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Choosing Federal Judges in the Second Clinton Administration

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ESSAY

Choosing Federal Judges in the Second Clinton Administration

By CARL TOBIAS*

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I. Introduction

One of the critical responsibilities that the Constitution entrusts to the President of the United States is the appointment of federal judges. The Chief Executive nominates, and with the advice and consent of the Senate, appoints these officials who enjoy lifetime tenure and must resolve disputes implicating the basic freedoms of America's citizens. President Clinton's careful discharge of this crucial duty may well have yielded the foremost success of his first term in office. When then-Governor Clinton campaigned for the presidency in 1992, he promised to name intelligent judges who possess balanced judicial temperament and evince a commitment to protecting the individual rights enumerated in the Constitution. The candidate also pledged to increase gender and racial balance on the federal courts.[1] The judicial

* Professor of Law, University of Montana. I wish to thank Peggy Sanner and Hank Waters for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. Errors that remain are mine.

1. *See, e.g.*, Bill Clinton, *Judiciary Suffers Racial, Sexual Lack of Balance*, NAT'L L.J., Nov. 2, 1992, at 15; *Bush v. Clinton: The Candidates on Legal Issues*, A.B.A. J., Oct. 1992, at 57.

selection record that Clinton compiled during his initial four years as Chief Executive shows that he has kept his covenant with the American people by appointing highly qualified federal judges and by creating a bench that more closely reflects the composition of American society.

Now that President Clinton has secured a second term, judicial selection in the Clinton administration warrants evaluation. This Essay first analyzes how the Chief Executive chose judges during his first term and finds that his administration articulated clear selection goals and implemented efficacious procedures for appointing members to the federal judiciary. The Essay then offers suggestions for naming judges during the second term. If President Clinton institutes effective measures for choosing judges, federal judicial selection could be the area in which his administration leaves its greatest legacy.

II. Judicial Selection During the First Term

President Clinton and his staff implemented a systematic, efficacious process for appointing judges during his first term.[2] Clinton carefully articulated his administration's objectives in choosing judges and instituted practices to achieve them. For instance, the Chief Executive proclaimed that competence as well as increasing gender and racial balance on the bench would be important in selecting nominees.[3] Administration officials worked closely with senators to identify candidates with stellar qualifications. Some of these senators reinstituted merit-based selection commissions which had been effective in designating talented women and minorities during the earlier administration of President Jimmy Carter.[4]

The Office of White House Counsel and the Department of Justice, particularly its Office of Policy Development, shared responsibility for judicial selection.[5] The White House Counsel's Office assumed a leadership role in finding potential candidates, especially for vacan-

2. I rely substantially in this paragraph and in this part on Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276 (1995), and Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309 (1996) [hereinafter Tobias, *Filling the Federal Courts*].

3. *See* Tobias, *Filling the Federal Courts*, *supra* note 2, at 315-16.

4. *See* ALAN NEFF, THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES, AND CANDIDATES (1981); Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136, 140 (1987); Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 174 (1990).

5. *See* Goldman, *supra* note 2, at 278.

cies on the United States Courts of Appeals.[6] The Office of Policy Development had major responsibility for reviewing possible nominees once they had been narrowed to a relatively small number.[7] Both offices relied substantially on the input of senators who represented the areas in which openings occurred and even deferred to the senators' views on many candidates for district court vacancies. This practice continued the long tradition of senatorial patronage and courtesy in judicial appointments.[8]

The Judicial Selection Group, which the White House Counsel chaired and which included White House and Department of Justice staff, met weekly to discuss judicial selection.[9] In identifying candidates to be considered, the selection group had to balance the goal of recommending the most competent attorneys against various political realities.[10] The White House Counsel typically suggested to President Clinton one or more individuals for each opening. The Chief Executive actively participated in choosing nominees, was consulted during several steps, and occasionally tendered candidates or sought other names.[11]

The Clinton administration apparently made a conscious choice to depoliticize the selection process as much as possible. Both the President and the officials, who assisted in filling judicial vacancies, emphasized competence as well as gender and racial diversity while forwarding the names of comparatively few nominees who might prove controversial. This reluctance to advance potentially controversial candidates and the corresponding willingness to compromise became more necessary after the Republican Party recaptured control of the Senate in 1994. For example, President Clinton decided against resubmitting the names of controversial nominees whom he had nominated in 1994.[12] The White House Counsel publicly proclaimed that

6. *See id.* at 279.

