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Keeping the Covenant on the Federal Courts

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KEEPING THE COVENANT ON THE FEDERAL COURTS

*Carl Tobias**

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OBSERVERS of American politics, ranging from Bob Dole to Ralph Nader to Ross Perot, have criticized President Bill Clinton for breaking many promises. Federal judicial selection is, however, one critical area in which the Chief Executive has clearly honored his commitments. In discharging the constitutional duty to appoint judges, the Clinton Administration has carefully implemented a new covenant with the people of the United States by increasing gender, racial, and political balance on the federal bench.

When Governor Clinton was campaigning for the presidency, he contended that the federal court appointments of President Ronald Reagan and President George Bush significantly reduced the diversity that President Jimmy Carter had strongly promoted. Candidate Clinton pledged, if elected President, to rectify that situation. Since the election, Bill Clinton has fulfilled his promise by naming to the judiciary outstanding attorneys who re-

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flect the diverse composition of American society. Now that President Clinton has completed his initial year of service, it is important to analyze the Clinton Administration's record of choosing judges to ascertain precisely how the President has kept his covenant. This article undertakes that effort by focusing on the appointment of women to the federal bench.¹

This article first considers the recent history of federal judicial selection, emphasizing the objectives and practices followed in naming judges, as well as the numbers and percentages of women and minorities actually placed on the courts, by the Carter, Reagan, and Bush Administrations. This article then evaluates the numbers and percentages of female and minority federal judges appointed and nominated, and the judicial selection goals and procedures employed, during the Clinton Administration's opening year in office.

This article finds that President Clinton appointed and nominated unprecedented numbers and percentages of women and minorities, although the Senate did not consider for confirmation two-fifths of his nominees. This article also ascertains that the Clinton Administration prudently and systematically instituted an efficacious selection process, as illustrated by the noncontroversial elevation of Judge Ruth Bader Ginsburg to the U.S. Supreme Court. Determining that those policies and practices which facilitate the appointment of large numbers and percentages of women and minorities were implemented, this article explains why President Clinton should continue naming many female and minority federal judges and affords suggestions for attaining this objective.

I. RECENT FEDERAL JUDICIAL SELECTION

The recent history of federal judicial selection warrants comparatively brief examination in this essay, as that background has been comprehensively considered elsewhere.² The goals articulated, the procedures followed, the judges appointed, and the jurists' decisionmaking in the Carter, Reagan, and Bush Administrations are analyzed because judicial selection during these presidencies furthers understanding of the Clinton Administration's record of choosing judges.

A. CARTER ADMINISTRATION

President Jimmy Carter was the first Chief Executive who enunciated a clear policy of substantially increasing the numbers and percentages of female and minority federal judges and who implemented concrete measures to achieve this purpose.³ One of the most important mechanisms that the

1. I recognize that increasing racial balance on the federal courts is very important. I treat this issue in somewhat less detail in the essay, although I do provide considerable applicable information. See, e.g., *infra* notes 3-8, 11-14, 19-21, 25-28 and accompanying text; see also Carl Tobias, *Closing the Gender Gap on the Federal Courts*, 61 U. CIN. L. REV. 1237, 1247 n.51 (1993).

2. See, e.g., DAVID M. O'BRIEN, *JUDICIAL ROULETTE* (1988); Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282 (1993); Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 B.Y.U. L. REV. 1257, 1258-74 (1993).

3. I rely substantially in this subsection on Tobias, *supra* note 2, at 1259-64, and on Elliot

Carter Administration employed was merit-based nominating commissions for both circuit and district courts.⁴ These panels were instrumental in seeking out, finding, and promoting the candidacies of highly-qualified women and minorities.⁵

President Carter's efforts to name competent female and minority attorneys proved to be extremely successful. A number of these appointees had to meet stricter nomination requirements than other lawyers and apparently possessed better qualifications than judges chosen by more conventional procedures.⁶ The women and minorities selected were as qualified as their predecessors in terms of numerous significant criteria.⁷

Quite a few of the female and minority appointees, such as Justice Ginsburg and Circuit Judges Harry Edwards⁸ and Amalya Kearse, have provided distinguished service on the bench.⁹ These jurists' contributions to judicial decisionmaking and to effective functioning of the courts demonstrate the value of having diverse viewpoints, often derived from personal life experiences, which numerous women and minorities bring to the judiciary.¹⁰ Moreover, the Carter appointees have been willing to recognize individual rights, have been sensitive to congressional intent expressed in substantive legislation, and have provided comparatively open court access for resource-poor parties.¹¹

President Carter placed six women out of sixty attorneys (ten percent) in

E. Slotnick, *Lowering the Bench or Raising it Higher?: Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POL'Y REV. 270 (1983); see also *infra* note 14 and accompanying text (discussing the tiny numbers of female and minority federal judges sitting prior to the Carter Administration).

4. See LARRY C. BERKSON & SUSAN B. CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES* (1980); ALAN NEFF, *THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES, AND CANDIDATES* (1981).

5. See Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136, 141 (1987); Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 174 (1990).

6. This observations is controversial and depends substantially on how qualifications are defined. See Slotnick, *supra* note 3, at 298.

7. See Slotnick, *supra* note 3, at 280-98; cf. Sheldon Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488, 492-93 (1979) (stating that female and minority Carter appointees on whole "may even be more distinguished than . . . white males chosen by Carter and previous administrations").

