obtain strategic advantage during the judicial selection process.***

***6. Both executive and legislative branch officials should devote adequate staff resources to the task of reviewing candidates for federal judgeships so that the process is not delayed due to lack of staff.***

***7. Both executive and legislative branch officials should make decisions about a candidate in light of the person's own merits. Such***

***decisions should not be linked with unrelated business that is the subject of bargaining between the legislative and executive branches of government.***

***8. The Task Force endorses as aspirational ideals the time-related goals set forth in the Miller Center Report, the most recent prior study of delay in federal judicial selection. The goals are the following: nominations within 180 days of vacancies and confirmations within 60 days of nominations—for an average total of 240 days, or about eight months. By endorsing these goals, the Task Force underscores the need for executive and legislative officials to make strong commitments to reversing the trend of increasing delay in federal judicial selection.***

We acknowledge that the eight-month guideline, as an average from vacancy to confirmation, represents a substantial reduction in the period of time that the process has actually consumed in recent years. We also recognize that the suggested guideline will be useful only if responsible officials take it seriously. As an initial matter, the key step is to begin moving in the direction of this guideline rather than, as has been happening, away from it.

***9. Public records that provide reliable and meaningful information about the federal judicial selection process should be maintained, regularly updated, and made easily accessible to all persons wishing to study such issues as delay in the process. It is the responsibility of executive and legislative branch officials to see that these steps are taken as soon as possible.***

***10. The data on judicial appointments show that the average number of days between nomination and final action for women is greater than the number of days for men. (Adequate data on race of nominees were not available.) We recommend that the responsible officials address this matter to assure that candidates for judgeships are not treated differently based on their gender.***

The Task Force is concerned that all responsible officials involved in federal judicial selection commit themselves to assuring that candidates are treated equally and fairly, without regard to gender or race. The data suggest that, on average, female candidates have taken a longer time to proceed from nomination to final action than have male candidates. (See Appendix, Figures 12–14, pages 63–67.) The Task Force urges the responsible officials to address this issue and to

report on efforts made to eliminate any appearance of unevenness in the treatment of female candidates.

The Task Force was unable to obtain similarly complete information about minority candidates. Information about minority candidates during the 105th Congress shows that unsuccessful minority candidates confronted a longer period of time, on average, from nomination to final action than unsuccessful white candidates. (See Appendix, Figures 15 and 16, pages 69 and 70.) Although these data are limited to the 105th Congress, they suggest that the involved officials should redouble efforts to treat candidates evenly without regard to race.

#### IV. CONCLUSION: A CALL FOR GREATER LEADERSHIP AND SELF-RESTRAINT BY EXECUTIVE AND LEGISLATIVE BRANCH OFFICIALS INVOLVED IN FEDERAL JUDICIAL SELECTION

Reform of federal judicial selection requires greater leadership and self-restraint by the officials who control the process, the president and members of the Senate. Such behavior is needed specifically to moderate the role of partisan ideology and to reverse the trend of increasing delay in judicial selection.

It should be underscored that self-restraint by our leaders is a major constituent of a well-functioning system of separation of powers and checks and balances. Under our Constitution, the legislative, executive, and judicial powers are vested in separate institutions. Such separation implies interdependence, for the branches must work with each other in order for the government to work. As Justice Robert Jackson noted in the steel seizure case, effective government under the U.S. Constitution presupposes “separateness but interdependence, autonomy but reciprocity” among the branches of government.<sup>31</sup> This interdependence of separate institutions sharing power requires self-restraint at the most basic level. Without it, the balance needed for a reasonably well-functioning government is threatened.

In the end, the president and the Senate must devote immediate and sustained attention to both moderating the role of partisan ideology and reversing the trend of increasing delay in the process of

selecting qualified, impartial, and independent federal judges.

## NOTES

1. See, e.g., American Bar Association Commission on Separation of Powers and Judicial Independence, *An Independent Judiciary* (Washington, D.C.: American Bar Association, 1997); Miller Center Commission on the Selection of Federal Judges, *Improving the Process of Appointing Federal Judges* (Charlottesville: University of Virginia, Miller Center of Public Affairs, 1996) (hereinafter Miller Center Report); Judicial Conference of the United States, *Long-Range Plan for the Federal Courts* (1995) (hereinafter Long-Range Plan); Association of the Bar of the City of New York, *Report of the Ad Hoc Committee on the Senate Confirmation Process* (New York: Association of the Bar of the City of New York, 1992). For a recent discussion of normative controversies in current debates about the federal courts as civil justice providers, see Robert G. Vaughn, *Normative Controversies Underlying Contemporary Debates about Civil Justice Reform: A Way of Talking about Bureaucracy and the Future of the Federal Courts*, 76 Denver U. L. Rev. 217 (1998).

2. When we speak of the “federal judicial selection process,” we are referring comprehensively to the nomination, confirmation, and appointment of federal judges.

3. See, e.g., Miller Center Report.

4. Although we are not undertaking to analyze the causes of recent partisan conflicts about judicial selection, some would suggest that tensions between the branches of government become more partisan in situations of divided government. These are situations when the presidency is controlled by one of the major political parties and Congress, and in particular the Senate, is controlled by the other major political party. For discussion of divided government—which has been relatively common since the Eisenhower administration—see Morris P. Fiorina, *Divided Government* (New York: Macmillan, 1992); David Mayhew, *Divided We Govern* (New Haven: Yale University Press, 1991); Gary W. Cox and Samuel Kernell, eds., *The Politics of Divided Government* (Boulder, Colo.: Westview Press, 1991). For a discussion of federal judicial selection in the context of divided government, see Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 Emory L.J. 527 (1998).

5. Moreover, the judicial selection process has become more complicated

over several decades as a result of, among other things, greater activity by the Senate in reviewing presidential nominees.

“Lest there be any doubt about the deepening and expansive consideration of judicial nominees. . . , ponder these bits of information: in 1922, . . . President Warren G. Harding nominated George Sutherland, and the Senate confirmed the candidate within hours; in 1953, the Senate confirmed Earl Warren to be chief justice without questioning him; and before the 1981 confirmation hearing of Sandra Day O’Connor, no radio or television network had ever broadcast from the hearing room” (Robert A. Katzmann, *Courts and Congress* [Washington, D.C.: Brookings Institution, 1997], p. 9).

6. The Task Force does not seek to assign blame for the problems we have identified, but rather seeks to encourage an active effort by responsible governmental officials to address issues in the public interest. There is too much at stake to permit indulgence in finger pointing rather than problem solving.

7. U.S. Constitution, art. III, sec. 1.

8. U.S. Constitution, art. II, sec. 4.

9. U.S. Constitution, art. III, sec. 1.

10. Chief Justice William H. Rehnquist, Keynote Address, *Symposium on the Future of the Federal Courts*, 46 Am. U. L. Rev. 267, 274 (1996).

11. Alexander Hamilton quoted Montesquieu approvingly for the proposition that “there is no liberty if the power of judging be not separated from the legislative and executive powers” (*The Federalist* No. 78 [New York: New American Library, 1961], p. 466).

12. For discussions of ideology, see, e.g., Judith N. Shklar, ed., *Political Theory and Ideology* (New York: Macmillan, 1966).

13. By “rule of law,” we are referring to the notion that authoritative legal materials can and should both guide the use of executive discretion and serve as the basis of judicial checks on agencies, even though the materials’ meaning and implications in particular cases may be contested. For a discussion of the rule of law, see, e.g., Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1 (1997).

14. Concern about rigid or partisan ideology was expressed in the Miller Center Report, p. 12: “Just as candidates should put aside their partisan political views when appointed to the bench, so too should they put aside ideology. To retain either is to betray dedication to the process of impartial judging. Men and women qualified by training and experience to be judges generally do not wish to and do not indulge in partisan or ideological approaches to their work. The rare exception should not be taken as the norm.”

15. *Webster’s Third New International Dictionary of the English Language*,

*Unabridged* (Springfield, Mass.: G & C Merriam, 1976).

16. *Webster's New World Dictionary of American English*, 3d ed. (New York: Webster's New World, 1988), p. 670.

17. For instance, H. L. A. Hart speaks of the law's "open texture" that demands an interpreter's judgment, rather than formalistic rule-following. Herbert Lionel Adolphus Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 120–32. Ronald Dworkin, in a different way, stresses the need for judges to turn to underlying policies and principles in deciding hard cases. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), pp. 14–130; Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), pp. 9–71; Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), pp. 1–86. The distinction between narrow rules and broad standards or principles, the latter of which may seem quite open-ended, is well-recognized in the law. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *Duke L.J.* 557 (1992); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. Chi. L. Rev.* 1175 (1989); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 *Harv. L. Rev.* 22 (1992).

18. We recognize that, in a given instance, there may be debate about whether a matter is truly "unresolved." If there is a plausible basis for considering it so, the matter should be treated carefully in order to protect judicial independence.

19. See Katzmann, *Courts and Congress*, p. 41 ("To compel a nominee to prejudge issues runs counter to the norms of judicial decisionmaking").

20. It bears noting that there are ways to find out a person's views other than by inappropriately asking for precommitments. One might, for example, look at what a person has done in his or her career, although caution should be exercised in assuming either that past history necessarily demonstrates what a person will do as a judge, or that a person will not change his or her views. (See Recommendation II.B.7, p. 19.) This cautionary lesson is confirmed by the experience of President Lincoln in filling the vacancy on the Supreme Court left by Roger Taney. Lincoln is reported to have said: "[W]e wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tenders. We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore we must take a man whose opinions are known" (George S. Boutwell, *Reminiscences of Sixty Years in Public Affairs* [New York: 1902], p. 29). Lincoln nominated as chief justice his secretary of the treasury, Salmon P. Chase, who, among other things, had helped to draft and shepherd the Legal Tender (or greenback) legislation

through Congress. Contrary to Lincoln's expectations, Chief Justice Chase wrote the opinion declaring the Legal Tender legislation unconstitutional. As Chief Justice William Rehnquist has noted: "Chief Justice Chase's vote in the Legal Tender Cases is a textbook example of the proposition that one may look at a legal question differently as a judge from the way one did as a member of the executive branch." William H. Rehnquist, *The Supreme Court: How It Was, How It Is* (New York: Morrow, 1987), p. 241.