7. *See id.* at 278-79.

8. *See* Tobias, *Filling the Federal Courts*, *supra* note 2, at 317.

9. This paragraph and much in the remainder of this part are premised on conversations with individuals who are knowledgeable about the selection procedures that the Clinton Administration employed and on Goldman, *supra* note 2, at 278-79.

10. *See* Goldman, *supra* note 2, at 279; *see also* Joan Biskupic, *Despite 129 Clinton Appointments, GOP Judges Dominate U.S. Bench*, WASH. POST, Oct. 16, 1994, at A20; Neil A. Lewis, *In Selecting Federal Judges, Clinton Has Not Tried to Reverse Republicans*, N.Y. TIMES, Aug. 1, 1996, at A20.

11. *See* Goldman, *supra* note 2, at 279; *U.S. Bench Looks More Like U.S.: Clinton Raises Ratio of Women, Minority Judges*, ARIZ. REPUBLIC, Oct. 24, 1994, at A9.

12. *See* Joan Biskupic, *Facing Fights on Court Nominees, Clinton Yields*, WASH. POST, Feb. 13, 1995, at A1; Lewis, *supra* note 10; Ana Puga, *Clinton Judicial Picks May Court the Right*, BOSTON GLOBE, Dec. 29, 1994, at 1.

the administration would not nominate lawyers whose candidacies could provoke confirmation battles.[13]

The Chief Executive and his assistants informally consulted with the Senate Judiciary Committee, which has major responsibility for the judicial confirmation process, and also spoke with specific senators before formally nominating candidates and seeking Senate confirmation.[14] The administration worked very effectively with Senator Joseph Biden (D-Del.) when he chaired the committee during its initial half-term. Indeed, President Clinton appointed one hundred judges in 1994, although he was able to name only twenty-three judges during his first year of office due to certain "start-up" difficulties.[15]

The administration also maintained a cordial working relationship with Senator Orrin Hatch (R-Utah) when he became the chair of the Judiciary Committee in 1995.[16] Senator Hatch seemed to handle President Clinton's nominees in a manner similar to the way that Senator Biden treated the Reagan administration's nominees during its last two years. Although Senator Hatch's Judiciary Committee did approve a substantial percentage of President Clinton's nominees, this may have happened because the administration did not submit candidates whom the Republicans would consider politically unacceptable.

After the 1994 elections, Senator Hatch stated that the Committee would vote favorably on all nominees who were "qualified, in good health, and understand the role of judges."[17] In 1995, the Committee did just that. Senator Hatch held confirmation hearings on one appeals court nominee and several district court nominees every month.[18] During 1995, President Clinton secured the appointment of fifty-three judges.[19] However, in 1996 the Senate approved fewer than twenty-fives nominees as election-year politics and other machi-

13. *See* Biskupic, *supra* note 10, at A1.

14. *See supra* note 9.

15. *See* Carl Tobias, *Increasing Balance on the Federal Bench*, 32 HOUS. L. REV. 137, 145 (1995) [hereinafter Tobias, *Increasing Balance*]; Carl Tobias, *Dear Judge Mikva*, 1994 WIS. L. REV. 1579, 1581 [hereinafter Tobias, *Dear Judge Mikva*].

16. I rely substantially in this paragraph on Tobias, *Filling the Federal Courts*, *supra* note 2, at 317-18. *See also Senator Orrin Hatch Looks at Courts, Legislation, and Judicial Nominees*, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Wash., D.C.), Nov. 1995, at 1 [hereinafter *Senator Orrin Hatch*].

17. *See* Biskupic, *supra* note 10.

18. *See* Al Kamen, *Window Closing on Judicial Openings*, WASH. POST, June 12, 1995, at A17.