8. See Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). Judge Edwards has actively participated in scholarly debate even while capably resolving the very complicated suits decided by the District of Columbia Circuit. *Id.*

9. Cf. Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 306 (1991) (mentioning Judge Kearse as possible Supreme Court nominee).

10. See *infra* notes 33-34 and accompanying text (discussing Justice Ginsburg's career); see also *infra* notes 68-73 (discussing other values of diversity). The diversity of the judges on the bench also makes it more representative of society.

11. See Tobias, *supra* note 2, at 1262-63; see also Sheldon Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 JUDICATURE 344, 355 (1981) Carter Appointees Liberal to Moderate Outlook. I appreciate that some observers would consider these judicial decisions to be indicia of unsuccessful judicial selection. See Tobias, *supra* note 2, at 1262-64.

judgeships during the first two years of his administration,¹² and he named forty-one female lawyers out of 258 appointees (15.9%) throughout his term in office.¹³ These efforts marked dramatic improvement. At the advent of the Carter Administration, there were only one female and two African-American circuit judges among the ninety-seven appellate judges, and five women and twenty African-Americans or Hispanic-Americans among the 400 district judges.¹⁴

B. REAGAN ADMINISTRATION

President Ronald Reagan was elected in 1980 with what he asserted was a mandate to make the entire federal government, particularly the courts, more conservative.¹⁵ The President expressly proclaimed that his major purpose in selecting judges was to create more conservative courts.¹⁶ Moreover, the Chief Executive apparently considered the naming of judges to be a rather cost-free way of appealing to conservative elements of the Republican party.¹⁷

President Reagan attempted to accomplish this objective in several ways. An important means was to reject the Carter Administration's approaches. For instance, President Reagan abrogated the merit-based selection commissions for appellate courts and deemphasized the district court panels.¹⁸ The Republican Chief Executive also eschewed nearly all of the special efforts of his predecessor to promote the judicial candidacies of very capable women

12. Sheldon Goldman, *Reagan's Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image*, 66 JUDICATURE 335, 345 (1983). I am employing numbers and percentages for the first two years of the Carter, Reagan, and Bush Administrations. Most presidential administrations require the first year to implement selection procedures. See *infra* notes 62-66 and accompanying text. All recent administrations have increased the numbers and percentages of women appointed over time. See Tobias, *supra* note 1, at 1240; see also *infra* notes 13-14, 21-22, 27-29 and accompanying text. Of course, relying on the figures for two years emphasizes how extraordinary were the numbers and percentage of women named by the Clinton Administration. See *infra* notes 30-31 and accompanying text.

13. See Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 322, 325 (1989); Patricia McGowan Wald, *Women in the Law*, TRIAL, Nov. 1988, at 75. President Carter also named 37 African Americans out of 258 appointees (14.3%) during his four-year tenure. See Goldman, *supra*, at 322, 325. Of the 258 appointees, 16 were Hispanic-Americans and two were Asian-Americans. See Alliance for Justice, *Judicial Selection Project, Annual Report 4* (1992) (copy on file with author) [hereinafter JSP Annual Report].

14. See Robert J. Lipshutz & Douglas B. Huron, *Achieving A More Representative Federal Judiciary*, 62 JUDICATURE 483 (1979); see also Slotnick, *supra* note 3, at 271. See generally Elaine Martin, *Women on the Federal Bench: A Comparative Profile*, 65 JUDICATURE 306 (1982).

15. I rely substantially in this subsection on O'BRIEN, *supra* note 2, at 60-64, and Goldman, *supra* note 13, at 319-25.

16. See O'BRIEN, *supra* note 2, at 60; Goldman, *supra* note 12, at 337.

17. See Ruth Marcus, *Bush Quietly Fosters Conservative Trend in Courts*, WASH. POST, Feb. 18, 1991, at A4; Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. TIMES, Apr. 10, 1990, at A1. See generally O'BRIEN, *supra* note 2, at 60-63.

18. Exec. Order No. 12,059, 43 Fed. Reg. 20,949, reprinted in 28 U.S.C. § 44 (Supp. IV 1992), revoked by Exec. Order No. 12,305, 46 Fed. Reg. 25,421 (1981), reprinted in 28 U.S.C. § 44 (Supp. IV 1992); Exec. Order No. 12,097, 43 Fed. Reg. 52455 (1978), reprinted in 28 U.S.C. § 133 (Supp. IV 1992), revoked by Exec. Order No. 12,553, 51 Fed. Reg. 7237 (1986), reprinted in 28 U.S.C. § 133 (Supp. IV 1992); see also O'BRIEN, *supra* note 2, at 61.

and minorities.¹⁹

The Reagan Administration relied on traditional selection procedures, such as senatorial courtesy and patronage, and infrequently consulted with the Senate Judiciary Committee.²⁰ President Reagan and the officials responsible for judicial recruitment also instituted affirmative measures to realize the administration's purpose of naming conservative judges. Presidential assistants assiduously sought out candidates with proper political perspectives and scrutinized the decisionmaking of lower court judges to discern their fitness for elevation to the next tier in the federal judicial system.