21. Cf. Katzmann, *Courts and Congress*, p. 43 ("What should be out of bounds is any effort to make the appointment process part of a politicized agenda, in which the judiciary becomes a pawn in often highly charged battles between groups and partisans").

22. While we are not seeking to establish a complete list of the desirable characteristics of judges, we endorse the listing in Henry Abraham's introduction to his book on Supreme Court appointments: "One, demonstrated judicial temperament. Two, professional expertise and competence. Three, absolute personal as well as professional integrity. Four, an able, agile, lucid mind. Five, appropriate professional educational background or training. Six, the ability to communicate clearly, both orally and in writing, especially the latter" (Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*, 3d ed. [New York, Oxford University Press, 1992], p. 4). Sheldon Goldman has also developed an excellent list of desirable judicial characteristics: "1. Neutrality as to the Parties in Litigation. 2. Fair-mindedness. 3. Being Well Versed in the Law. 4. Ability to Think and Write Logically and Lucidly. 5. Personal Integrity. 6. Good Physical and Mental Health. 7. Judicial Temperament. 8. Ability to Handle Judicial Power Sensibly" (Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan* [New Haven: Yale University Press, 1987]).

23. See Katzmann, *Courts and Congress*, p. 10 ("[I]t is appropriate to consider a nominee's core values, perspectives about the law and the role of the Court, and approaches to judging . . ."), and p. 38 ("It is consistent with the norms of judicial independence and proper for senators to learn of a nominee's perspectives").

24. In fact, there may be wide ground for disagreement. See Katzmann, *Courts and Congress*, p. 19 (noting that nominees "may draw the line in different ways and may not always adhere to the standards they set for themselves," whereas senators "will commonly express their frustration about the responsiveness of those being questioned, about what they believe are the highly selective and subjective criteria by which nominees determine whether to answer queries").

25. 347 U.S. 483 (1954).

26. U.S. Constitution, art. II, sec. 2. For a discussion of the appointment process in general, see Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 Harv. J.L. & Pub. Pol'y 467 (1998).

27. Nor are senators' discussions with candidates outside the hearing room on the public record.

28. See William H. Rehnquist, *The 1997 Year-End Report on the Federal Judiciary* (Jan. 1, 1998).

29. For a study of federal judicial selection at the lower court level from the time of President Roosevelt to that of President Reagan, see Sheldon Goldman, *Picking Federal Judges*. Professor Goldman also has published a series of articles about judicial selection in the journal of the American Judicature Society. See Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 Judicature 318 (April/May 1989); Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 Judicature 294 (April/May 1991); Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 Judicature 282 (April/May 1993); Sheldon Goldman, *Judicial Selection under Clinton: A Midterm Examination*, 78 Judicature 276 (May/June 1995); Sheldon Goldman and Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 Judicature 254 (June 1997); Sheldon Goldman and Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges under Fire*, 82 Judicature 264 (May/June 1999). See also Gordon Bermant, Jeffrey A. Hennemuth, and A. Fletcher Mangum, *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 Miss. C.L. Rev. 319 (1994).

30. We are grateful for the assistance of Professor Harold Spaeth and Wendy L. Martinek, Ph.D. candidate and senior research assistant of the Program for Law and Judicial Politics at Michigan State University, who analyzed the data and prepared the charts in the Appendix. We also appreciate the help of Lisa Holmes, Ph.D. candidate in political science at the University of Georgia, who created the initial database from which the analysis was performed, and of Professor Sheldon Goldman of the University of Massachusetts at Amherst, who provided additional data and assisted us in understanding the process of judicial selection.

31. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)(Jackson, J., concurring).

# APPENDIX:

## DESCRIPTION OF METHODOLOGY AND FINDINGS

The following tables and figures provide data on the nomination and confirmation process for federal judges from 1977 through 1998. They cover the entire Carter, Reagan, and Bush presidencies, and six years of Clinton's two terms. They include the judgeships of all the U.S. District Courts and U.S. Courts of Appeals, except for the district courts of the Virgin Islands, Guam, and the Northern Mariana Islands, which are not Article III courts. (Article III courts are those established under Article III of the U.S. Constitution.)

### METHODOLOGY

These tables and figures were generated from a database that was created by Wendy L. Martinek, Ph.D. candidate and senior research assistant, under the supervision of Dr. Harold Spaeth of the Program for Law and Judicial Politics at Michigan State University.\* The database will be made available to the public on the website of the Program for Law and Judicial Politics, as well as that of Citizens

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\* Lisa Holmes, Ph.D. candidate at the University of Georgia, also provided substantial assistance in the creation of the database.

for Independent Courts. The database will be continually updated by the Program for Law and Judicial Politics as data become available.

The data included in the database were collected by the staff of Citizens for Independent Courts from various sources, since no one source had all the desired information in a publicly available form. The primary source was the Congressional Research Service, which provided, via a senator's office, vacancy dates, nomination dates, and confirmation dates for all vacancies on the federal courts described above arising between 1977 and 1998. Data on the ethnicity, gender, and party affiliation of nominees were provided by Professor Sheldon Goldman of the University of Massachusetts-Amherst. Additional data and verification were provided by the Senate Judiciary Committee librarian and minority staff, the Federal Judicial Center, and the American Bar Association.

One of the major reasons for creating the database was to determine the average amount of time taken to nominate and confirm federal judges, and to determine whether that average amount of time has changed over the past twenty-two years. Specifically, we sought to determine the average amount of time between vacancy and the president's nomination of a candidate, and between nomination and either the Senate's confirmation or the failure of a candidate. Unfortunately, hearing dates were not available for all nominees; thus, we were unable to determine the average amount of time between nomination and hearing, and between hearing and confirmation or rejection.

There were several different ways in which we could have measured these time periods, including exclusion of congressional recesses. However, more important than what was included or excluded was ensuring that our methodology was consistent. Thus, we decided to count every calendar day, with the exceptions noted below. This method was consistent with our attempt to view the process from the vantage point of the "consumers" of the courts—those of us who require access to the courts, want timely resolution of our cases, and who do not care what the reason is that federal vacancies are not being filled.

#### MEASURING THE TIME BETWEEN VACANCY AND NOMINATION

To determine the amount of time between vacancy and the president's nomination of a candidate, we counted the number of days between

each “nomination opportunity” that arose between 1977 and 1998 and the date a nomination was made for that opportunity (or the last day of the last congressional term during that president’s service if no nomination was made). A president is faced with a nomination opportunity when a new vacancy occurs, when a prior nomination is withdrawn or fails to secure Senate approval, or when a vacancy is inherited from a previous president. This methodology ensured that presidents were not “charged” for the time period in which their predecessor failed to nominate someone; thus, the time shown for each president to nominate a candidate includes only time when he could have nominated a candidate.

At the end of each president’s term of office, we excluded the days between the adjournment of Congress (*sine die*) and the inauguration of the next president, since it would not be realistic for a president about to leave office to make a nomination after Congress has already adjourned.

Although nominations that have not been acted upon terminate at the end of a Congress, numerous vacancies currently remain unfilled. We decided to “stop the clock” for all vacancies that had not yet been filled on October 21, 1998, the last day of the 105th Congress.

#### MEASURING THE TIME BETWEEN NOMINATION AND CONFIRMATION OR FAILURE

To determine the amount of time between nomination and either confirmation or failure of a nominee, we counted the number of days between each nomination made for a nomination opportunity that arose between 1977 and 1998 and the date of one of the following: the Senate’s confirmation of a nominee, the Senate’s rejection of a nominee, the president’s withdrawal of a nominee, or the termination of a nomination by the ending of the Congress in which the nomination was made. Because pending nominations die at the end of a Congress (*sine die* adjournment), the days between Congresses were never included.

We analyzed the amount of time to fill vacancies for district courts as compared with circuit courts, as well as the amount of time to fill vacancies under divided government (when the president is of one

party and the Senate is of the other party) as compared with unified government. In addition, we analyzed the time for confirmation or rejection of female nominees as compared with male nominees. We also analyzed the time for confirmation or rejection of racial minority nominees as compared with white nominees for the 105th Congress only. The 105th Congress was the only Congress for which data on the race of nominees were available for both successful and unsuccessful nominees.

Once nominations are made, there is an opportunity to analyze them by various factors. Thus, we were able to conduct more analyses on the time between nomination and either confirmation or failure than on the time between vacancy and nomination.

### CAVEAT

It is important to note that our method of counting days does not necessarily account for the total amount of time a single vacancy may have remained open. For example, if a vacancy was created in one Congress but not filled until another Congress, more than one nomination would be required to fill it (and those successive nominations might be of the same person). For such a case, our data would include the time it took for the president to make each nomination and for the Senate to confirm each nomination (or to reject it or let it die), but would not indicate that a particular vacancy remained open over several Congresses.

For greater accuracy and ease of understanding, the data in the tables and figures are presented by presidential term for action by presidents and by congressional term for action by the Senate.

### FINDINGS

The tables and figures show a general trend of an increasing amount of time taken to fill vacancies on the federal bench.

*Table 1 - Summary* provides a summary of the amount of time taken to nominate and confirm federal judges from 1977 through 1998. For each president starting with President Carter, the table gives the number of nomination opportunities, number of actual nominations,

and average number of days for the president to act on a nomination opportunity. For each congressional term, the summary shows the number of confirmations, number of nominations returned to the president, and average number of days for the Senate to act on a nomination (or, where the Senate did not act, for the nomination to expire at the end of a congressional term). The chart also includes the average number of days for Senate action during each president's administration since 1977.

*Table 2 - Presidential Action* and the accompanying figures show the number of nomination opportunities each president had and the number of nominations he made. Figure 2b reflects a sharp increase in nominations in 1978, 1984, and 1990, years when new federal judgeships were created by Congress.

*Table 3 - Presidential Action* and the accompanying figure show the average number of days between nomination opportunity and nomination, broken down by president. As can be seen, the mean has steadily increased. For example, President Clinton's average is seventy-five days higher than President Carter's.