19. *See* Telephone Interview with Deborah Lewis, Legislative Counsel, Alliance for Justice (Jan. 22, 1996); *see also* Tobias, *Filling the Federal Courts*, *supra* note 2, at 314.

nations, such as the dispute over splitting the Ninth Circuit,[20] conspired to slow the confirmation process considerably.[21]

During President Clinton's initial term in office, he apparently kept his promises relating to judicial appointments, and his administration achieved the selection goals that it had set. President Clinton appointed 202 judges to the federal bench; 62 (31%) of whom are women and 58 (29%) of whom are minorities.[22] This judicial selection record is unprecedented. It contrasts sharply with the numbers of women and minorities chosen by the Reagan, Bush, and Carter Administrations. For instance, President Clinton named more women to the bench in his first three years as Chief Executive than President Bush appointed in one term and than President Reagan named in eight years.[23]

The Clinton administration appointees have also received the highest rankings for excellence assigned by the American Bar Association since that entity began rating nominees' qualifications more than forty years ago.[24] Virtually all of the judges appear to be highly competent and to have the necessary qualities of independence, integrity, intellect, industriousness, and balanced temperament, which are critical to excellent federal court service.[25] For instance, Second Circuit Judge Guido Calabresi was the Dean of Yale Law School prior to his appointment,[26] while Sixth Circuit Judge Karen Nelson Moore had been a highly respected faculty member at Case Western Reserve University School of Law before her appointment.[27] A significant number of the appointees had previously served as judicial officers either in the federal or state courts. For example, Second Circuit Judge Jose Cabranes was widely regarded as a creative, diligent federal district court judge before being elevated, while Eleventh Circuit

20. *See, e.g., Court Watch: Partisan Game*, L.A. TIMES, June 23, 1995, at B8. *See generally* Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. 1357 (1995) [hereinafter Tobias, *Impoverished Idea*].

21. *See* Telephone Interview with Mike Lee, Fellow, Alliance for Justice (Sept. 3, 1996); *see also* Lewis, *supra* note 10.

22. *See supra* notes 15, 19, 21 and accompanying text.

23. *See* Tobias, *Filling the Federal Courts*, *supra* note 2, at 314; *see also* Goldman, *supra* note 2, at 285.

24. I rely substantially in the next two paragraphs on Tobias, *Filling the Federal Courts*, *supra* note 2, at 315. *See also* Lewis, *supra* note 10. *See generally* Robert A. Stein, *For the Benefit of the Nation*, A.B.A. J., Mar. 1996, at 104.

25. *See* Goldman, supra note 2, at 282-83.

26. *See id.* at 283.

27. *See CWRU Professor Joins U.S. Court*, CLEVELAND PLAIN DEALER, March 30, 1995, at 5B.

Judge Rosemary Barkett had earlier been a distinguished member of the Florida Supreme Court.[28]

Although President Clinton appears to have met his objective of appointing highly competent judges during his first term, it is too soon to discern precisely what type of judicial service these judges will ultimately render. Certain federal court observers have criticized the administration for its failure to appoint politically partisan or liberal lawyers to offset the number of conservative judges appointed by Presidents Reagan and Bush.[29]

Given the substantial obstacles faced by the Clinton administration, the success attained in realizing its objectives for choosing judges is remarkable. During the first year of Clinton's presidency, the judicial selection efforts encountered the same "start-up" problems experienced by all administrations.[30] However, this situation may well have been exacerbated because there had not been a Democratic President for twelve years and thus the administration had few personnel with recent experience in choosing federal judges.[31] During President Clinton's second year in office, Philip Heymann and Webster Hubbell, the first Deputy and Associate Attorneys General, and Bernard Nussbaum, the initial White House Counsel, resigned.[32] In the administration's third year, it had to respond to complications created by Republican Party control of the Senate and the House of Representatives as well as political initiatives, namely the Republican Contract With America.[33]

During the final year of Clinton's first term, the Chief Executive had to address problems involving election-year politics.[34] These difficulties were compounded for the first five months by Senator Robert Dole (R-Kan.), the majority leader, who was seeking his party's presidential nomination and had responsibility for floor votes on all legisla-

28. *See* Sheldon Goldman & Matthew D. Sorenson, *Clinton's Nontraditional Judges: Creating a More Representative Bench*, 78 JUDICATURE 68, 69 (1994).

29. *See, e.g.*, Biskupic, *supra* note 10; Ted Gest, *Disorder in the Courts? Left and Right Both Gripe About Clinton's Taste in Judges*, U.S. NEWS & WORLD REP., Feb. 12, 1996, at 40; Lewis, *supra* note 10; Puga, *supra* note 12.

