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# Rethinking Federal Judicial Selection

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# Rethinking Federal Judicial Selection

*Carl Tobias\**

The inauguration of President Bill Clinton, who will appoint more than three hundred new federal judges, affords an auspicious occasion for rethinking the process of federal judicial selection. Appointing federal judges is one of the President's most significant responsibilities, because Article III judges enjoy life tenure and resolve disputes that implicate Americans' fundamental freedoms. The selection process, especially for choosing Supreme Court Justices, has become increasingly contentious and decreasingly substantive. High Court nominees have included "stealth" candidates and judges who have carefully recited a standard litany, regarding issues such as the right of privacy, which they believed the Senate Judiciary Committee wanted to hear. The confirmation proceedings of Justice Clarence Thomas were symptomatic and even plumbed new depths. Senate hearings for nearly all circuit and district court nominees have correspondingly lacked substance, although their ostensible purpose is to scrutinize the candidates' fitness for judicial service.

The current federal bench, two-thirds of whose members were appointed by Presidents Ronald Reagan and George Bush, reflects increased conservatism and is quite homogeneous in terms of race, gender, and political perspectives. For instance, President Reagan appointed a dramatically smaller, and President Bush named a substantially lower, percentage of African-Americans than did President Jimmy Carter. The Republican chief executives made these appointments although they had much larger, more experienced, pools of female and minority attorneys from which to select judges.

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\* Professor of Law, University of Montana. I wish to thank Mark Gitenstein, Melissa Harrison, Rob Natelson, Peggy Sanner and Tammy Wyatt-Shaw 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.

The substantive decisionmaking of many Republican appointees also manifests conservatism. For example, the judges have restrictively interpreted the Constitution and congressional legislation, have limited federal court access, and have narrowly viewed the rights of individuals accused of crime. The Republican Presidents, accordingly, achieved their expressly stated objective of creating a more conservative judiciary, even though they arguably exceeded popular consensus in appointing judges. The factors above have apparently increased public cynicism about judicial selection and may have eroded respect for the federal courts.

All of these considerations, particularly the advent of a new administration and growing disillusionment with the process of choosing judges, make the present a propitious time to reconsider selection. This Article undertakes that effort. The Article first examines how Presidents Carter, Reagan and Bush named judges. It assesses the goals articulated, the procedures employed, the judges confirmed, and the decisional records of those appointed. Because this evaluation finds that the processes for choosing judges were problematic, it concludes with suggestions for improving federal judicial selection.

## I. THE RECENT HISTORY OF FEDERAL JUDICIAL SELECTION

The judicial selection policies enunciated, the procedures followed, the judges named, and their decisionmaking during the Carter, Reagan, and Bush administrations warrant considerable treatment here, although other observers have explored these phenomena.<sup>1</sup> Numerous aspects of this history are important to understanding recent developments involving judicial selection and the recommendations presented in Part II of the Article; those features will be emphasized in this Part.

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1. See, e.g., Charles M. Mathias, Jr., *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200 (1987); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1502-12 (1992); Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 172-76 (1990); cf. W. Gary Fowler, *A Comparison of Initial Recommendation Procedures: Judicial Selection Under Reagan and Carter*, 1 YALE L. & POL'Y REV. 299, 301-06 (1983) (pre-1975 history); Strauss & Sunstein, *supra*, at 1494-1502 (same). See generally MARK H. GITENSTEIN, *MATTERS OF PRINCIPLE* (1992); DAVID M. O'BRIEN, *JUDICIAL ROULETTE* (1988).

### A. *The Carter Administration*

President Carter had a clear, strong commitment to improving the federal judiciary, which he pursued in a number of ways.<sup>2</sup> The President believed that reduced reliance on traditional procedures, such as patronage and senatorial courtesy, the concomitant opening of the selection process to broader public participation, and the creation of a larger, more diverse pool of potential candidates would foster the appointment of better judges.<sup>3</sup> Nominating commissions were instrumentalities integral to these phenomena, and the Carter administration employed the panels for both appellate and district courts.<sup>4</sup>

An important dimension of President Carter's judicial selection policy was his determination to place substantially increased numbers of women and minorities on the federal bench.<sup>5</sup> When the Carter administration assumed office, there were only two African-Americans and one woman among the ninety-seven appeals court judges and only twenty African-Americans or Latinos and five women among the 400 district court judges.<sup>6</sup>

President Carter created the United States Circuit Judge Nominating Commission to recommend lawyers for appointment to the federal appellate courts.<sup>7</sup> The Carter administra-

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2. I rely substantially in this subsection on 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 (1983), and on numerous articles in *Judicature* magazine, such as those in the issue titled *Federal Judicial Selection: The Problems and Achievements of Carter's Merit Plan*, 62 JUDICATURE 463-510 (1979).