*Table 4 - Senate Action* and the accompanying figure show the average number of days between nomination and final action on that nomination for both successful and unsuccessful nominees. Final action is a confirmation, a withdrawal of the nomination by the president, or a return of the nomination to the president by the Senate (because the nomination expired without Senate action at the end of a congressional term; none were rejected during this time period). The data show a steady increase in the number of days between nomination and final action, especially for unsuccessful nominees in recent years. In general, unsuccessful nominations tended to take longer for final action. This may reflect the fact that unsuccessful nominations frequently receive no action by the Senate and simply expire at the end of the congressional term, as much as two years after they are made.

There appears to be a pattern of additional delay in Senate action in each two-year period preceding a presidential election, with the exception of 1983–84. This occurred even in 1979–80, when the same party (the Democrats) had control of both the White House and the Senate.

*Table 5 - Senate Action, Table 6 - Senate Action*, and the accompany-

ing figures provide the average number of days between nomination and final action on that nomination for district court and circuit court nominees, respectively. The average number of days for final action on nominations has increased for nominees to both types of court.

*Table 7 - Senate Action* and the accompanying figure show the average amount of time between nomination and final action, broken down by the thirteen federal circuit courts.

*Table 8 - Senate Action* shows the average amount of time between nomination and final action for each circuit, broken down by congressional term. In the 105th Congress, there were seven circuits with an average of two hundred or more days between nomination and final action, as compared with four circuits in the 102nd and 104th Congresses.

*Table 9 - Senate Action* and the accompanying figure show the average number of days between nomination and final action, broken down by president, for successful, unsuccessful, and all nominees. Again, the data show a steady increase in the amount of time. President Carter's nominees received final action in an average of 78 days, while President Clinton's nominees took an average of 144 days.

*Table 10 - Senate Action* and the accompanying figure provide the average number of days between nomination and final action, broken down by president and type of court (district or circuit). The data show an increase in this average from the Carter administration to the Clinton administration, with President Clinton's circuit court nominees taking the longest amount of time for final action.

*Table 11 - Senate Action* and the accompanying figure show the average number of days between nomination and final action during times of divided government and unified government. During times when one party had control of the Senate and the other party of the White House, the average number of days between nomination and final action was significantly higher. This difference existed for both successful and unsuccessful nominees, but the average time for unsuccessful nominees was much longer.

*Table 12 - Senate Action* and the accompanying figure show the aver-

age amount of time for final action for male and female nominees, broken down by president. President Clinton's female nominees have taken the longest time for final action, and President Reagan's female nominees took the shortest amount of time.

*Table 13 - Senate Action* and the accompanying figure show the average amount of time between nomination and final action for men and women, broken down by congressional term. The amount of time for final action on female nominees has been roughly the same as for males from the 95th through the 104th Congresses (except for the 100th Congress). The greatest disparity occurred during the 105th Congress, when it took women an average of sixty-five days longer than men for final action. It should be noted that the proportion of female nominees was much higher in the 105th Congress—they constituted over one-third of the nominees—than in the 95th Congress, when women comprised about 12 percent of the nominees.

*Table 14 - Senate Action* and the accompanying figure show the average amount of time between nomination and final action for male and female nominees, both successful and unsuccessful. Overall, female nominees waited an average of twenty-seven more days than men for final action over the twenty-two-year period we analyzed.

*Table 15 - Senate Action* and the accompanying figure show the average number of days between nomination and final action, broken down by race and success of nominee for the 105th Congress, the only Congress for which data were available on unsuccessful as well as successful nominees. The data show that nominations of nonwhites took an average of sixty days longer than those of white nominees to receive final action.

*Note:* The data on race were not available for unsuccessful nominees other than those nominated during the 105th Congress. Thus, it was not possible to perform an analysis on race of nominees for any Congress other than the 105th.

*Table 16 - Senate Action* and the accompanying figure compare the average number of days between nomination and final action in the 105th Congress for white men to the average number for

white women and minorities. Overall, the nominations of white male candidates received final action an average of seventy-six days sooner than did the nominations of racial minorities and white women. Unsuccessful white male nominees received final action, on average, in 242 days, and unsuccessful white female and nonwhite nominees received final action, on average, in 386 days. Again, we were unable to provide a similar analysis for Congresses other than the 105th due to the lack of data on the race of unsuccessful nominees.

*Table 17* and the accompanying figure show the number of nominations that were made per vacancy, broken down by president. Where the initial nomination for a particular vacancy failed, at least one and as many as three additional nominations were made before the Senate finally confirmed a candidate for that vacancy. The number of nominations per vacancy has increased over time. For vacancies that were filled during the Carter administration, only 1.9 percent required more than one nomination. For vacancies that were filled during President Clinton's first six years in office, 26.9 percent required more than one nomination. The accompanying figure shows, by president, the percentages of total successful nominations that were first nominations.

*Table 18* and the accompanying figure show the number of nominations needed in order to fill a vacancy, broken down by congressional term. For vacancies that were filled during the 95th Congress (1977-78), 96.7 percent were filled by the first nomination, whereas for vacancies filled during the 105th Congress (1997-98), only 75.8 percent were filled by the first nomination. The accompanying figure shows, by congressional term, the percentages of total successful nominations that were first nominations.

## SUMMARY

Between 1977 and 1998, there has been an increase in the amount of time required to fill a vacancy on the federal bench. Through 1998, President Clinton took an average of 75 more days to nominate a candidate for the federal bench than did President Carter during his time in office. In the 105th Congress, the Senate took an average of

163 more days to act on a nomination (or to let it expire) than did the Senate in the 95th Congress. Whatever the reasons, these findings have serious implications for those Americans who require access to the federal courts and want timely resolution of their cases.

**TABLE 1. SUMMARY: PRESIDENTIAL AND SENATE ACTION, 1977-98**

| Pres-<br>ident | Cong.<br>Term | Years   | Party in<br>Control<br>of the<br>Senate | Nominations           |                   | Avg. No.<br>of Days<br>for Pres.<br>Action <sup>c</sup> | Confirm-<br>ations | Nomin-<br>ations<br>Returned<br>to the<br>Pres. | Avg. No. of Days<br>for Senate Action |                       |
|----------------|---------------|---------|---|-----------------------|-------------------|---|--------------------|---|---------------------------------------|-----------------------|
|                |               |         |   | Opp. for <sup>a</sup> | Made <sup>b</sup> |   |                    |   | by Cong. <sup>d</sup>                 | by Pres. <sup>d</sup> |
| Carter         |               | 1977-80 |   | 296                   | 280               | 240   | 258                | 19  |                                       | 78                    |
|                | 95th          | 1977-78 | Dem.                                    |                       |                   |   | 214                | 10  | 38                                    |                       |
|                | 96th          | 1979-80 | Dem.                                    |                       |                   |   | 44                 | 9   | 90                                    |                       |
| Reagan         |               | 1981-88 |   | 432                   | 423               | 254   | 372                | 42  |                                       | 65                    |
|                | 97th          | 1981-82 | Repub.                                  |                       |                   |   | 110                | 5   | 32                                    |                       |
|                | 98th          | 1983-84 | Repub.                                  |                       |                   |   | 147                | 19  | 38                                    |                       |
|                | 99th          | 1985-86 | Repub.                                  |                       |                   |   | 75                 | 7   | 45                                    |                       |
|                | 100th         | 1987-88 | Dem.                                    |                       |                   |   | 40                 | 11  | 144                                   |                       |
| Bush           |               | 1989-92 |   | 302                   | 248               | 296   | 191                | 57  |                                       | 120                   |
|                | 101st         | 1989-90 | Dem.                                    |                       |                   |   | 156                | 31  | 78                                    |                       |
|                | 102nd         | 1991-92 | Dem.                                    |                       |                   |   | 35                 | 26  | 138                                   |                       |
| Clinton        |               | 1993-98 |   | 402                   | 368               | 315   | 297                | 61  |                                       | 144                   |
|                | 103rd         | 1993-94 | Dem.                                    |                       |                   |   | 173                | 27  | 83                                    |                       |
|                | 104th         | 1995-96 | Repub.                                  |                       |                   |   | 89                 | 26  | 159                                   |                       |
|                | 105th         | 1997-98 | Repub.                                  |                       |                   |   | 35                 | 8   | 201                                   |                       |

**TABLE 1. SUMMARY: PRESIDENTIAL AND SENATE ACTION, 1977-98**

| Pres-<br>ident               | Cong.<br>Term            | Years   | Party in<br>Control<br>of the<br>Senate | Nominations           |                   | Avg. No.<br>of Days<br>for Pres.<br>Action <sup>c</sup> | Confirm-<br>ations | Nomin-<br>ations<br>Returned<br>to the<br>Pres. | Avg. No. of Days<br>for Senate Action |                       |
|------------------------------|--------------------------|---------|---|-----------------------|-------------------|---|--------------------|---|---------------------------------------|-----------------------|
|                              |                          |         |   | Opp. for <sup>a</sup> | Made <sup>b</sup> |   |                    |   | by Cong. <sup>d</sup>                 | by Pres. <sup>d</sup> |
| Carter<br>through<br>Clinton | 95th<br>through<br>105th | 1977-98 | —                                       | 1432                  | 1319              | 277   | 1118               | 179   | 100                                   | 100                   |

<sup>a</sup> A nomination opportunity arises when a new vacancy occurs, a prior nomination is withdrawn or fails to secure Senate approval, or a vacancy is inherited from a previous president.

<sup>b</sup> A nomination returned to the president that is resubmitted by the president counts as two separate nominations.

<sup>c</sup> The average number of days for presidential action is the average number of days between nomination opportunity and nomination (or last day of last congressional term of presidential service if nomination not made).