30. *See* Carl Tobias, *Keeping the Covenant on the Federal Courts*, 47 SMU L. REV. 1861, 1871-72 (1994); Tobias, *Dear Judge Mikva*, *supra* note 15, at 1581.

31. *See* Tobias, *Dear Judge Mikva*, supra note 15, at 1581.

32. *See* Tobias, *Increasing Balance*, *supra* note 15, at 150.

33. *See Republican Contract With America*, Sept. 28, 1994, *available in* LEXIS, News Library, Hottop File. *See generally* William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719 (1995); Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699 (1995).

34. *See* Tobias, *Filling the Federal Courts*, *supra* note 2, at 320.

tive matters, including confirmation votes on judicial nominees.[35] Senator Dole might have been reluctant to schedule full Senate consideration of candidates who had secured Judiciary Committee approval lest he seem to lack confidence in his own presidential aspirations.[36] Finally, during much of President Clinton's first term, the Whitewater investigations probably distracted administration employees, particularly those in the White House Counsel's Office and the Justice Department, from choosing nominees.[37]

Although President Clinton apparently succeeded in selecting highly competent judges and increasing gender and racial balance on the bench, his administration was unable to fill all of the existing vacancies on the federal courts.[38] Indeed, when the Republican-dominated Senate stopped processing nominees during the fall of 1996, there were sixteen openings on the appeals courts and forty-two vacancies on the district courts.[39]

Despite the serious difficulties that President Clinton and his administration faced, they attained substantial success in diversifying the federal bench. As Clinton begins a second term, his administration should attempt to achieve even more by continuing to rely upon most of the judicial selection objectives and procedures that it employed in the first term and by considering a number of the suggestions which follow.

III. Suggestions for the Second Term

A. Introduction

Recommendations relating to the goals that the Clinton administration should pursue and how it can achieve them require relatively limited examination here. Numerous similar suggestions have been offered elsewhere,[40] a few of which have been mentioned above. Because the Chief Executive and his assistants enunciated objectives and instituted procedures which facilitated the appointment of many highly qualified judges, recommendations pertaining to this goal and its accomplishment warrant minimal review.

35. *See id.*
36. *See id.*
37. *See id.*
38. *See id.*
39. *See* Telephone Interview with Mike Lee, *supra* note 21.
40. *See, e.g.*, Goldman, *supra* note 2; Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 B.Y.U. L. REV. 1257, 1274-85 [hereinafter Tobias, *Rethinking*].

All of the problems that could interfere with achievement of the administration's objectives cannot be anticipated. For example, it is difficult to predict problems that may result from future political machinations. Illustrative of this point is the Senate's failure in 1996 to fill a current vacancy on the D.C. Circuit, due in part to the Senate's determination that the existing contingent of judges was adequate to resolve the court's caseload.[41] However, the Clinton administration may also have forseen that the legal and political significance of an opening on the nation's second most important court[42] could lead to some political development, thereby complicating the confirmation of its nominee.[43] Numerous difficulties involving judicial selection are perennial. For instance, retirements of Supreme Court Justices are inevitable, and finding replacements for the Justices may consume much of the time of a presidential administration. However, the effort that must be devoted to the process can probably be reduced by anticipating retirements and by compiling a list of promising candidates. The administration should attempt to predict and treat problems that are foreseeable while maintaining the requisite flexibility to address complications that cannot be anticipated.

As a first step, the Clinton administration should expeditiously enunciate the judicial selection goals that it wishes to achieve during the second term and promptly implement measures that will attain those objectives. Securing another four years in office has freed the administration from concerns about re-election. Accordingly, the Clinton administration has the flexibility to set goals and institute policies and practices that President Clinton believes are best for the nation and will most improve the courts.

B. Goals and Reasons for Attaining Them

Filling all of the present vacancies on the federal bench is one of the most significant goals. Only the full complement of Article III judges authorized by Congress can expedite litigation by reducing the substantial backlogs on civil dockets in many districts, decreasing the pressures which the 1994 crime legislation is imposing on the criminal

41. *See, e.g.*, Neil A. Lewis, *Partisan Gridlock Blocks Senate Confirmation of Federal Judges*, N.Y. TIMES, Nov. 30, 1995, at A16.