President Reagan achieved his clearly-enunciated goal of making the courts more conservative. The judges named were quite similar in terms of gender, race, and ideological viewpoints. The Reagan Administration placed a minuscule number, three women out of eighty-seven judges (3.4%), on the courts during its opening half-term in office²¹ and named only thirty-one female federal judges out of 372 appointees (8.3%) over the course of its eight years.²² A number of those judges, once on the bench, have resolved cases in a conservative manner. For instance, they have narrowly interpreted the Constitution and statutes and have sharply restricted federal court access.²³

C. BUSH ADMINISTRATION

President Bush closely followed the Reagan Administration's methods for choosing judges. For example, President Bush stated that his principal purpose was to make the federal judiciary more conservative, and he depended substantially on senatorial courtesy and patronage.²⁴ The Bush Administration's policies and procedures differed, however, in certain respects. Most important, President Bush instituted greater efforts to appoint highly-competent female and minority lawyers, although these initiatives began only during his last two years in office and were less comprehensive than those of President Carter.²⁵

The Bush Administration realized the goal of creating more conservative

19. See Martin, *supra* note 5, at 141; Elliot E. Slotnick, *Gender, Affirmative Action, and Recruitment to the Federal Bench*, 14 GOLDEN GATE U. L. REV. 519, 545-61 (1984).

20. I rely substantially in this paragraph on O'Brien, *supra* note 2, at 60-62; Goldman, *supra* note 13, at 319; Lewis, *supra* note 17, at A1; Tim Weiner, *White House Builds Courts in Its Own Image*, PHILADELPHIA INQUIRER, Oct. 7, 1990, at A1.

21. See Goldman, *supra* note 12, at 339, 345; see also Tobias, *supra* note 5, at 172.

22. See Goldman, *supra* note 13, at 322, 325. African-Americans comprised only 1.9% (seven out of 368) of the lawyers whom President Reagan appointed in his eight years. See *id.* at 321, 325. Of 368 lawyers, 13 were Hispanic-Americans and two were Asian-Americans. See JSP Annual Report, *supra* note 13, at 4.

23. See Goldman, *supra* note 13, at 330; cf. Steve Alumbaugh & C.K. Rowland, *The Links Between Platform-Based Appointment Criteria and Trial Judges' Abortion Judgements*, 74 JUDICATURE 153 (1990) (stating that Reagan appointees are much more likely than Carter appointees to reject pro-abortion claims). See generally O'BRIEN, *supra* note 2, at 60-64.

24. See Letter from President George Bush to Senator Robert Dole (Nov. 30, 1990) (copy on file with author) [hereinafter Letter]; Goldman, *supra* note 9, at 295-97; Lewis, *supra* note 17 at A1; see also *supra* notes 15-16, 20 and accompanying text.

25. See Letter, *supra* note 24; Goldman, *supra* note 9, at 297.

courts, although some evidence indicates that its appointees are less ideological than the judges whom President Reagan named.²⁶ The jurists whom President Bush selected were more diverse. The Chief Executive chose seven female attorneys out of sixty-eight appointees (10.3%) in his initial half-term of service,²⁷ and the administration placed thirty-six women out of 192 judges (18.7%) on the courts over its four-year tenure.²⁸ The percentage of women named during the Bush Presidency was unprecedented, although several factors qualify this apparent success. For example, the Bush Administration chose many of the female judges after the disastrous proceedings to confirm Justice Clarence Thomas and during the year when Mr. Bush was desperately seeking reelection.²⁹

II. JUDICIAL SELECTION IN THE FIRST YEAR OF THE CLINTON ADMINISTRATION

A. DATA

In the first year of the Clinton Administration, President Clinton appointed eleven women out of twenty-eight attorneys (39.3%) and seven minorities out of twenty-eight practitioners (25%) to the federal bench.³⁰ Moreover, he nominated eighteen female lawyers out of forty-eight (37.5%) and thirteen minority attorneys out of forty-eight (27.2%).³¹ The numbers and percentages of women and minorities named and nominated are unprecedented; they clearly eclipse the record of judicial selection that President Reagan compiled and substantially surpass the results which Presidents Bush and Carter secured.³²

All of the Clinton Administration's appointees and nominees appear to have excellent qualifications. The individuals named and nominated seem to be highly intelligent, extremely industrious, and quite independent. Furthermore, they appear to possess great integrity and appropriately-measured judicial temperament. Quite a few have already earned much-deserved respect for their effective performance as federal or state court judges.

Justice Ginsburg is illustrative. Ginsburg's litigation of numerous landmark women's rights cases as a practicing attorney prompted some ob-

26. See Goldman, *supra* note 9, at 295-98; Neil A. Lewis, *The 1992 Campaign: Selection of Conservative Judges Insures a President's Legacy*, N.Y. TIMES, July 1, 1992, at A13.

27. See Goldman, *supra* note 9, at 297.

28. See Goldman, *supra* note 2, at 287, 293; Tobias, *supra* note 1, at 1237 n.3 and accompanying text; see also *supra* note 12. African-Americans constituted 5.2% (ten out of 192) of President Bush's appointees. See Goldman, *supra* note 2, at 287, 293. Of the 192 judges, nine were Hispanic-Americans and one was an Asian-American. See JSP Annual Report, *supra* note 13, at 4.

29. See Tobias, *supra* note 1, at 1240-42; see also Tobias, *supra* note 2, at 1262 n.18, 1270-74.

30. Telephone interview with George Kassouf, Alliance for Justice, Washington, D.C. (Nov. 19, 1993).

31. *Id.* I include the numbers and percentages of women and minorities nominated as well as appointed because nominees indicate an administration's commitment to naming female and minority judges.