<sup>d</sup> The average number of days for Senate action is the average number of days between nomination and one of the following: confirmation, return of the nomination, or withdrawal.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

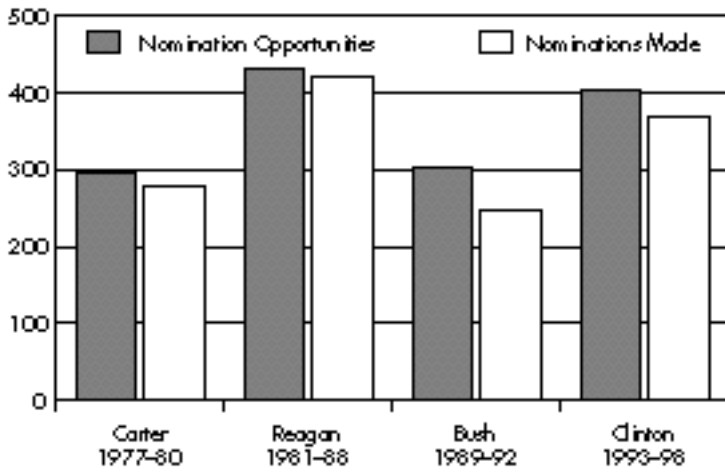
**TABLE 2. PRESIDENTIAL ACTION: NOMINATION OPPORTUNITIES<sup>a</sup>  
AND NOMINATIONS MADE, BY PRESIDENT, 1977-98**

| <b>President</b>                          | <b>Nomination Opportunities</b> | <b>Nominations Made</b> |
|---|---------------------------------|-------------------------|
| Carter<br>(1977-80)                       | 296                             | 280                     |
| Reagan<br>(1981-88)                       | 432                             | 423                     |
| Bush<br>(1989-92)                         | 302                             | 248                     |
| Clinton<br>(1993-98)                      | 402                             | 368                     |
| Carter<br>through<br>Clinton<br>(1977-98) | 1432                            | 1319                    |

<sup>a</sup> A nomination opportunity arises when a new vacancy occurs, a prior nomination is withdrawn or fails to secure congressional approval, or a vacancy is inherited from a previous president.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

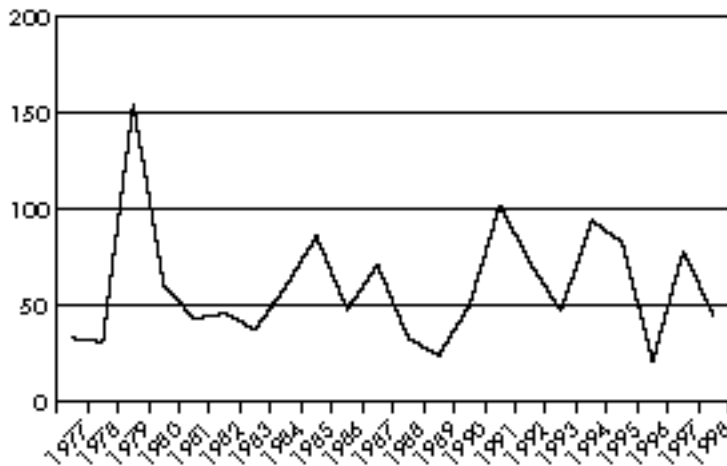
**FIGURE 2A. PRESIDENTIAL ACTION: NOMINATION OPPORTUNITIES<sup>a</sup> AND NOMINATIONS MADE, BY PRESIDENT, 1977-98**



<sup>a</sup> A nomination opportunity arises when a new vacancy occurs, a prior nomination is withdrawn or fails to secure congressional approval, or a vacancy is inherited from a previous president.

Source: Prepared by the Program for Law and Judicial Politics at Michigan State University.

**FIGURE 2B. PRESIDENTIAL ACTION: NOMINATIONS MADE, 1977-98**



Source: Prepared by the Program for Law and Judicial Politics at Michigan State University.

**TABLE 3. PRESIDENTIAL ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION OPPORTUNITY<sup>a</sup> AND NOMINATION, BY PRESIDENT, 1977-98**

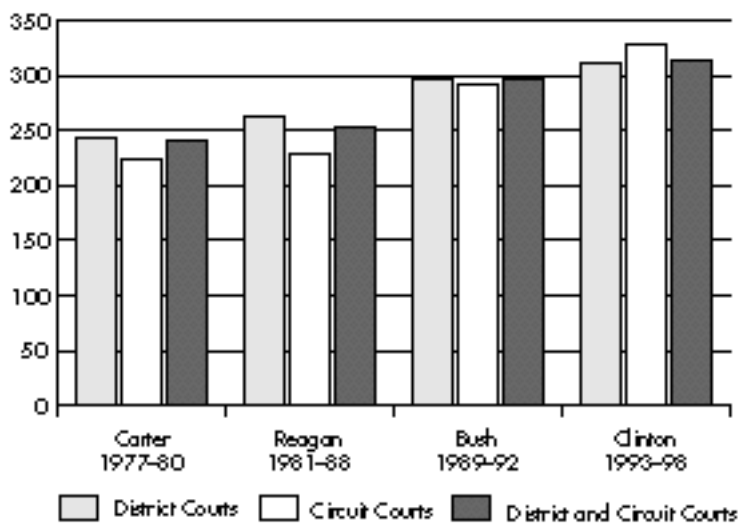
| <b>President</b>                 | <b>District Courts</b> | <b>Circuit Courts</b> | <b>District and Circuit Courts</b> |
|----------------------------------|------------------------|-----------------------|------------------------------------|
| Carter (1977-80)                 | 244 (234)              | 224 (62)              | 240 (296)                          |
| Reagan (1981-88)                 | 262 (332)              | 230 (100)             | 254 (432)                          |
| Bush (1989-92)                   | 297 (240)              | 292 (62)              | 296 (302)                          |
| Clinton (1993-98)                | 311 (321)              | 329 (81)              | 315 (402)                          |
| Carter through Clinton (1977-98) | 279 (1127)             | 268 (305)             | 277 (1432)                         |

*Note:* Numbers in parentheses indicate the number of nomination opportunities.

<sup>a</sup> A nomination opportunity arises when a new vacancy occurs, a prior nomination is withdrawn or fails to secure congressional approval, or a vacancy is inherited from a previous president.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**FIGURE 3. PRESIDENTIAL ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION OPPORTUNITY<sup>a</sup> AND NOMINATION, BY PRESIDENT, 1977-98**



*Note:* Numbers in parentheses indicate the number of nomination opportunities.

<sup>a</sup> A nomination opportunity arises when a new vacancy occurs, a prior nomination is withdrawn or fails to secure congressional approval, or a vacancy is inherited from a previous president.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**TABLE 4. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> ALL DISTRICT AND CIRCUIT COURT NOMINEES, BY CONGRESSIONAL TERM, 1977-98**

| <b>Congressional Term</b>       | <b>Successful Nominees</b> | <b>Unsuccessful Nominees<sup>b</sup></b> | <b>All Nominees</b> |
|---------------------------------|----------------------------|--|---------------------|
| 95th (1977-78)                  | 38 (60)                    | 35 (4)                                   | 38 (64)             |
| 96th (1979-80)                  | 80 (198)                   | 205 (18)                                 | 90 (216)            |
| 97th (1981-82)                  | 33 (86)                    | 10 (3)                                   | 32 (89)             |
| 98th (1983-84)                  | 35 (75)                    | 51 (21)                                  | 38 (96)             |
| 99th (1985-86)                  | 44 (128)                   | 71 (6)                                   | 45 (134)            |
| 100th (1987-88)                 | 120 (83)                   | 241 (21)                                 | 144 (104)           |
| 101st (1989-90)                 | 77 (70)                    | 91 (4)                                   | 78 (74)             |
| 102nd (1991-92)                 | 111 (120)                  | 197 (54)                                 | 138 (174)           |
| 103rd (1993-94)                 | 81 (127)                   | 102 (14)                                 | 83 (141)            |
| 104th (1995-96)                 | 114 (72)                   | 259 (32)                                 | 159 (104)           |
| 105th (1997-98)                 | 171 (99)                   | 326 (24)                                 | 201 (123)           |
| 95th through 105th<br>(1977-98) | 83 (1118)                  | 194 (201)                                | 100 (1319)          |

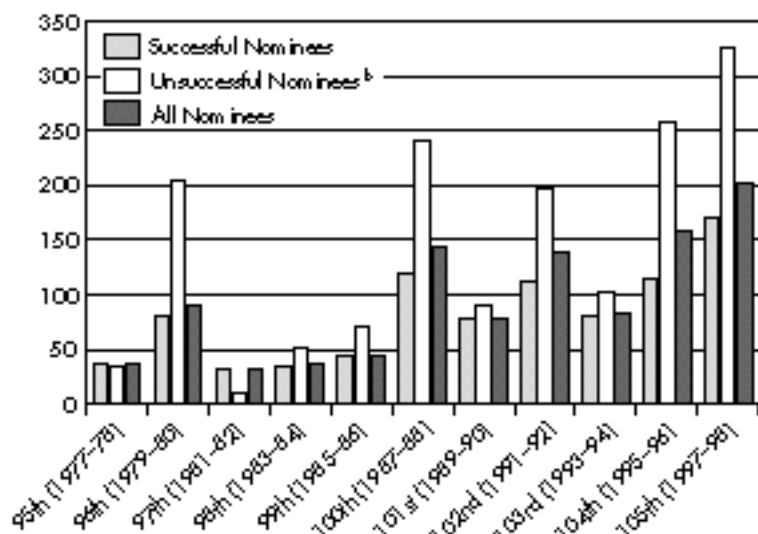
*Note:* Numbers in parentheses indicate the number of nominations.

<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**FIGURE 4. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> ALL DISTRICT AND CIRCUIT COURT NOMINEES, BY CONGRESSIONAL TERM, 1977-98**



<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

Source: Prepared by the Program for Law and Judicial Politics at Michigan State University.