42. *See generally* Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. MIAMI L. REV. 159 (1993).

43. *See* sources cited *supra* notes 20, 21; *see also* Tobias, *Dear Judge Mikva*, *supra* note 15, at 1579 (indicating that seat has been open since Judge Abner Mikva's 1994 resignation).

justice system, and ameliorating the "crisis of volume" that the appeals courts are experiencing.[44]

Another important goal will obviously be the continued appointment of highly competent, highly qualified lawyers to the federal judiciary. Because of the need to resolve disputes involving fundamental liberties and to resolve expeditiously, inexpensively, and fairly the ever-expanding federal caseload with fewer resources, appointees must be independent, intelligent, industrious, and have balanced temperment.

The above observations regarding caseload increases concomitantly mean that President Clinton should consider working with Congress on the authorization of additional federal judgeships. The appointment of more appellate and district judges could be responsive to docket growth, although the effectiveness of that approach is controversial.[45] For instance, the need to create judgeships may vary across appeals courts and from district to district because the size, complexity, and growth rates of the caseloads differ. Moreover, the courts have employed diverse measures to treat multiplying dockets. For example, the Judicial Conference of the United States recently requested that Congress authorize ten new judges for the Ninth Circuit.[46] However, a few appellate courts have officially declined to seek more judgeships[47] and the Senate did not fill an existing opening on the D.C. Circuit in 1996, ostensibly finding the present judicial complement sufficient.[48] Some federal court observers claim that other responses, such as making appeals discretionary or restructuring circuits, might have greater efficacy at the appellate level[49] and that

44. For discussion of district court backlogs, see Tobias, *Dear Judge Mikva, supra* note 15, at 1580; and Tobias, *Filling the Federal Courts, supra* note 2, at 310. *See also* FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990) (discussing crisis of volume). *See generally Record-Setting Workloads Confront Federal Courts*, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Wash., D.C.), July 1996, at 2.

45. *See Senator Orrin Hatch, supra* note 16, at 10; *see also Senate Holds Hearing on Allocation of Judgeships*, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Wash., D.C.), Nov. 1995, at 7.

46. *See* Tobias, *Impoverished Idea, supra* note 20, at 1411; Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts,* 81 CORNELL L. REV. 1264, 1271 (1996).

47. *See* Tobias, *Impoverished Idea, supra* note 20, at 1362; Interview with Judge Jane R. Roth, U.S. Court of Appeals for the Third Circuit, in Wilmington, DE (Apr. 1, 1996).

48. *See* Lewis *supra* note 41. A rather similar situation obtains in the federal districts, some of which have not experienced docket growth.

49. *See, e.g.*, Jon O. Newman, *1000 Judges—The Limit for an Effective Judiciary*, 76 JUDICATURE 187 (1993); Gerald Bard Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70; *see also* Martha Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11. *But see* Stephen Reinhardt, *Too Few Judges, Too*

additional mechanisms, such as limiting jurisdiction or enhancing alternatives to dispute resolution, could prove more effective in the district courts.[50] Many federal judges also strongly oppose the bench's expansion and have voiced concerns that this would reduce collegiality or the quality of decisionmaking.[51] Moreover, judgeship bills are controversial and politicized because they afford a sitting President the opportunity to appoint numerous new judges and expand the Chief Executive's political influence. Therefore, Congress will scrutinize and may ultimately reject proposals for authorizing more judges. Nonetheless, this prospect would afford enough benefit to deserve serious consideration.

Additionally, the Clinton Administration should continue its effort to increase gender and racial balance on the federal courts. Naming greater numbers of female and minority attorneys could enhance their judicial colleagues' understanding of complex policy issues[52] as well as reduce gender and racial bias in the federal civil and criminal justice systems.[53] Such appointments may inspire greater public confidence in the courts by forming them to more closely resemble the population at large.[54] It is also important to rectify the lack of gender and racial balance on the current federal bench, most of whose members are Reagan and Bush appointees.[55] For instance, less than two percent of the Reagan administration's appointees were African American, and President Bush placed only one Asian American on the federal courts, despite the fact that both of these Republican Pres-

Many Cases: A Plea to Save the Federal Courts, A.B.A. J., Jan. 1993, at 52; William L. Reynolds & William M. Richman, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996).