32. See *supra* notes 12-13, 21-22, 27-28 and accompanying text; see also Al Kamen, *Vow on Federal Judges Still on Hold*, WASH. POST, Oct. 29, 1993, at A25.

servers to analogize her career to that of Justice Thurgood Marshall.³³ For thirteen years, she rendered distinguished service on the U.S. Court of Appeals for the District of Columbia Circuit, the second most important court in the country.³⁴ Judge Ginsburg enjoyed a reputation as a clear thinker, a lucid writer, and a consensus-builder on a very contentious court: The D.C. Circuit decides many cases involving complex issues of science, economics, and public policy that substantially affect the health, safety, and financial well-being of millions of Americans. President Clinton also elevated to the Second Circuit District Judge Pierre Leval, who is widely acclaimed as one of the preeminent federal trial court judges.³⁵ Moreover, the Chief Executive appointed to the Sixth Circuit Justice Martha Daughtrey, who has been a highly-regarded member of the Tennessee state bench for over a decade.³⁶

B. REASONS FOR THE ADMINISTRATION'S SUCCESS

Why the Clinton Administration placed such large numbers and percentages of women and minorities on federal courts and nominated so many additional female and minority lawyers to judicial posts is rather easy to ascertain. One significant reason seems to be that President Clinton is keeping his covenant with the citizens of the United States. Another explanation is that the Chief Executive apparently possesses substantive views about the federal courts, and he has applied policies and procedures for choosing judges that more closely resemble the perspectives, goals, and processes of President Carter than those of Presidents Reagan or Bush.³⁷

1. Campaign Promises

Candidate Clinton criticized his two Republican predecessors for pursuing a "single-minded effort to remake the federal judiciary by selecting judges who shared their restrictive view of constitutional rights"³⁸ and who favored the "interests of big business over the rights of individuals."³⁹ Moreover, Clinton criticized Presidents Reagan and Bush for creating federal courts with compositions that were "less reflective of our diverse society than at

33. See, e.g., Guy Gugliotta, *A Mentor, Role Model and Heroine of Feminist Lawyers*, WASH. POST, June 15, 1993, at A14; Nat Hentoff, *One Cheer for Judge Ginsburg*, WASH. POST, July 3, 1993, at A23. For examples of Professor Ginsburg's landmark litigation, see *Craig v. Boren*, 429 U.S. 190 (1976) and *Kahn v. Shevin*, 416 U.S. 351 (1974).

34. I rely substantially in this sentence and the next on Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. MIAMI L. REV. No. 2 § IIA (forthcoming 1994).

35. See Arnold H. Lubasch, *Judge With Gentle Firmness*, N.Y. TIMES, Oct. 10, 1984, at B28.

36. See John Commins, *Daughtrey Takes Oath as First Woman Supreme Court Justice*, UPI Regional News, Tenn., Apr. 23, 1990, at 40-44; see also Lacrisha Butler, *Daughtrey Nomination Clears Judiciary Committee*, Gannett News Service, Nov. 18, 1993 1; Neil A. Lewis, *G.O.P. to Challenge Judicial Nominees Who Oppose Death Penalty*, N.Y. TIMES, Oct. 15, 1993, at A26.

37. See Tobias, *supra* note 2, at 1258-74.

38. *Bush v. Clinton: The Candidates on Legal Issues*, A.B.A. J., Oct. 1992, at 57 [hereinafter *Bush v. Clinton*].

39. William J. Clinton, *Judiciary Suffers Racial, Sexual Lack of Balance*, NAT'L L.J., Nov. 2, 1992, at 15.

any other time in recent memory."⁴⁰

Governor Clinton promised, if elected President, that he would "strive to restore confidence in the federal judiciary, appointing only men and women of unquestioned intellect, judicial temperament, broad experience and a demonstrated concern for, and commitment to, the individual rights protected by our Constitution, including the right to privacy."⁴¹ The candidate also pledged to increase gender and racial balance on the federal bench, vowing before a National Bar Association convention that he would name more African Americans than President Carter.⁴²

Governor Clinton stated as well that he would implement an appointment process less political in nature and promised to choose an attorney general whose familiarity with lawyers across the country could facilitate the identification of excellent nominees.⁴³ Candidate Clinton correspondingly suggested that the attorneys recommended would enjoy more widespread approval than the lawyers proposed by Presidents Reagan and Bush and that, therefore, the Senate might confirm them more promptly.⁴⁴

2. *Judicial Selection in the First Year*

Since the time of President Clinton's inauguration, his administration has faithfully and comprehensively implemented the pronouncements of Candidate Clinton. The President occasionally mentioned the above ideas regarding the appointment of exceptionally-qualified attorneys who reflect the nation's gender, racial, and political composition, which the elevation of Justice Ginsburg epitomizes.⁴⁵ Bernard W. Nussbaum, former White House Counsel, whose office has substantial responsibility for judicial selection, observed that the administration's philosophy and process for choosing judges have one objective: "showing respect for the vital role that the federal courts play in our society, by naming distinguished men and women - from diverse backgrounds - for service on the bench."⁴⁶ He reiterated that "our only test is that [candidates] be distinguished and diverse" while disavowing the use of any ideological litmus tests.⁴⁷

Attorney General Janet Reno similarly remarked that the administration wants to fill judicial vacancies "in a careful, thoughtful way, with excellence,

40. *Id.*; accord *Bush v. Clinton*, *supra* note 38, at 58.

41. *Clinton*, *supra* note 39, at 15-16; accord *Bush v. Clinton*, *supra* note 38, at 57.