**TABLE 5. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> ALL DISTRICT COURT NOMINEES, BY CONGRESSIONAL TERM, 1977-98**

| <b>Congressional Term</b>       | <b>Successful Nominees</b> | <b>Unsuccessful Nominees<sup>b</sup></b> | <b>All Nominees</b> |
|---------------------------------|----------------------------|--|---------------------|
| 95th (1977-78)                  | 40 (47)                    | 35 (4)                                   | 40 (51)             |
| 96th (1979-80)                  | 79 (154)                   | 208 (14)                                 | 90 (168)            |
| 97th (1981-82)                  | 33 (67)                    | 9 (2)                                    | 32 (69)             |
| 98th (1983-84)                  | 31 (61)                    | 48 (15)                                  | 35 (76)             |
| 99th (1985-86)                  | 42 (95)                    | 71 (6)                                   | 44 (101)            |
| 100th (1987-88)                 | 120 (66)                   | 217 (12)                                 | 135 (78)            |
| 101st (1989-90)                 | 77 (48)                    | 69 (3)                                   | 76 (51)             |
| 102nd (1991-92)                 | 112 (100)                  | 172 (43)                                 | 130 (143)           |
| 103rd (1993-94)                 | 76 (107)                   | 104 (11)                                 | 79 (118)            |
| 104th (1995-96)                 | 113 (61)                   | 250 (23)                                 | 150 (84)            |
| 105th (1997-98)                 | 162 (79)                   | 300 (14)                                 | 183 (93)            |
| 95th through 105th<br>(1977-98) | 82 (885)                   | 174 (147)                                | 95 (1032)           |

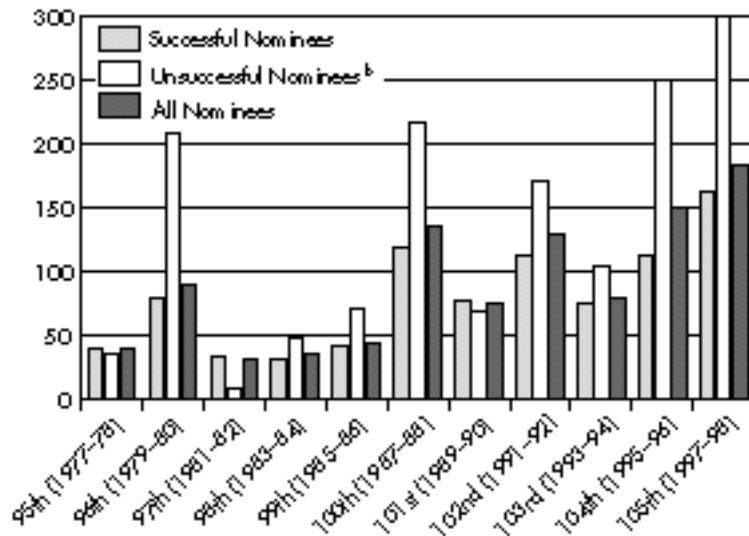
*Note:* Numbers in parentheses indicate the number of nominations.

<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**FIGURE 5. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> ALL DISTRICT COURT NOMINEES, BY CONGRESSIONAL TERM, 1977-98**



<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

Source: Prepared by the Program for Law and Judicial Politics at Michigan State University.

**TABLE 6. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> ALL CIRCUIT COURT NOMINEES, BY CONGRESSIONAL TERM, 1977-98**

| <b>Congressional Term</b>    | <b>Successful Nominees</b> | <b>Unsuccessful Nominees<sup>b</sup></b> | <b>All Nominees</b> |
|------------------------------|----------------------------|--|---------------------|
| 95th (1977-78)               | 32 (13)                    | —  | 32 (13)             |
| 96th (1979-80)               | 81 (44)                    | 195 (4)                                  | 91 (48)             |
| 97th (1981-82)               | 34 (19)                    | 12 (1)                                   | 33 (20)             |
| 98th (1983-84)               | 51 (14)                    | 56 (6)                                   | 52 (20)             |
| 99th (1985-86)               | 50 (33)                    | —  | 50 (33)             |
| 100th (1987-88)              | 119 (17)                   | 273 (9)                                  | 172 (26)            |
| 101st (1989-90)              | 79 (22)                    | 155 (1)                                  | 82 (23)             |
| 102nd (1991-92)              | 108 (20)                   | 296 (11)                                 | 174 (31)            |
| 103rd (1993-94)              | 105 (20)                   | 94 (3)                                   | 103 (23)            |
| 104th (1995-96)              | 124 (11)                   | 280 (9)                                  | 194 (20)            |
| 105th (1997-98)              | 206 (20)                   | 362 (10)                                 | 258 (30)            |
| 95th through 105th (1977-98) | 88 (233)                   | 248 (54)                                 | 118 (287)           |

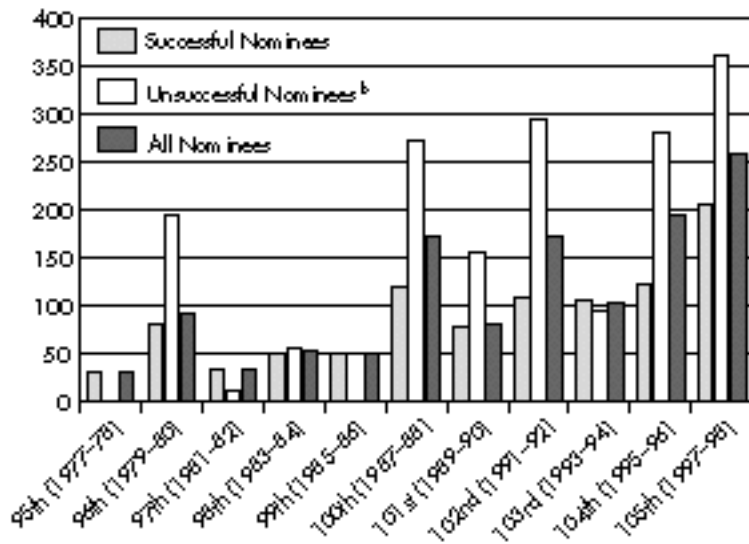
*Note:* Numbers in parentheses indicate the number of nominations.

<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**FIGURE 6. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> ALL CIRCUIT COURT NOMINEES, BY CONGRESSIONAL TERM, 1977-98**



<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

Source: Prepared by the Program for Law and Judicial Politics at Michigan State University.

**TABLE 7. SENATE ACTION: AVERAGE NUMBER OF DAYS  
BETWEEN NOMINATION AND FINAL ACTION<sup>a</sup> FOR CIRCUIT  
COURT NOMINEES, BY CIRCUIT, 1977-98**

| <b>Circuit</b> | <b>Successful<br/>Nominees</b> | <b>Unsuccessful<br/>Nominees<sup>b</sup></b> | <b>All<br/>Nominees</b> |
|----------------|--------------------------------|--|-------------------------|
| 1st            | 66 (10)                        | 61 (1)                                       | 66 (11)                 |
| 2nd            | 105 (20)                       | 253 (2)                                      | 119 (22)                |
| 3rd            | 70 (16)                        | 324 (3)                                      | 110 (19)                |
| 4th            | 77 (17)                        | 386 (5)                                      | 147 (22)                |
| 5th            | 78 (31)                        | 249 (7)                                      | 109 (38)                |
| 6th            | 79 (23)                        | 276 (5)                                      | 114 (28)                |
| 7th            | 64 (12)                        | 88 (2)                                       | 68 (14)                 |
| 8th            | 76 (13)                        | 139 (1)                                      | 81 (14)                 |
| 9th            | 121 (37)                       | 260 (13)                                     | 157 (50)                |
| 10th           | 74 (15)                        | 329 (1)                                      | 90 (16)                 |
| 11th           | 130 (9)                        | 193 (4)                                      | 149 (13)                |
| DC             | 83 (18)                        | 219 (4)                                      | 108 (22)                |
| Federal        | 87 (12)                        | 190 (6)                                      | 121 (18)                |
| All Circuits   | 88 (233)                       | 248 (54)                                     | 118 (287)               |

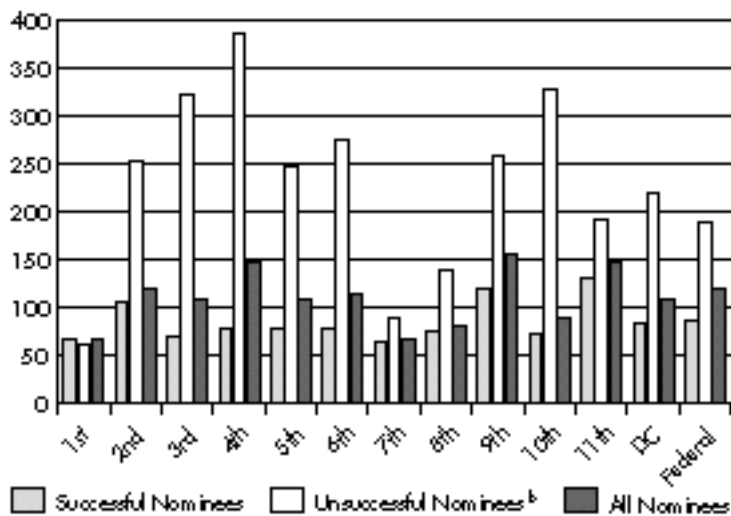
*Note:* Numbers in parentheses indicate the number of nominations.

<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**FIGURE 7. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> ALL CIRCUIT COURT NOMINEES, BY CIRCUIT, 1977-98**



<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

Source: Prepared by the Program for Law and Judicial Politics at Michigan State University.