50. *See, e.g.*, 28 U.S.C. §§ 651-58 (1994) (instituting experimental compulsory arbitration); Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1499 (1995) (book review).

51. *See, e.g.*, Newman, *supra* note 49; Tjoflat, *supra* note 49.

52. *See, e.g.*, Sheldon Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488, 494 (1979); Elliot E. Slotnick, *Lowering the Bench or Raising it Higher?, Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POL'Y REV. 270, 272 (1983); Marion Z. Goldberg, *Carter-Appointed Judges - Perspectives on Gender*, TRIAL, Apr. 1990, at 108.

53. *See* FEDERAL COURTS STUDY COMMITTEE, *supra* note 44, at 169; Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus For Judicial Reform*, 21 ARIZ. ST. L.J. 237, 238, 271-73 (1989). *See generally* THE PRELIMINARY REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE July (1992).

54. *See* Slotnick, *supra* note 52, at 272-73; Tobias, *Rethinking*, *supra* note 40, at 1276.

55. *See supra* note 23 and accompanying text.

idents had substantially larger, more experienced pools of female and minority attorneys to draw upon than did President Carter.[56]

Increasing political balance on the federal bench is another important goal. For example, several observers have urged President Clinton to select judges who can offset the perspectives of numerous Reagan and Bush appointees, particularly those of certain high-profile jurists, such as Supreme Court Justices Antonin Scalia and Clarence Thomas and Seventh Circuit Judges Frank Easterbrook and Richard Posner, some of whom the Chief Executives named for the express purpose of making the bench more conservative.[57] Because the two Republican Presidents so explicitly enunciated this goal, President Clinton could justifiably pursue the opposite objective, although he would be vulnerable to criticism like that leveled against his predecessors. Continued appointment of highly qualified female and minority attorneys could partly respond to concerns regarding political balance. For instance, considerable evidence suggests that numerous women and minorities might strike a different political balance in resolving certain substantive matters; this assertion, however, remains somewhat controversial.[58]

In the final analysis, whether attempting to secure greater balance is an objective which the administration should pursue partly depends on its perspectives on the roles and responsibilities of federal judges and on the courts' purposes in a constitutional democracy. For example, a number of federal courts scholars believe that the Constitution's general phrasing and the difficulty of drafting clear legislation requires judges to expound that the law and those declarations are at least informed by policy or political factors.[59] However, quite a few observers, particularly politicians, disavow this view.[60] Should President Clinton conclude that attaining more political balance is worth-

56. *See* Tobias, *Filling the Federal Courts*, *supra* note 2, at 322; *see also* Goldman, *supra* note 2, at 285, 288.

57. *See* Sheldon Goldman, *Reaganizing the Judiciary*, 68 JUDICATURE 313, 324-25 (1985); *see also* sources cited *supra* note 29 and accompanying text.

58. *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, 168-73 (1983); Elaine Martin, *Men and Women on the Bench: Vive la Difference?*, 73 JUDICATURE 204, 208 (1990); Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Court of Appeals*, 56 J.L. & POL'Y 425 (1994).

59. *See, e.g.*, PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 3 (1976); Dragich, *supra* note 49, at 15. *See generally* WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994).

60. *See, e.g.*, Gest, *supra* note 29; Bob Dole, *Judicial Appointments Can Shape Nation's Course*, HOUS. CHRON., Dec. 26, 1995, at A27; Joyce Price, *Clinton Bench Appointments on Hold: "Liberal Activism" Worries Senators*, WASH. TIMES, Aug. 19, 1996, at A4.

while, the administration may find that it must compromise other important goals, such as filling the bench, to accomplish the objective.

C. Suggestions for Achieving Goals

President Clinton should begin planning for judicial selection immediately. The Chief Executive and his staff initially may want to reconsider the goals that they pursued during the last four years, especially in light of the suggestions above. One important immediate purpose was to assemble a package of nominees for submission to the 105th Congress when it convened in January 1997. An efficient way in which the administration accomplished this objective was by resubmitting the names of candidates whose nominations languished but who were acceptable to relevant constituencies.[61] Once President Clinton has attained his short-term goals, the administration should consider the following recommendations for achieving the objectives examined in the above subsection over the remainder of the four years.