3. See Fowler, *supra* note 1, at 307-09, 331; see also Slotnick, *supra* note 2, at 296-98; cf. O'BRIEN, *supra* note 1, at 49-80 (discussing patronage and senatorial courtesy).

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, e.g., Fowler, *supra* note 1, at 299-300, 307-09; Elliot E. Slotnick, *Gender, Affirmative Action, and Recruitment to the Federal Bench*, 14 GOLDEN GATE U. L. REV. 519, 530-35 (1984); Slotnick, *supra* note 2, at 271-77.

6. See Robert J. Lipshutz & Douglas B. Huron, *Achieving a More Representative Federal Judiciary*, 62 JUDICATURE 483 (1979); see also Slotnick, *supra* note 2, at 271. See generally Elaine Martin, *Women on the Federal Bench: A Comparative Profile*, 65 JUDICATURE 306 (1982).

7. See Lipshutz & Huron, *supra* note 6, at 484; Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136, 140 (1987). See generally BERKSON & CARBON, *supra* note 4.

tion established merit selection panels in each circuit to suggest possible nominees when vacancies occurred, asking the panels to search for, find, recommend, and promote the candidacies of highly-qualified female and minority attorneys. In May 1978, President Carter encouraged all of these panels "to make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees."<sup>8</sup>

With the 1978 passage of the Omnibus Judgeships Act creating 152 new judicial seats, the President intensified his efforts to make the "judiciary more fully representative of our population"<sup>9</sup> and requested that senators work with him to attain this goal. President Carter issued an Executive Order which asked that nominating commissions be created to suggest district court nominees and which directed the Attorney General to ascertain whether the panels had affirmatively attempted to "identify qualified candidates, including women and members of minority groups" before forwarding names to the President.<sup>10</sup>

Because President Carter was dissatisfied with the early results of these endeavors, he wrote the panels' chairs and senators requesting that they redouble their efforts to designate competent female and minority attorneys.<sup>11</sup> Illustrative of the Carter administration's approach to judicial selection was the Attorney General's Senate testimony indicating that the President would appoint qualified women and minorities even when white male candidates who might be better qualified were under consideration.<sup>12</sup>

8. Exec. Order No. 12,059, 3 C.F.R. 180, 182 (1979), noted in 28 U.S.C. § 44 (Supp. 1992), revoked by Exec. Order No. 12,305, 3 C.F.R. 150 (1982), noted in 28 U.S.C. § 44 (Supp. 1992). See generally Slotnick, *supra* note 5, at 530-31.

9. President Jimmy Carter, Law Day Address (May 1, 1978), cited in Lipshutz & Huron, *supra* note 6, at 485; see also Omnibus Judgeships Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629 (codified as amended in scattered sections of 28 U.S.C.). See generally O'BRIEN, *supra* note 1, at 58-59.

10. Exec. Order No. 12,097, 3 C.F.R. 254, 255 (1979), noted in 28 U.S.C. § 133 (Supp. 1993), revoked by Exec. Order No. 12,553, 3 C.F.R. 204, 210 (1987), noted in 28 U.S.C. § 133 (Supp. 1992). See generally NEFF, *supra* note 4.

11. See Lipshutz & Huron, *supra* note 6, at 485; cf. Katherine Randall, *The Success of Affirmative Action in the Sixth Circuit*, 62 JUDICATURE 486 (1979) (panel member's description of how panel responded to President's requests); Peter G. Fish, *Merit Selection and Politics: Choosing a Judge of the United States Court of Appeals for the Fourth Circuit*, 15 WAKE FOREST L. REV. 635 (1979) (panel member's description of how another panel functioned).