**TABLE 8. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION<sup>a</sup>  
FOR CIRCUIT COURT NOMINEES, BY CIRCUIT AND CONGRESSIONAL TERM, 1977-98**

| Cong.<br>Term | Circuit   |            |            |            |            |            |            |            |            |            |            |            | All<br>Federal<br>Circuits |             |
|---------------|-----------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|----------------------------|-------------|
|               | 1st       | 2nd        | 3rd        | 4th        | 5th        | 6th        | 7th        | 8th        | 9th        | 10th       | 11th       | DC         |                            |             |
| 95th          | 18<br>(1) | —          | 18<br>(1)  | 22<br>(1)  | 36<br>(2)  | 44<br>(2)  | —          | 50<br>(1)  | 28<br>(2)  | 30<br>(3)  | —          | —          | —                          | 32<br>(13)  |
| 96th          | 26<br>(1) | 69<br>(3)  | 77<br>(1)  | 63<br>(3)  | 94<br>(14) | 128<br>(4) | 112<br>(2) | 101<br>(2) | 91<br>(13) | 64<br>(1)  | —          | 86<br>(4)  | —                          | 91<br>(48)  |
| 97th          | —         | 43<br>(4)  | 17<br>(1)  | 62<br>(1)  | 29<br>(3)  | 32<br>(3)  | 29<br>(3)  | 20<br>(2)  | —          | —          | —          | 42<br>(2)  | 12<br>(1)                  | 33<br>(20)  |
| 98th          | 63<br>(1) | —          | —          | 128<br>(2) | 20<br>(3)  | 27<br>(1)  | 49<br>(2)  | 55<br>(1)  | 41<br>(4)  | —          | —          | 53<br>(2)  | 56<br>(4)                  | 52<br>(20)  |
| 99th          | 12<br>(1) | 46<br>(3)  | 17<br>(2)  | 10<br>(1)  | 35<br>(1)  | 47<br>(5)  | 65<br>(3)  | 33<br>(2)  | 73<br>(5)  | 57<br>(4)  | 34<br>(1)  | 59<br>(4)  | 61<br>(1)                  | 50<br>(33)  |
| 100th         | —         | 395<br>(1) | 70<br>(5)  | —          | 180<br>(4) | —          | 106<br>(1) | 128<br>(1) | 193<br>(6) | 158<br>(2) | 118<br>(1) | 205<br>(2) | 260<br>(3)                 | 172<br>(26) |
| 101st         | 87<br>(2) | 78<br>(2)  | 66<br>(1)  | 84<br>(1)  | 112<br>(2) | 70<br>(1)  | —          | 32<br>(1)  | 81<br>(3)  | —          | 106<br>(3) | 81<br>(3)  | 68<br>(4)                  | 82<br>(23)  |
| 102nd         | 70<br>(2) | 193<br>(1) | 224<br>(4) | 174<br>(5) | 150<br>(3) | 178<br>(4) | 41<br>(1)  | 153<br>(2) | 112<br>(1) | 235<br>(2) | 200<br>(4) | 255<br>(1) | 162<br>(1)                 | 174<br>(31) |

**TABLE 8. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION FOR CIRCUIT COURT NOMINEES, BY CIRCUIT AND CONGRESSIONAL TERM, 1977-98 (CONT.)**

| Congress                 | Circuit    |             |             |             |             |             |            |            |             |            |             |             | All<br>Federal Circuits |              |
|--------------------------|------------|-------------|-------------|-------------|-------------|-------------|------------|------------|-------------|------------|-------------|-------------|-------------------------|--------------|
|                          | 1st        | 2nd         | 3rd         | 4th         | 5th         | 6th         | 7th        | 8th        | 9th         | 10th       | 11th        | DC          |                         |              |
| 103rd                    | 61<br>(1)  | 88<br>(4)   | 115<br>(2)  | 111<br>(3)  | 124<br>(4)  | 84<br>(2)   | —          | 71<br>(1)  | 63<br>(1)   | 86<br>(1)  | 202<br>(1)  | 111<br>(2)  | 98<br>(1)               | 103<br>(23)  |
| 104th                    | 65<br>(1)  | —           | —           | 287<br>(2)  | 240<br>(1)  | 149<br>(3)  | 100<br>(2) | —          | 282<br>(5)  | 63<br>(3)  | 199<br>(1)  | 395<br>(1)  | 169<br>(1)              | 194<br>(20)  |
| 105th                    | 164<br>(1) | 251<br>(4)  | 200<br>(2)  | 279<br>(3)  | 454<br>(1)  | 283<br>(3)  | —          | 185<br>(1) | 310<br>(10) | —          | 136<br>(2)  | 71<br>(1)   | 204<br>(2)              | 258<br>(30)  |
| 95th<br>through<br>105th | 66<br>(11) | 119<br>(22) | 110<br>(19) | 147<br>(22) | 109<br>(38) | 114<br>(28) | 68<br>(14) | 81<br>(14) | 157<br>(50) | 90<br>(16) | 149<br>(13) | 108<br>(22) | 121<br>(18)             | 118<br>(287) |

*Note:* Numbers in parentheses indicate the number of nominations for each category.

<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**TABLE 9. SENATE ACTION: AVERAGE NUMBER OF DAYS  
BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> BY  
PRESIDENT AND SUCCESS OF NOMINEE, 1977-98**

| <b>President</b>                          | <b>Successful<br/>Nominees</b> | <b>Unsuccessful<br/>Nominees<sup>a</sup></b> | <b>All<br/>Nominees</b> |
|---|--------------------------------|--|-------------------------|
| Carter<br>(1977-80)                       | 70 (258)                       | 174 (22)                                     | 78 (280)                |
| Reagan<br>(1981-88)                       | 57 (372)                       | 129 (51)                                     | 65 (423)                |
| Bush<br>(1989-92)                         | 99 (190)                       | 190 (58)                                     | 120 (248)               |
| Clinton<br>(1993-98)                      | 119 (298)                      | 250 (70)                                     | 144 (368)               |
| Carter<br>through<br>Clinton<br>(1977-98) | 83 (1118)                      | 194 (201)                                    | 100 (1319)              |

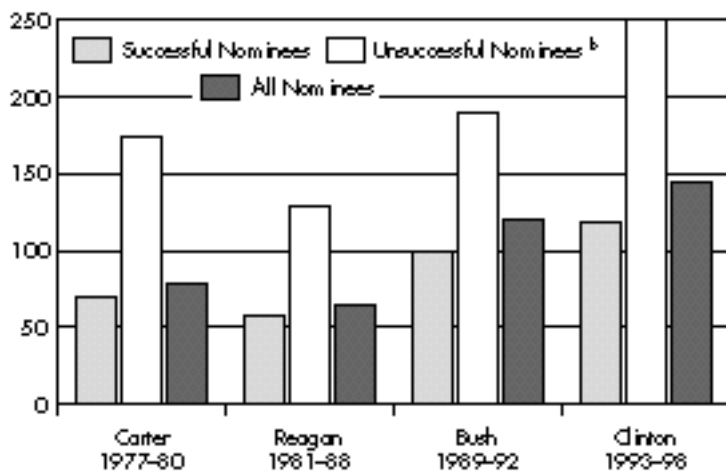
*Note:* Numbers in parentheses indicate the number of nominations.

<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**FIGURE 9. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> BY PRESIDENT AND SUCCESS OF NOMINEE, 1977-98**



<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

Source: Prepared by the Program for Law and Judicial Politics at Michigan State University.

**TABLE 10. SENATE ACTION: AVERAGE NUMBER OF DAYS  
BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup>  
BY PRESIDENT AND TYPE OF COURT, 1977-98**

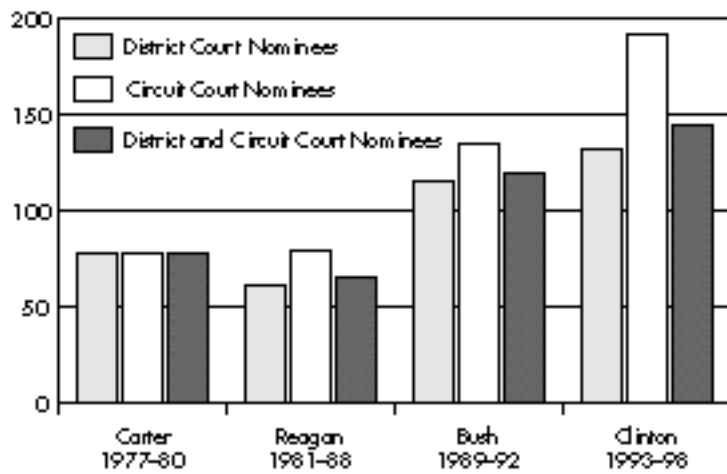
| <b>President</b>                       | <b>District Court<br/>Nominees</b> | <b>Circuit Court<br/>Nominees</b> | <b>District and<br/>Circuit Court<br/>Nominees</b> |
|--|------------------------------------|-----------------------------------|--|
| Carter<br>(1977-80)                    | 78 (219)                           | 78 (61)                           | 78 (280)   |
| Reagan<br>(1981-88)                    | 61 (324)                           | 79 (99)                           | 65 (423)   |
| Bush<br>(1989-92)                      | 116 (194)                          | 135 (54)                          | 120 (248)  |
| Clinton<br>(1993-98)                   | 132 (295)                          | 192 (73)                          | 144 (368)  |
| Carter through<br>Clinton<br>(1977-98) | 95 (1032)                          | 118 (287)                         | 100 (1319)   |

*Note:* Numbers in parentheses indicate the number of nominations.

<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**FIGURE 10. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> BY PRESIDENT AND TYPE OF COURT, 1977-98**



<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

Source: Prepared by the Program for Law and Judicial Politics at Michigan State University.

**TABLE 11. SENATE ACTION: AVERAGE NUMBER OF DAYS  
BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup>  
BY DIVIDED VERSUS UNIFIED GOVERNMENT,<sup>b</sup> 1977-98**

|  | <b>Divided<br/>Government</b> | <b>Unified<br/>Government</b> |
|--|-------------------------------|-------------------------------|
| <b>District Courts</b>   |                               |                               |
| Days between nomination and confirmation for successful candidates                       | 120 (354)                     | 57 (531)                      |
| Days between nomination and final Senate action for unsuccessful candidates <sup>c</sup> | 212 (95)                      | 103 (52)                      |
| <b>Circuit Courts</b>  |                               |                               |
| Days between nomination and confirmation for successful candidates                       | 127 (90)                      | 64 (143)                      |
| Days between nomination and final Senate action for unsuccessful candidates              | 300 (40)                      | 101 (14)                      |
| <b>District and Circuit Courts</b>   |                               |                               |
| Days between nomination and confirmation for successful candidates                       | 121 (444)                     | 59 (674)                      |
| Days between nomination and final Senate action for unsuccessful candidates              | 238 (135)                     | 103 (66)                      |

*Note:* Numbers in parentheses indicate the number of nominations.