42. See Stephen Labaton, *Clinton May Use Diversity Pledge to Remake Courts*, N.Y. TIMES, Mar. 8, 1993, at A1; see also *Clinton*, *supra* note 39, at 15-16; *Bush v. Clinton*, *supra* note 38, at 57-58; Sandra Torry, *Seeing a Chance for Bench that Resembles the District*, WASH. POST, Aug. 9, 1993, at F7.

43. See *Bush v. Clinton*, *supra* note 38, at 58.

44. See *id.*

45. See Neil A. Lewis, *Unmaking the G.O.P. Court Legacy*, N.Y. TIMES, Aug. 23, 1993, at A10; Susan Page, *Supreme Matter on Home Front*, NEWSDAY, Mar. 24, 1993, at 4; see also *supra* notes 32-33 and accompanying text.

46. *White House Counsel Discusses Nation's Legal Agenda*, THIRD BRANCH, Sept. 1993, at 1, 10.

47. Steve Albert, *100 Judges Named by July. White House Counsel Promises*, RECORDER, Aug. 20, 1993, at 2; see also *Nussbaum Out As White House Counsel*, N.Y. TIMES, Mar. 6, 1994 at 1.

diversity, and excellence in judicial temperament as the criteria."⁴⁸ The Department of Justice, which was the other Executive Branch institution with important judicial selection duties, was strongly committed to the above purposes and was actively involved in implementing the process.⁴⁹

The Senate judiciously exercised its power of advice and consent. The Senate Judiciary Committee - which has significant responsibility for reviewing nominees - and many individual senators were responsive to the administration's goals in choosing judges and closely cooperated with President Clinton and his assistants. For example, Senator Joseph Biden (D-Del.), Chair of the Judiciary Committee, observed that there "will not be an ideological blood test . . . if the candidate is a moderate or liberal . . . but there will be insistence on diversity."⁵⁰ Quite a few senators correspondingly used or revived district court nominating commissions to find and promote excellent female and minority candidates.

The Clinton Administration's general procedures for selecting judicial nominees closely resembled the practices followed by President Carter but differed little from the process of the Bush Administration and only somewhat from that of President Reagan.⁵¹ The Clinton White House assumed greater responsibility for choosing judges than the Justice Department.⁵² For instance, the Department of Justice participated minimally in searching for and forwarding proposed nominees, although it was intimately involved in scrutinizing virtually all attorneys once they became serious candidates.

Senatorial patronage and courtesy figured prominently in the choice of nominees for the federal district courts, because the Clinton Administration has deferred considerably to senators who represent the geographical areas in which the judicial openings existed.⁵³ Senators apparently proposed the names of several lawyers from whom President Clinton picked a nominee. The Clinton Administration did not require, but has encouraged, the use of district court nominating panels, which were employed in approximately half of the states.⁵⁴

The Clinton Administration exercised much greater control over the selection of circuit court nominees, although the administration seemed quite

48. Al Kamen, *When Vacancies Are "Judicial Emergencies,"* WASH. POST, Apr. 26, 1993, at A17; accord Tom Hamburger & Josephine Marcotty, *Two Proposed for U.S. Court by Wellstone*, MINNEAPOLIS STAR TRIB., Mar. 10, 1993, at A1.

49. This statement and much in the remainder of this subsection are premised substantially on conversations with individuals who are knowledgeable about the selection procedures that the Clinton Administration is employing. See also Labaton, *supra* note 42, at A1.

50. Labaton, *supra* note 42, at A1; see also Lewis, *supra* note 45, at A10 (providing Senator Biden's additional observations on judicial selection).

51. See Tobias, *supra* note 2, at 1259-74.

52. See Chris Reidy, *Clinton Gets His Turn*, BOSTON GLOBE, Aug. 8, 1993, at 69; see also Goldman, *supra* note 2, at 285 (suggesting that the Bush Administration had assumed similar responsibility); Goldman, *supra* note 13, at 319-20 (suggesting that the White House assumed greater responsibility during the Reagan Administration's first term but that the Justice Department assumed greater responsibility during second term).

53. See Neil A. Lewis, *Clinton is Considering Judgeship for Opponents of Abortion Rights*, N.Y. TIMES, Sept. 18, 1993, at A1; Michael York, *Clout Sought in Choosing U.S. Judges*, WASH. POST, Feb. 5, 1993, at D3.

54. See Lewis, *supra* note 45 at A10; see also *supra* notes 4-5 and accompanying text.

receptive to the views of senators who serve the regions from which the nominees were drawn.⁵⁵ President Clinton played a substantial role in choosing the administration's first Supreme Court Justice and will probably be an active participant in the selection of future appointees. The Administration informally consulted on potential nominees with the Senate Judiciary Committee and with individual senators before formally nominating lawyers and sending their names to the Senate. This was especially true of Judge Ginsburg's nomination for the Supreme Court, in which close consultation apparently facilitated her noncontroversial appointment. For instance, Senator Orrin Hatch (R-Utah), the ranking Republican member of the Judiciary Committee, supported her candidacy.⁵⁶

The Clinton Administration instituted a number of special efforts to seek out, find, and nominate very qualified women and minorities. President Clinton, the White House Counsel, and other high-ranking personnel clearly and strongly proclaimed that the appointment of excellent female and minority attorneys was an important priority.⁵⁷ Moreover, some administration officials with significant responsibility for judicial selection were women or minority group members, such as Janet Reno, the Attorney General, and Eleanor Dean Acheson, the Assistant Attorney General for the Office of Policy Development.⁵⁸ These individuals and other employees who were involved in choosing judges have many professional, educational, political, and personal associations with female and minority lawyers. The officials also seriously considered the input and suggestions for potential nominees of national, state, and local women's organizations, public interest entities, and minority political groups.