The best way to fill all current openings on the federal bench is by building on the valuable procedures that President Clinton and his aides employed during the first term.[62] For instance, the administration must continue to work closely with the Senate Judiciary Committee and its chair and with senators who represent states from which nominees are drawn.[63] The Chief Executive and his assistants should also encourage maximum participation by individuals and interest groups, such as the American Bar Association, state and local bar associations, women's groups and minority political organizations.

One efficient technique might be the elevation to appeals courts of district court judges who rendered distinguished service. Because these judges have already secured confirmation, the Senate would readily approve most of them, and there would be no need for time-consuming background investigations and security clearances. Presidents Reagan and Bush used this approach effectively and the Clinton administration has employed it selectively;[64] however, President Clinton may want to consider increased reliance, especially if efficiency becomes a factor.

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61. *See Clinton Nominates 22 to the Federal Bench*, U.S. NEWSWIRE, Jan. 7, 1997.

62. *See supra* Part I.

63. *See supra* text accompanying notes 8, 14-18.

64. *See* Mark Ballard, *U.S. Judicial Hopefuls Have Long Wait*, TEXAS LAWYER, June 24, 1991, at 1-2; Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. TIMES, April 10, 1990, at A1; Tobias, *Filling the Federal Courts*, *supra* note 2, at 7, 313-14. *But cf.* Tobias, *Impoverished Idea*, *supra* note 20, at 1402 (suggesting that circuit and district judges have different qualifications).

The Clinton administration should also consider how much it would be willing to compromise the realization of other goals in order to eliminate existing vacancies, although, this might prove unnecessary if the process established works efficaciously. For example, were President Clinton to pursue less gender, racial or political balance on the courts, he could probably fill the bench more easily.[65]

When deciding whether to seek an increase in the number of federal judges authorized, the Chief Executive ought to work closely with members of Congress and with the Judicial Conference because the policymaking arm of the federal courts has substantial expertise in this area. Most Conference recommendations for additional judgeships are carefully considered, comparatively conservative, and premised on relatively objective factors, such as complexity and size of caseload per judge in circuits and districts.[66] Nevertheless, a number of observers perceive the federal judiciary as self-interested or at least overly protective of its prerogatives. A few senators and representatives have increasingly scrutinized the Third Branch's budget requests and related facets of federal court operations.[67] In any event, because judgeship proposals are always controversial and politicized, Congress will closely analyze, and may reject, suggestions for authorizing more judges.[68]

Recommendations for how President Clinton can name additional highly qualified female and minority attorneys to the courts deserve comparatively brief analysis here. Some suggestions have been offered elsewhere[69] and several appear above. The Clinton administration is clearly committed to appointing more women and minorities and has implemented efficacious procedures for attaining this objective;[70] however, the Chief Executive and his assistants might examine new ways of redoubling efforts to seek, designate, and name addi-

65. I am not suggesting that President Clinton should do so. *See* Carl Tobias, *Judicial Appointments: Cautious Approach Advised*, NAT'L L.J., Dec. 9, 1996, at A18; *see also* Tobias, *Filling the Federal Courts*, *supra* note 2, at 326.

66. *See* Reynolds & Richman, *supra* note 49, at 300-03.

67. *See, e.g.*, *Appellate Survey Results Released,* THE THIRD BRANCH (Admin. Office of the U.S. Courts, Wash., D.C.), June 1996, at 1; *Bill to Prioritize Buildings Passes, id.* at 5. *See generally* William H. Rehnquist, *1994 Year-End Report on the Federal Judiciary*, *reprinted in* 18 AM. J. TRIAL ADVOC. 499 (1995); Lauren K. Robel, *Impermeable Federalism, Pragmatic Silence, and the Long Range Plan for the Federal Courts*, 71 IND. L.J. 841, 844 (1996).

68. *See supra* note 45 and accompanying text.

69. *See, e.g.*, Carl Tobias, *Closing the Gender Gap on the Federal Courts*, 61 U. CIN. L. REV. 1240, 1245-49 (1993) [hereinafter Tobias, *Closing the Gender Gap*]; Tobias, *Rethinking*, *supra* note 40, at 1274-85. *See generally* Goldman, *supra* note 2.