12. *The Selection and Confirmation of Federal Judges: Hearing Before the*

The Carter administration apparently did not pursue very specific goals in terms of the political perspectives or judicial philosophies which nominees would have as federal judges, although it probably expected that the nominees would share the President's political viewpoints.<sup>13</sup> President Carter and those officials responsible for judicial selection could well have assumed that the administration's appointees, especially women and minorities, would generally be rather "liberal."<sup>14</sup>

The Carter administration's efforts to name highly qualified attorneys, including women and minorities, proved quite successful. Indeed, observers have characterized the nominating commissions as the most efficacious technique yet developed for increasing the number of female and minority lawyers appointed to the bench.<sup>15</sup> The panels, composed of a broad spectrum of individuals, such as persons who had not participated in traditional politics, were able to identify, recommend, and champion the candidacies of highly competent attorneys with whom senators may have been less familiar.<sup>16</sup>

Of the 258 judges whom President Carter ultimately appointed during his four-year tenure, there were forty women (15.5%) and thirty-seven African-Americans (14.3%).<sup>17</sup> The administration's success in naming very qualified female and minority lawyers is striking because of the comparatively

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*Senate Comm. on the Judiciary*, pt. 1, 96th Cong., 1st Sess. 25 (1979) [hereinafter *Hearings*] (statement of Griffin Bell); see also NEFF, *supra* note 4, at 102; cf. Elliot E. Slotnick, *The Changing Role of the Senate Judiciary Committee in Judicial Selection*, 62 JUDICATURE 502, 503 (1979) (alluding to similar testimony).

13. See O'BRIEN, *supra* note 1, at 59-60; Fowler, *supra* note 1, at 308, 336; see also NEFF, *supra* note 4, at 149, 151.

14. One definition of liberalism is a "relative tendency to vote in favor of the legal claims of the criminally accused and prisoners in criminal and prisoner's rights cases, and in favor of the legal claims of women and racial minorities in sex and race discrimination cases respectively." 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 *infra* notes 19-20 and accompanying text.

15. See Martin, *supra* note 7, at 140-41; see also Tobias, *supra* note 1, at 174. See generally BERKSON & CARBON, *supra* note 4; NEFF, *supra* note 4. But see *infra* notes 21-22, 131 and accompanying text.

16. Cf. Sheldon Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488 (1979); Randall, *supra* note 11. See generally BERKSON & CARBON, *supra* note 4; NEFF, *supra* note 4.

17. See Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 322, 325 (1989); see also Patricia M. Wald, *Women in the Law*, TRIAL, Nov. 1988, at 75.

small, relatively inexperienced, pool of attorneys from which to select.<sup>18</sup>

It is more problematic to ascertain the quality of judicial service that the Carter appointees have provided. One important reason for this is the difficulty of articulating parameters which accurately measure quality. Certain criteria have strong political connotations. For instance, the judges whom President Carter placed on the courts clearly have been more liberal than those appointed by Presidents Reagan and Bush.<sup>19</sup> A somewhat less political example is that the Carter appointees have been comparatively sensitive to numerous constitutional rights of individuals; have sought out and implemented congressional intent in substantive statutes, even when it is not expressed with blinding clarity; and have afforded relatively expansive court access to resource-deficient parties, such as civil rights plaintiffs.<sup>20</sup>

More neutral parameters can pose problems of assessment. For instance, even if evaluators could clearly ascertain when judges resolved cases faster, it would be difficult to discern whether those dispositions were fairer, and even more difficult to draw conclusions about the judges' diligence from that determination. Greater complications attend efforts to measure other important judicial qualities. For example, it is virtually impossible to assess accurately the integrity, intelligence, independence, and judicial temperament that specific judges have.

The Carter administration's goals and procedures for selecting federal judges, its appointees, and their decisionmaking have been rather controversial. For instance, conservative commentators and politicians have been critical of the Carter selection process,<sup>21</sup> and observers have characterized it as "affirma-

18. For example, there were 62,000 women in the legal profession in 1980 and 140,000 female attorneys in 1988. Telephone Interview with Marena McPherson, American Bar Association Commission on Women in the Profession (Nov. 17, 1992); see also *infra* note 62 and accompanying text. See generally Slotnick, *supra* note 5, at 522-25.

19. See, e.g., Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 306 (1991); Goldman, *supra* note 17, at 328; Neil A. Lewis, *Selection of Conservative Judges Insures a President's Legacy*, N.Y. TIMES, July 1, 1992, at A13; cf. Timothy B. Tomasi & Jess A. Velona, Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766, 779-93 (1987) (finding Reagan appointees not significantly more conservative than Republican colleagues).

