3 Clinton and the Courts
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President Ronald Reagan was committed to fundamental change in the direction of constitutional decision-making in the federal courts, especially in most civil liberties fields. Toward that end, the Reagan Justice Department pursued an aggressive judicial agenda directed at persuading the courts to reject or limit abortion precedents and constitutional requirements of church–state separation, as well as earlier decisions expanding the rights of suspects and defendants in criminal cases and rulings condoning affirmative action programs. Even the office of Solicitor-General, an official appointed by the president but traditionally removed from politics, was put to the administration’s purposes, to such an extent, in fact, that Rex Lee, Reagan’s first Solicitor-General, resigned from the office in protest. The Reagan White House also took steps to assure the appointment of federal judges who shared the president’s conservative constitutional philosophy. President Bush continued the pattern, although in a more moderate fashion.

President Clinton obviously has no desire to see the federal judiciary reject or weaken civil liberties precedents; he has been a strong supporter, for example, of the Supreme Court’s abortion rulings, and an opponent of Congressional efforts to curtail late-term abortions. At the same time, the centrist character of his campaign appeals has clearly influenced his choices for federal judgeships. This chapter examines Clinton’s approach to judicial selection, the characteristics of Clinton nominees and the controversies both have aroused.

THE JUDICIAL SELECTION PROCESS

President Clinton’s two immediate predecessors were committed to using their judicial appointments to reshape what they considered to be an unduly liberal-activist federal court system. To secure close scrutiny of judicial candidates and their likely decisional patterns, the Reagan administration shifted oversight of the selection process from the office of the Deputy Attorney General, in which the responsibility
had been traditionally placed, to the Justice Department’s Office of Legal Policy. To maximize White House influence over the process, Reagan also established the President’s Committee on Judicial Selection, composed of key White House and Justice Department officials, to review prospective nominees referred to the committee by the Office of Legal Policy and also to act as an independent source of candidates. To further assure that nominees were politically/ideologically acceptable, the White House personnel office also began to conduct investigations of prospective nominees independently of the Justice Department’s own review. Finally, the Reagan administration discontinued the White House practice of securing pre-nomination evaluations of judicial candidates from the American Bar Association’s Standing Committee on Federal Judiciary, which had been reviewing and rating candidates since President Eisenhower’s days. That decision stemmed from difficulties Nixon administration candidates had experienced with the committee, as well as the Reagan White House’s plan to nominate younger judges (with better prospects for long tenure) and conservative law professors (who could be expected to be articulate and forceful advocates of legal views important to the administration’s conservative constitutional agenda), rather than the older, practicing attorneys the ABA tended to favor in its evaluations of nominees.¹

In an apparent effort to blunt somewhat the controversial ideological focus of the Reagan selection process, President Bush’s first Attorney General, Richard Thornburgh, decided to abolish the Office of Legal Policy, transfer its non-judicial functions to a new Office of Policy Development, and return oversight of judicial selection to the office of the Deputy Attorney General, in which that function had been traditionally housed. Amidst a controversy surrounding his first choice for that position, however, Thornburgh moved responsibility for the judicial selection process into his office, giving a long-time associate primary responsibility for such matters. After persuading the ABA judiciary committee to disavow review of political or ideological philosophy in its review of candidates, Thornburgh also resumed the traditional Justice Department practice of submitting the names of likely nominees to the committee for its review and evaluation. Otherwise, the Bush administration largely retained the selection arrangements that President Reagan had established. In fact, Bush’s legal counsel, who chaired the White House selection committee, appeared to play an even greater role in the selection process than his Reagan administration predecessor.²