70. *See supra* text accompanying notes 22-23.

tional capable female and minority judges. The President and administration personnel should expand their successful endeavors to appoint women and minorities by considering new approaches and relying upon previously untapped resources.[71]

The selection of Supreme Court Justices and appeals court judges warrants cursory evaluation because the White House has assumed substantial control over nominees to those courts.[72] President Clinton and the White House Counsel must insure that White House employees who help choose judges appreciate the significance of increased representation of female and minority lawyers and work to perfect processes for accomplishing this goal. During the Clinton administration's first term, these personnel clearly understood the objective and used quite effective procedures to achieve it.[73]

The goals and practices for appointing district court judges deserve scrutiny because the Chief Executive has deferred to senators from the areas where the judges will serve.[74] Numerous senators instituted, or continued relying upon, measures to identify and foster the candidacies of competent female and minority practitioners.[75] The President should laud those senators who have helped achieve his judicial selection goals while encouraging other senators to undertake similar efforts.

President Clinton might reiterate in an appropriate public forum his strong commitment to naming even larger numbers of female and minority attorneys. The Chief Executive could write specifically to senators, requesting their assistance in proposing more women and minorities and in implementing procedures, namely nominating commissions, which will search for these lawyers and promote their appointment.

Senators and administration employees who have responsibility for judicial selection should enlist the aid of additional sources in seeking the names of female and minority practitioners. Administration personnel and members of the Senate must rely on conventional entities, such as bar associations, which can offer some assistance. Equally significant would be some less traditional sources, including women's organizations and minority political groups. President Clinton must also work closely with all of the female senators, who can

71. *See supra* text accompanying notes 22-23.

72. *See* Tobias, *Filling the Federal Courts*, *supra* note 2, at 316-17; *see also* Goldman, *supra* note 2, at 279.

73. *See supra* text accompanying notes 22-23.

74. *See* Tobias, *Filling the Federal Courts*, *supra* note 2, at 317.

75. *See id.* at 319.

persuade their colleagues to recommend more women and minorities and help the President encourage their candidacies.[76] Qualifications and contacts of female and minority attorneys, who now constitute approximately one-quarter of practicing lawyers in the United States, will be important.[77] The efforts and networking capabilities of women and minorities in the administration, such as Assistant Attorney General Eleanor Dean Acheson, and of Roberta Ramo, who recently completed her term as the first female President of the American Bar Association, may be quite helpful.[78]

If President Clinton decides to pursue the goal of increasing political balance on the federal courts, one starting point would be expanding the number of female and minority appointees. While some of those judges will enhance political balance,[79] certain sources which might help find women and minorities may also be able to recommend attorneys who would increase political balance.

Many other candidates who could enhance political balance can be easily identified. One promising source is the faculty of United States law schools. Numerous professors have the requisite intelligence, independence, and industriousness to be fine federal judges. For example, President Reagan drew several high-profile, conservative appointees, including Justice Scalia and Circuit Judges Posner and Easterbrook, from legal academia.[80] Additional sources can be designated with similar felicity, such as lawyers for certain public interest litigation groups, such as the NAACP, Public Citizen Litigation Group, the Sierra Club, and the ACLU. Finally, many attorneys in the plaintiffs' personal injury or criminal defense bars as well as in federal and state government are also potential candidates.

IV. Conclusion

President Clinton had an enviable record of judicial selection in his first term of office. The Clinton administration carefully identified its objectives for choosing judges and implemented efficacious procedures for realizing those goals. The President named unprecedented numbers and percentages of extremely able judges, many of whom were female and minority practitioners, and substantially decreased

76. *See* Tobias, *Filling the Federal Courts*, *supra* note 2, at 324.

77. *See id.*

78. *See* Tobias, *Closing the Gender Gap*, *supra* note 69, at 1248-49.

79. *See supra* note 58 and accompanying text.

80. *See* Goldman, *supra* note 57. *But cf.* Lewis, *supra* note 10 (suggesting that President Clinton has appointed few judges from academia).

existing federal court vacancies. If the Chief Executive and his assistants continue to follow these objectives and processes and implement suggestions made in this Essay, they will be able to appoint numerous highly competent female and minority judges and fill all of the openings during the next four years.