20. See, e.g., Sheldon Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 JUDICATURE 344, 355 (1981); see also Goldman, *supra* note 19, at 306; *infra* notes 23-24 and accompanying text.

21. For general discussions of the criticisms and citations to relevant primary

tive action" for the judiciary. They have implied that the appointees were less qualified,<sup>22</sup> although the criticism seems to implicate disagreement with the judges' substantive determinations. The decisionmaking of the Court of Appeals for the District of Columbia specifically troubled many members of Congress when Democratic appointees, including Carter judges, constituted a majority.<sup>23</sup> Indeed, some senators and representatives introduced legislation which would have revamped traditional notions of venue by dramatically reducing the possibilities for suing in Washington, D.C.<sup>24</sup>

Despite these criticisms, many of President Carter's appointees apparently have been better qualified than judges named through more traditional procedures.<sup>25</sup> A number of the female and minority judges, such as Circuit Judges Amalya Kearse, Patricia McGowan Wald, and Harry Edwards, have rendered exceptional judicial service.<sup>26</sup> One study correspondingly found that women and minorities whom President Carter appointed had to satisfy higher standards for nomination than did other lawyers and that these female and minority judges were as qualified as their predecessors in terms of certain significant parameters.<sup>27</sup> There are also numerous reasons why

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sources, see O'BRIEN, *supra* note 1, at 59; Slotnick, *supra* note 2, at 274-75; Elliot E. Slotnick, *Reforms in Judicial Selection: Will They Affect the Senate's Role? Part II*, 64 JUDICATURE 114, 117 (1980); see also BERKSON & CARBON, *supra* note 4, at 183.

22. See, e.g., *Hearings, supra* note 12, pt. 8, at 2-5 (statement of Sen. Harry F. Byrd); see also Fowler, *supra* note 1, at 334; Slotnick, *supra* note 2, at 274-75.

23. See Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 979, 999 (1982). See generally *Venue Reform: Sue West, Young Man?*, REGULATION, Jan.-Feb. 1982, at 10.

24. See, e.g., H.R. 754, 97th Cong., 1st Sess. (1981); S. 739, 96th Cong., 1st Sess. (1979). This legislation was dubbed "Sagebrush Venue," because its proponents represented western states. Cf. PAUL LAXALT ET AL., *VENUE AT THE CROSSROADS* (Steven R. Schlesinger ed., 1982) (legislative analysis by proponents and opponents); Lewis, *supra* note 19 (discussing the much more conservative current composition of the District of Columbia Circuit); see also Sunstein, *supra* note 23.

25. This is controversial and may ultimately depend on the definition of "qualified" employed. See Slotnick, *supra* note 2, at 298.

26. See, e.g., Goldman, *supra* note 19, at 306 (mentioning Judge Kearse as a possible Supreme Court nominee). Judge Edwards and Judge Wald have been active participants in scholarly debate even while ably handling the highly complex cases resolved by the District of Columbia Circuit. See, e.g., Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Patricia M. Wald, *The "New Administrative Law"—With the Same Old Judges in It?*, 1991 DUKE L.J. 647.

27. See Slotnick, *supra* note 2, at 280-98; cf. Goldman, *supra* note 16, at 492-93 (stating that female and minority Carter appointees on the whole "may even be



it is important to have the diverse perspectives, especially from personal life experiences, which many women and minorities bring to service on the federal bench.<sup>28</sup>

### B. *Republican Administrations*

The goals, procedures, and appointees of the Carter administration contrast markedly with those of President Reagan and President Bush. Moreover, both Republican administrations followed rather similar processes of judicial selection, relying on comparatively traditional policies and procedures. Because these practices have more limited relevance to the suggestions made in the next section of this Article, the selection processes of the Republican chief executives, and particularly those of President Bush, are accorded somewhat less treatment in this Article.

#### 1. *The Reagan administration*

President Reagan swept into office in 1981 with what he claimed was a popular mandate to make the federal government, including the judicial branch, more conservative.<sup>29</sup> The Chief Executive specifically observed that his primary objective in choosing judges was to make the courts more conservative.<sup>30</sup> President Reagan and his advisers sought out and proposed nominees who they believed subscribed to the President's judicial philosophy.<sup>31</sup> This meant, for example, that the nominees disagreed with the "judicial activism" attributed to the Warren Court, which expansively interpreted the right of privacy, the Equal Protection Clause, and the protections accorded the criminally accused.<sup>32</sup> President Reagan frequently spoke of

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more distinguished than . . . white males chosen by Carter and previous administrations").