Numerous senators may have been predisposed to search for, identify, and propose female and minority candidates, while the pronouncements of President Clinton and his aides may have encouraged other members of the Senate to undertake similar efforts. The administration specifically urged senators to forward the names of female and minority attorneys and to use existing, or revive moribund, district nominating commissions, some of which senators voluntarily reinstated.⁵⁹ Quite a few senators sought assistance and recommendations for possible nominees from individuals and orga-

55. See Reidy, *supra* note 52, at 69. The Clinton Administration has not reinstated the Circuit Judge Nominating Commission employed during the Carter Administration. See *supra* notes 4-5 and accompanying text.

56. See William E. Clayton, *Panel Endorses Ginsburg*, HOUSTON CHRON., July 30, 1993, at A20; Martin Kasindorf & Timothy H. Phelps, *In Supreme Company: Ginsburg's Nomination to Top Court Is Confirmed*, NEWSDAY, Aug. 4, 1993, at 23.

57. See *supra* notes 45-49 and accompanying text; *infra* note 59 and accompanying text.

58. See David Johnston, *Executive Brief: The Justice Department*, N.Y. TIMES, Mar. 22, 1993, at A15; see also Goldman, *supra* note 9, at 297 n.37. The Office of Policy Development has major responsibility for appointments at the department. See Kamen, *supra* note 32, at A25; Reidy, *supra* note 52, at 69.

59. The New York Times quoted a senior White House official as saying that "[w]e have spoken to each and every Democrat in the Senate and told them we expect their recommendations to include women and minorities." Lewis, *supra* note 45, at A10; see also *supra* note 54 and accompanying text.

nizations such as women's groups, criminal defense counsel and associations, minority political entities, and legal services lawyers and organizations.

Several members of the Senate, including Senator Robert Graham (D-Fla.), Senator Edward Kennedy (D-Mass.), and Senator Harrison Wofford (D-Pa.), represent states with numerous district court vacancies and substantial populations of female or minority attorneys. These senators tendered the names of significant numbers and percentages of women and minorities.⁶⁰ Senator Paul Wellstone (D-Minn.), who comes from a state with comparatively few minority lawyers, formed a special advisory group which assisted him in suggesting two well-respected African-American state court judges for nomination.⁶¹

C. RESOLUTION

In short, President Clinton compiled an outstanding record of judicial selection. During the Clinton Administration's first year in office, it achieved remarkable success in appointing and nominating very capable women and minorities, greatly exceeding President Reagan's efforts and substantially surpassing those of Presidents Bush and Carter. The Clinton Administration also articulated clear goals for choosing judges and employed efficacious selection procedures, particularly for seeking out, finding, and naming excellent women and minorities.

President Clinton's success is even more striking in light of the obstacles that he confronted. First, the Clinton Administration faced the generic difficulties that every new presidency meets during its initial year of service. Several factors compounded these inherent complications. One was that the Democrats had not controlled the Executive Branch for twelve years, which meant that the Clinton Administration lacked recent judicial selection models and individuals with applicable governing experience. For instance, in August 1993, Bernard Nussbaum explained the slow pace of judicial appointments by stating that President Clinton assumed "office after twelve years of Democrats being out of power [and that it had] taken this long for many senators to get their nominating commissions in place."⁶²

Another consideration was a set of problems that seemed unusual so early in the nascent existence of a presidency. Justice Byron White's decision to resign within two months of the inauguration was critical.⁶³ The search for his successor required many weeks of resource-intensive activity, especially from personnel with central responsibility for judicial selection in the Office of White House Counsel. Much of the time and energy expended on that

60. For example, the Judiciary Committee held confirmation hearings on two African-Americans and one woman whom Senator Graham proposed and two women and one African-American whom Senator Kennedy proposed. See Mark Ballard, *New Contenders for 5th Circuit: Krueger's Choices for Trial Bench Still on Track*, TEX. LAW., Sept. 13, 1993, at 1.

61. See Hamburger & Marcotty, *supra* note 48, at A1.

62. Albert, *supra* note 47, at 2.

63. See Joan Biskupic, *Promises, Pressure in Court Search*, WASH. POST, Mar. 21, 1993, at A1; Linda Greenhouse, *White Announces He'll Step Down From High Court*, N.Y. TIMES, Mar. 19, 1993, at A1.

effort were lost to the nomination of circuit and district court judges.⁶⁴

Other important complications distracted top-ranking officials in the White House and the Department of Justice. These included difficulties that specifically occupied the White House Counsel's Office and the Justice Department. One valuable illustration was the lengthy siege, the delicate negotiations, and the decision to storm the Branch Davidian compound at Waco, Texas.⁶⁵ A second included the machinations which surrounded the departure of Williams Sessions as Director of the Federal Bureau of Investigation and the complications encountered in naming his successor.⁶⁶ Major policy-makers in the Office and the Department devoted much attention to these problems.