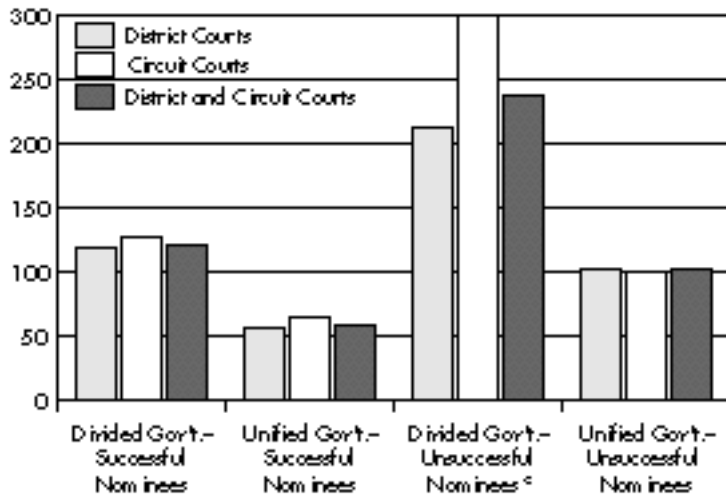
<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> Divided government exists when one party controls the White House and the other party controls the Senate.

<sup>c</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**FIGURE 11. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> BY DIVIDED VERSUS UNIFIED GOVERNMENT<sup>b</sup> AND SUCCESS OF NOMINEE, 1977-98**



<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> Divided government exists when one party controls the White House and the other party controls the Senate.

<sup>c</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

Source: Prepared by the Program for Law and Judicial Politics at Michigan State University.

**TABLE 12. SENATE ACTION: AVERAGE NUMBER OF DAYS  
BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup>  
BY PRESIDENT AND GENDER OF NOMINEE, 1977-98**

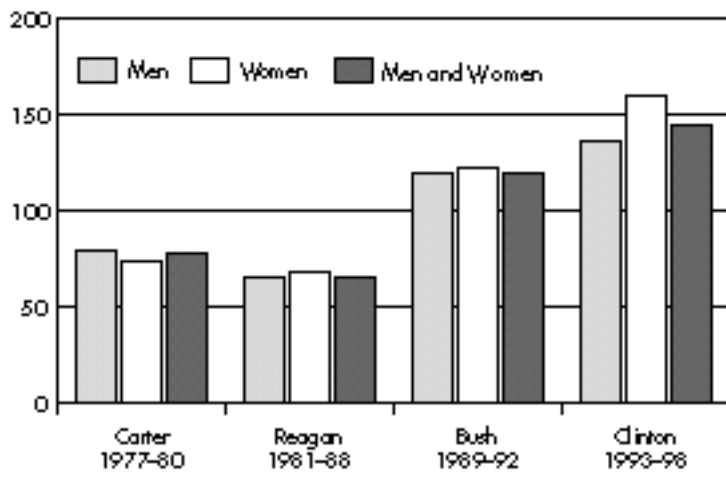
| <b>President</b>                       | <b>Men</b>   | <b>Women</b> | <b>Men and Women</b> |
|--|--------------|--------------|----------------------|
| Carter<br>(1977-80)                    | 79<br>(238)  | 74<br>(42)   | 78<br>(280)          |
| Reagan<br>(1981-88)                    | 65<br>(388)  | 68<br>(35)   | 65<br>(423)          |
| Bush<br>(1989-92)                      | 119<br>(208) | 123<br>(40)  | 120<br>(248)         |
| Clinton<br>(1993-98)                   | 137<br>(260) | 160<br>(108) | 144<br>(368)         |
| Carter through<br>Clinton<br>(1977-98) | 96<br>(1094) | 123<br>(225) | 100<br>(1319)        |

*Note:* Numbers in parentheses indicate the number of nominations.

<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**FIGURE 12. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> BY PRESIDENT AND GENDER OF NOMINEE, 1977-98**



<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

Source: Prepared by the Program for Law and Judicial Politics at Michigan State University.

**TABLE 13. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> BY CONGRESSIONAL TERM AND GENDER OF NOMINEE, 1977-98**

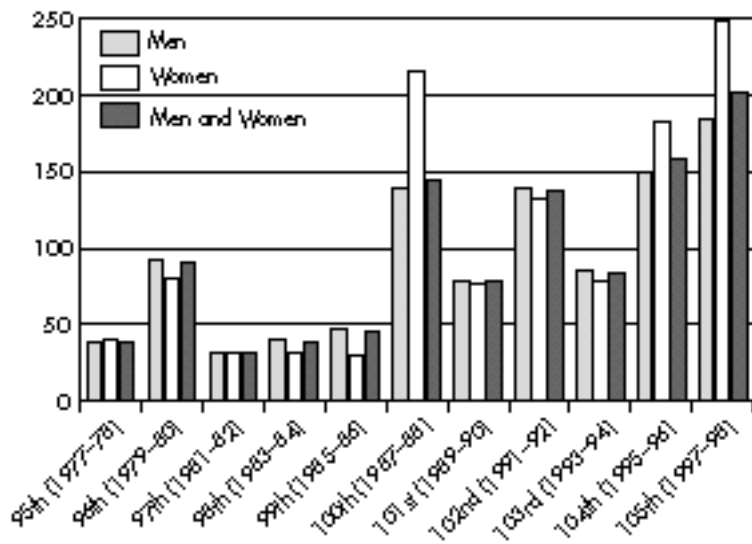
| <b>Congressional Term</b>    | <b>Men</b> | <b>Women</b> | <b>Men and Women</b> |
|------------------------------|------------|--------------|----------------------|
| 95th (1977-78)               | 38 (57)    | 40 (7)       | 38 (64)              |
| 96th (1979-80)               | 92 (181)   | 80 (35)      | 90 (216)             |
| 97th (1981-82)               | 32 (86)    | 32 (3)       | 32 (89)              |
| 98th (1983-84)               | 40 (83)    | 31 (13)      | 38 (96)              |
| 99th (1985-86)               | 47 (122)   | 30 (12)      | 45 (134)             |
| 100th (1987-88)              | 139 (97)   | 216 (7)      | 144 (104)            |
| 101st (1989-90)              | 78 (67)    | 77 (7)       | 78 (74)              |
| 102nd (1991-92)              | 139 (141)  | 133 (33)     | 138 (174)            |
| 103rd (1993-94)              | 85 (97)    | 78 (44)      | 83 (141)             |
| 104th (1995-96)              | 149 (72)   | 182 (32)     | 159 (104)            |
| 105th (1997-98)              | 184 (91)   | 249 (32)     | 201 (123)            |
| 95th through 105th (1977-98) | 96 (1094)  | 123 (225)    | 100 (1319)           |

*Note:* Numbers in parentheses indicate the number of nominations.

<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**FIGURE 13. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> BY CONGRESSIONAL TERM AND GENDER OF NOMINEE, 1977-98**



<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

Source: Prepared by the Program for Law and Judicial Politics at Michigan State University.

**TABLE 14. SENATE ACTION: AVERAGE NUMBER OF DAYS  
BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup>  
BY GENDER AND SUCCESS OF NOMINEE, 1977-98**

|                                       | <b>Men</b> | <b>Women</b> | <b>Men and Women</b> |
|---------------------------------------|------------|--------------|----------------------|
| Successful<br>Nominees                | 79 (927)   | 104 (191)    | 83 (1118)            |
| Unsuccessful<br>Nominees <sup>b</sup> | 187 (167)  | 228 (34)     | 194 (201)            |
| All Nominees                          | 96 (1094)  | 123 (225)    | 100 (1319)           |

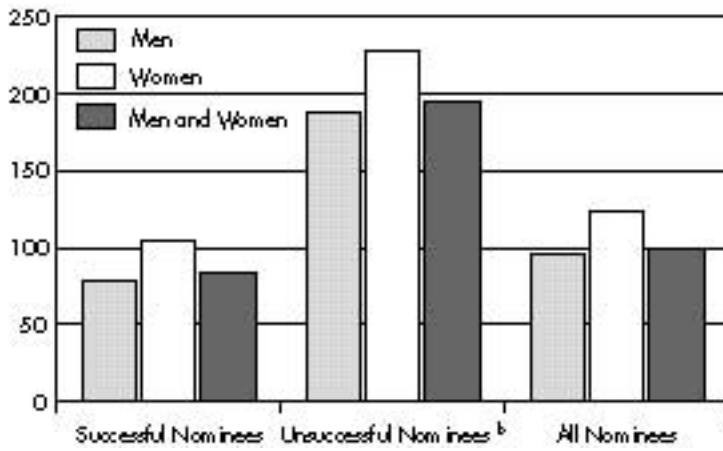
*Note:* Numbers in parentheses indicate the number of nominations.

<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**FIGURE 14. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> BY GENDER AND SUCCESS OF NOMINEE, 1977-98**



<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

Source: Prepared by the Program for Law and Judicial Politics at Michigan State University.

**TABLE 15. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> BY RACE AND SUCCESS OF NOMINEE, FOR THE 105TH CONGRESS**

| <b>Race</b>           | <b>Successful Nominees</b> | <b>Unsuccessful Nominees<sup>b</sup></b> | <b>All Nominees</b> |
|-----------------------|----------------------------|--|---------------------|
| Whites                | 170 (79)                   | 285 (13)                                 | 186 (92)            |
| Minorities            | 175 (20)                   | 374 (11)                                 | 246 (31)            |
| Whites and Minorities | 171 (99)                   | 326 (24)                                 | 201 (123)           |

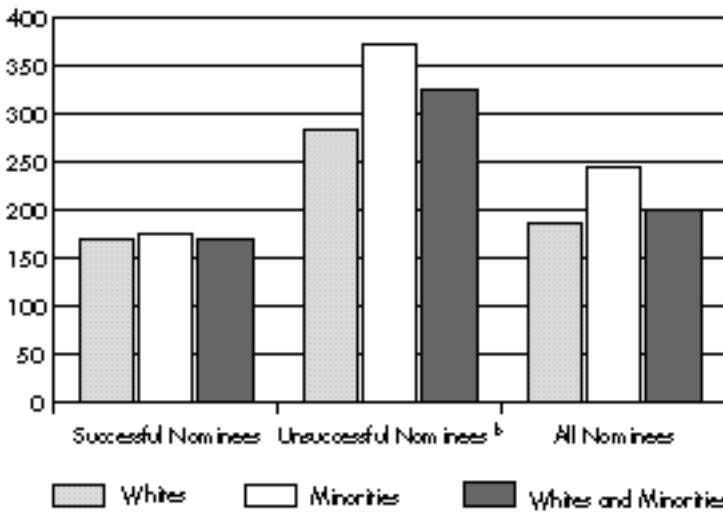
*Note:* Numbers in parentheses indicate the number of nominations; the analysis is limited to the 105th Congress due to unavailability of complete race data for other than the 105th Congress.