Additional matters significant to the Clinton Presidency - but not directly within the purview of the Office of the White House Counsel or the Department of Justice - include the passage of the administration's budget, the North American Free Trade Agreement (NAFTA), health care initiatives, and foreign policy issues. These matters consumed considerable time of Executive Branch officials. In sum, the Clinton Administration's treatment of judicial selection was highly commendable, given the substantial constraints. President Clinton seems poised to achieve even more, and he can do so by continuing to follow the goals and procedures above and by instituting several of the suggestions below.

III. SUGGESTIONS FOR THE FUTURE

A. WHY MORE WOMEN AND MINORITIES SHOULD BE APPOINTED

The reasons the Clinton Administration should name additional competent women and minorities to federal courts require relatively little examination here. Those reasons have been expressly and implicitly explored above and have been thoroughly treated elsewhere.⁶⁷ Moreover, the effort to recruit, nominate, and appoint highly-qualified female and minority attorneys that President Clinton expended during his initial year of service indicates that the Clinton Administration appreciates the importance of increased appointments of excellent women and minorities.

One extremely significant reason for appointing additional female and minority judges is the diverse perspectives that these women and minorities will bring to the federal bench. For example, female and minority judges could enhance their colleagues' sensitivity to complicated public policy is-

64. See Kamen, *supra* note 48, at A17. The tragic death of Vincent Foster, White House Associate Counsel, understandably disrupted the operations of the White House Counsel Office and of certain Justice Department components for a considerable period of time. See Gwen Ifill, *White House Aide Found Dead*, N.Y. TIMES, July 21, 1993, at A1; Ruth Marcus, *Clinton's Mystified by Aide's Death*, WASH. POST, July 22, 1993, at A1.

65. See David Johnston, *Doubts on Reno's Competence Rise in Justice Department*, N.Y. TIMES, Oct. 26, 1993, at A1.

66. See *Text of Reno's Letter Recommending Dismissal*, WASH. POST, July 20, 1993, at A11; see also Johnston, *supra* note 65, at A1.

67. See, e.g., Goldman, *supra* note 7, at 495; Martin, *supra* note 5, at 139; Slotnick, *supra* note 3, at 272.

sues, such as those involving the death penalty and abortion, that federal courts must address.⁶⁸ Female and minority judges may also better apprehend specific difficulties, such as securing and maintaining employment and experiencing discrimination, which many women and minorities have encountered.⁶⁹ The appointment of more female and minority judges could also reduce gender and racial bias in the federal court system.⁷⁰ Considerable evidence suggests as well that the public has greater confidence in a federal bench whose composition more closely resembles that of American society.⁷¹

Many women and minorities, including Justice O'Connor, Justice Ginsburg and Justice Marshall, have been outstanding jurists.⁷² Moreover, naming greater numbers and percentages of female and minority attorneys is one indicator of an administration's commitment to improving conditions for women and minorities in the country, in the federal courts, and in legal practice.⁷³

Another reason to appoint more female and minority judges is the need to rectify the lack of gender, racial, and political diversity in the current federal judiciary, sixty percent of whose members Presidents Reagan and Bush placed on the bench. Less than two percent of the Reagan Administration's judges were African-Americans, and comparatively few were women.⁷⁴ President Bush compiled a dismal record of appointing minorities, naming a lone Asian-American and only nine Hispanic-Americans to the courts, although he placed an unprecedented percentage of female lawyers on the bench.⁷⁵ Many of the Republican appointees, especially such high-profile judges as Justice Clarence Thomas, Judge Robert Bork, Judge Edith Jones, and Judge Daniel Manion, were apparently named or nominated primarily for their conservative political views.⁷⁶

68. See Goldman, *supra* note 7, at 494; Slotnick, *supra* note 3, at 272. Republican Senators have suggested that they will oppose nominees who are insufficiently solicitous of the death penalty. See Lewis, *supra* note 36, at A26. Other individuals and groups have expressed concern that President Clinton might nominate lawyers who are insufficiently solicitous of abortion rights. See Helen Dewar, *Appeal on Antiabortion Judges*, WASH. POST, Oct. 1, 1993, at A16; Lewis, *supra* note 52, at A1.

69. See Marion Z. Goldberg, *Carter-Appointed Judges - Perspectives on Gender*, TRIAL, Nov. 1990, at 108; Tobias, *supra* note 1, at 1243.

70. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990); Lynn H. Schafran, *Gender Bias in the Courts: An Emerging Focus For Judicial Reform*, 21 ARIZ. ST. L.J. 237, 238, 271-73 (1989). See generally REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE (1992) (asserting that female judges recognize the significant impact gender distinctions play in the outcome of a case).

71. Additional research concomitantly shows that a number of female and minority judges could improve substantive decisionmaking. See Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Court of Appeals*, 67 JUDICATURE 165, 168 (1983); see also Elaine Martin, *Men and Women on the Bench: Vive la Difference?*, 73 JUDICATURE 204, 208 (1990). *But cf. supra* note 11 (recognizing that this assertion is controversial).