<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**FIGURE 15. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> BY RACE AND SUCCESS OF NOMINEE, FOR THE 105TH CONGRESS**



*Note:* The analysis is limited to the 105th Congress due to unavailability of complete race data for other than the 105th Congress.

<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**TABLE 16. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> WHITE MEN VERSUS WOMEN AND MINORITIES, FOR THE 105TH CONGRESS**

|                                 | <b>Successful Nominees</b> | <b>Unsuccessful Nominees<sup>b</sup></b> | <b>All Nominees</b> |
|---------------------------------|----------------------------|--|---------------------|
| White Men                       | 154 (58)                   | 242 (10)                                 | 167 (68)            |
| Women and Minorities            | 194 (41)                   | 386 (14)                                 | 243 (55)            |
| White Men, Women and Minorities | 171 (99)                   | 326 (24)                                 | 201 (123)           |

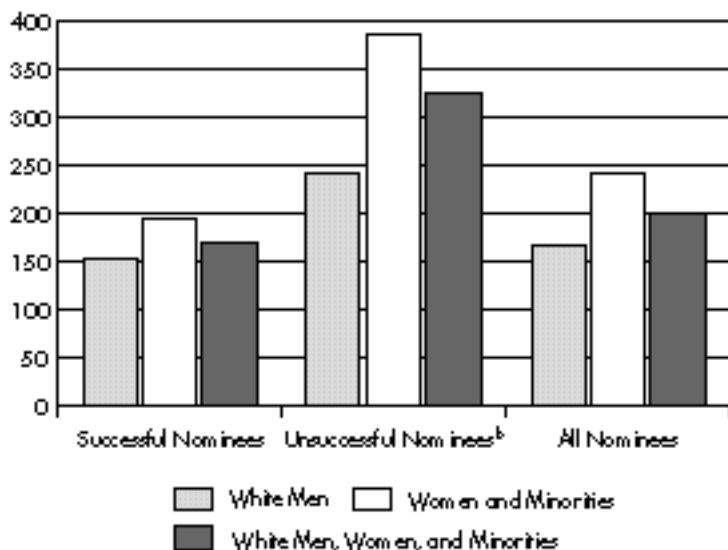
*Note:* Numbers in parentheses indicate the number of nominations; the analysis is limited to the 105th Congress due to unavailability of complete race data for other than the 105th Congress.

<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**FIGURE 16. SENATE ACTION: AVERAGE NUMBER OF DAYS BETWEEN NOMINATION AND FINAL ACTION,<sup>a</sup> WHITE MEN VERSUS WOMEN AND MINORITIES, FOR THE 105TH CONGRESS**



*Note:* The analysis is limited to the 105th Congress due to unavailability of complete race data for other than the 105th Congress.

<sup>a</sup> Final action is the confirmation, return to the president, or withdrawal of a nomination.

<sup>b</sup> An unsuccessful nomination is one that is either returned to the president or withdrawn by the president.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

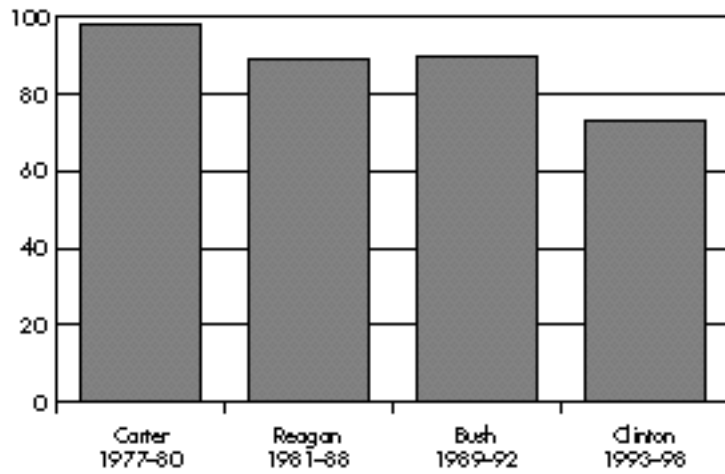
**TABLE 17. NOMINATIONS REQUIRED TO FILL A VACANCY,  
DISTRICT AND CIRCUIT COURTS, BY PRESIDENT  
MAKING SUCCESSFUL NOMINATION, 1977-98**

| President                                 | Number of Nominations |             |           |          |
|---|-----------------------|-------------|-----------|----------|
|   | 1                     | 2           | 3         | 4        |
| Carter<br>(1977-80)                       | 253 (98.1%)           | 5 (1.9%)    | 0 (0.0%)  | 0 (0.0%) |
| Reagan<br>(1981-88)                       | 330 (88.7%)           | 36 (9.7%)   | 5 (1.3%)  | 1 (0.3%) |
| Bush<br>(1989-92)                         | 171 (90.0%)           | 16 (8.4%)   | 2 (1.1%)  | 1 (0.5%) |
| Clinton<br>(1993-98)                      | 217 (73.1%)           | 71 (23.9%)  | 5 (1.7%)  | 4 (1.3%) |
| Carter<br>through<br>Clinton<br>(1977-98) | 971 (86.9%)           | 128 (11.4%) | 12 (1.1%) | 6 (0.5%) |

*Note:* Numbers in parentheses indicate percentages of total unsuccessful nominations.

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**FIGURE 17. SUCCESSFUL FIRST NOMINATIONS AS PERCENTAGE OF TOTAL SUCCESSFUL NOMINATIONS, DISTRICT AND CIRCUIT COURTS, BY PRESIDENT MAKING SUCCESSFUL NOMINATION, 1977-98**



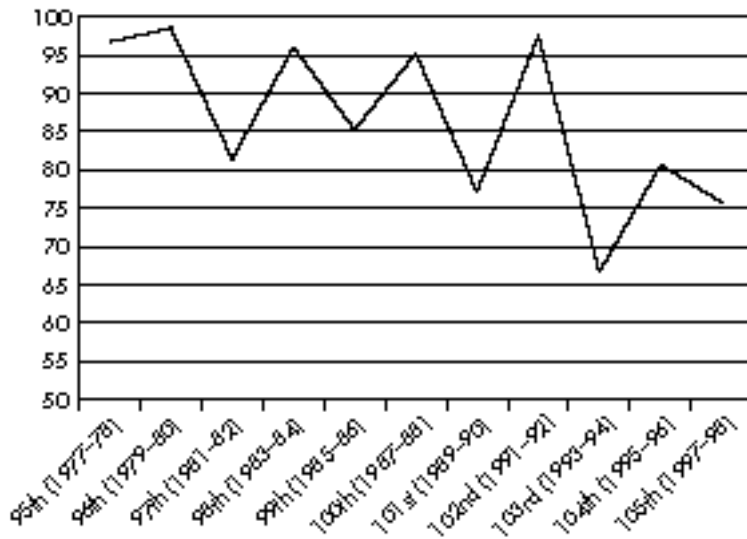
*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**TABLE 18. NOMINATIONS REQUIRED TO FILL A VACANCY,  
DISTRICT AND CIRCUIT COURTS, BY CONGRESSIONAL TERM  
DURING WHICH SUCCESSFUL NOMINATION WAS MADE, 1977-98**

| Congressional Term                 | Number of Nominations |                |              |             |
|------------------------------------|-----------------------|----------------|--------------|-------------|
|                                    | 1                     | 2              | 3            | 4           |
| 95th<br>(1977-78)                  | 58<br>(96.7%)         | 2<br>(3.3%)    | 0<br>(0.0%)  | 0<br>(0.0%) |
| 96th<br>(1979-80)                  | 195<br>(98.5%)        | 3<br>(1.5%)    | 0<br>(0.0%)  | 0<br>(0.0%) |
| 97th<br>(1981-82)                  | 70<br>(81.4%)         | 14<br>(16.3%)  | 2<br>(2.3%)  | 0<br>(0.0%) |
| 98th<br>(1983-84)                  | 72<br>(96.0%)         | 1<br>(1.3%)    | 1<br>(1.3%)  | 1<br>(1.3%) |
| 99th<br>(1985-86)                  | 109<br>(85.2%)        | 18<br>(14.1%)  | 1<br>(0.8%)  | 0<br>(0.0%) |
| 100th<br>(1987-88)                 | 79<br>(95.2%)         | 3<br>(3.6%)    | 1<br>(1.2%)  | 0<br>(0.0%) |
| 101st<br>(1989-90)                 | 54<br>(77.1%)         | 13<br>(18.6%)  | 2<br>(2.9%)  | 1<br>(1.4%) |
| 102nd<br>(1991-92)                 | 117<br>(97.5%)        | 3<br>(2.5%)    | 0<br>(0.0%)  | 0<br>(0.0%) |
| 103rd<br>(1993-94)                 | 84<br>(66.7%)         | 40<br>(31.7%)  | 0<br>(0.0%)  | 2<br>(1.6%) |
| 104th<br>(1995-96)                 | 58<br>(80.6%)         | 10<br>(13.9%)  | 3<br>(4.2%)  | 1<br>(1.4%) |
| 105th<br>(1997-98)                 | 75<br>(75.8%)         | 21<br>(21.2%)  | 2<br>(2.0%)  | 1<br>(1.0%) |
| 95th through<br>105th<br>(1977-98) | 971<br>(86.9%)        | 128<br>(11.5%) | 12<br>(1.1%) | 6<br>(0.5%) |

*Source:* Prepared by the Program for Law and Judicial Politics at Michigan State University.

**FIGURE 18. SUCCESSFUL FIRST NOMINATIONS AS PERCENTAGE OF TOTAL SUCCESSFUL NOMINATIONS, DISTRICT AND CIRCUIT COURTS, BY CONGRESSIONAL TERM DURING WHICH SUCCESSFUL NOMINATION WAS MADE, 1977-98**



Source: Prepared by the Program for Law and Judicial Politics at Michigan State University.