72. See Tobias, *supra* note 1, at 1244.

73. See Tobias, *supra* note 5, at 176; Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477, 483 (1981).

74. See *supra* notes 21-22 and accompanying text.

75. See *supra* notes 27-28 and accompanying text.

76. See Tobias, *supra* note 2, at 1268-71.

This failure to appoint greater numbers and percentages of women and minorities is even more disconcerting because Presidents Reagan and Bush had substantially larger, more experienced pools of female and minority attorneys from which to select than did President Carter. For instance, 62,000 women were lawyers in 1980, while 140,000 women were attorneys in 1988.⁷⁷ Many of these women have been actively involved in diverse forms of challenging legal work in settings such as the Justice Department, public interest organizations, and large law firms.⁷⁸ The total number of African-American, Hispanic-American, and Asian-American practitioners correspondingly increased from 23,000 in 1980 to 51,000 in 1989.⁷⁹ These attorneys have participated in equally rigorous legal activity by, for example, pursuing landmark civil rights litigation, practicing corporate law, or writing cutting-edge legal scholarship.⁸⁰

B. RECOMMENDATIONS FOR APPOINTING MORE WOMEN AND MINORITIES

Suggestions for how the Clinton Administration can appoint even more well-qualified female and minority federal judges warrant relatively little treatment here. Many similar recommendations have been offered elsewhere,⁸¹ and some have been described above. Moreover, President Clinton and administration personnel responsible for judicial selection are clearly committed to naming additional female and minority federal judges and have already instituted numerous effective procedures for achieving this goal. Several suggestions nonetheless can be provided. The Chief Executive and his advisers may want to examine ways of redoubling their efforts to search for, identify, and appoint higher numbers and percentages of competent female and minority judges. The President and administration officials continue aggressively pursuing the naming of women and minorities considering new courses of action, and invoking formerly untapped sources.

Judicial selection for the Supreme Court and appellate courts deserves comparatively limited discussion, as the White House has retained substantial control over those choices.⁸² President Clinton and the White House Counsel, therefore, will primarily need to guarantee that White House employees participating in selection clearly understand that appointing more women and minorities is of utmost importance and that the officials must use the finest procedures to accomplish this objective. Experience to date inspires confidence that administration personnel fully comprehend this particular goal and that they have implemented quite effective selection practices.

77. See Tobias, *supra* note 1, at 1241 n.22.

78. *Id.* at 1246-47; see also *supra* note 58 and accompanying text.

79. See JSP Annual Report, *supra* note 13, at 3.

80. See Symposium, *Regulating the Electoral Process*, 71 TEX. L. REV. 1409 (1993) (discussing voting rights litigation); see also *Symposium on Civic and Legal Education*, 45 STAN. L. REV. 1525 (1993) (providing examples of cutting-edge scholarship by minority professors).

81. See Tobias, *supra* note 1, at 1245-49; Tobias, *supra* note 2, at 1274-81.

82. See *supra* notes 53-55 and accompanying text.

The policies and processes for choosing district court judges warrant closer evaluation because the Clinton Administration has ceded considerable responsibility for these appointments to senators who represent the geographic regions where the judges will sit.⁸³ Senators' own predilections, or the suggestions of President Clinton or of top-ranking administration officials, apparently have prompted many senators to institute mechanisms for seeking out, finding, and promoting the candidacies of highly competent women and minorities and to forward the names of significant numbers and percentages of female and minority lawyers. President Clinton may want to commend those senators who have enabled the administration to realize its judicial selection objectives and encourage the remaining senators to undertake similar efforts.

The Chief Executive ought to consider reiterating, in an important public forum, his strong commitment to naming large numbers of excellent female and minority judges. President Clinton might even want to write senators directly, requesting their help in proposing the names of women and minorities⁸⁴ and in employing measures, such as nominating panels, that will find, identify, and facilitate the appointment of these attorneys.⁸⁵

The administration officials responsible for selection and members of the Senate should correspondingly solicit the advice and assistance of other sources who will be familiar with qualified female and minority lawyers. The judicial recruiters and senators should contact traditional entities, such as bar associations and other "old boy networks," which ought to provide some help. Perhaps more valuable will be less conventional sources, such as women's groups or minority political organizations. The administration must concomitantly enlist the aid of each female and minority senator, who may more appropriately be denominated as members of "new girl" or "new minority" networks. Those senators can convince their colleagues to suggest more women and minorities, and could assist President Clinton in fostering the candidacies of female and minority attorneys.

Female and minority lawyers, who now comprise more than a quarter of the legal profession in the United States, will also be critical to these recruitment efforts. Hillary Rodham Clinton, who chaired the American Bar Association Commission on Women in the Profession and reportedly worked on judicial selection in Arkansas, female and minority Cabinet members such as Attorney General Janet Reno and Commerce Secretary Ronald Brown, and women and minorities who are serving throughout the Executive Branch are important examples.⁸⁶

83. See *supra* note 53 and accompanying text.

84. President Bush wrote a similar letter. See *supra* note 24; see also *supra* note 59 (quoting White House official who stated that administration had urged all Democratic senators to propose women and minorities).

85. See *supra* notes 54, 59 and accompanying text.

86. See Tobias, *supra* note 1, at 1248-49. The Clinton Administration has experienced considerable support for, and little resistance to, its judicial selection efforts thus far. The Administration, however, should anticipate and prepare for difficulties which could arise in the future. Examples include conservative critics who find nominees insufficiently solicitous of the death penalty and liberal critics who find nominees insufficiently solicitous of abortion rights.

IV. CONCLUSION

President Clinton compiled an excellent record of judicial selection during his initial year in office. The Clinton administration clearly delineated its goals for choosing judges and implemented effective procedures for attaining those objectives. President Clinton appointed and nominated unprecedented numbers and percentages of highly competent women and minorities. If the administration redoubles its efforts, it can name even more excellent female and minority judges.

See supra note 68. Neither form of opposition can muster the votes needed to reject nominees. More problematic will be addressing the concerns of Senators who forward the names of highly qualified white males.

Lecture