28. For example, these judges' presence on the bench makes the courts more representative of society. *See also infra* notes 101-104 and accompanying text. *But see infra* note 104.

29. I rely substantially here on O'BRIEN, *supra* note 1, at 60-64; Goldman, *supra* note 17.

30. *See, e.g.*, O'BRIEN, *supra* note 1, at 60; Sheldon Goldman, *Reagan's Judicial Appointments at Mid-term: Shaping the Bench in His Own Image*, 66 JUDICATURE 334, 347 (1983).

31. *See, e.g.*, Fowler, *supra* note 1, at 308; Goldman, *supra* note 17, at 319-20.

32. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (privacy); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (equal protection); *Miranda v. Arizona*, 384 U.S. 436 (1966) (protections accorded criminally accused); *see also* Goldman, *supra*

appointing attorneys who would exercise judicial restraint and be tough on crime.<sup>33</sup>

These selection policies partly reflected the broader conservative agenda of the Reagan administration and the corresponding view among a number of conservatives that the federal courts were important institutions which had previously frustrated the attainment of certain conservative social and political aims, such as restricting abortion and fostering prayer in public schools.<sup>34</sup> President Reagan's goals concomitantly responded to the concern that passage of the Omnibus Judgeships Act had facilitated President Carter's appointment of numerous judges, too many of whom conservatives believed had overly liberal perspectives.<sup>35</sup> The Republican Chief Executive also found judicial appointments to be a relatively cost-free means of appeasing conservative elements in his political party.<sup>36</sup>

The Reagan administration sought to achieve its objective of making the federal judicial bench more conservative in a number of ways. One approach was a negative response to the goals and procedures the Carter administration had employed. Among the initial actions President Reagan took upon assuming office was the revocation of the executive orders governing selection that his predecessor had issued.<sup>37</sup> President Reagan correspondingly abolished Carter's Circuit Judge Nominating Commission and relied substantially less on the district court nominating panels.<sup>38</sup> The Reagan administration also undertook virtually none of the special efforts President Carter had

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note 17, at 319-20. *See generally* ROBERT H. BORK, *THE TEMPTING OF AMERICA* 69-100 (1990); ARCHIBALD COX, *THE WARREN COURT* (1968).

33. *See, e.g.*, O'BRIEN, *supra* note 1, at 60; Fowler, *supra* note 1, at 336; *cf.* Sheldon Goldman, *Reaganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 312, 328 (1985).

34. *See, e.g.*, Nadine Cohodas, *Conservatives Pressing to Reshape Judiciary*, 43 CONG. Q. WKLY. REP. 1759, 1759 (1985) (statement of Bruce Fein, former Associate Deputy Attorney General). *See generally* O'BRIEN, *supra* note 1, at 61-62.

35. *See, e.g.*, Fowler, *supra* note 1, at 308; Goldman, *supra* note 30, at 337 n.2; *see also supra* note 9.

36. *See, e.g.*, Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. TIMES, Apr. 10, 1990, at A1; Ruth Marcus, *Bush Quietly Fosters Conservative Trend in Courts*, WASH. POST, Feb. 18, 1991, at A4. *See generally* O'BRIEN, *supra* note 1, at 60-63.

37. *See supra* notes 8, 10.

38. *See supra* notes 8, 10; *see also* O'BRIEN, *supra* note 1, at 61; Fowler, *supra* note 1, at 309-10.

instituted to search for, find, and appoint highly qualified women and minorities.<sup>39</sup>

President Reagan implicitly rejected other approaches implemented by the Carter administration.<sup>40</sup> He applied selection procedures that were comparatively closed. President Reagan involved relatively few participants in the process, while the pool of candidates considered, and the nominees actually appointed, were neither large nor diverse in terms of, for instance, gender, race, or political views. The Chief Executive concomitantly relied on traditional procedures. Patronage and senatorial courtesy prominently figured in most judicial appointments. The Reagan administration deferred substantially to senators who represented geographic areas in which judicial vacancies occurred and rarely consulted the Senate Judiciary Committee before nominating candidates.

President Reagan and individuals with responsibility for judicial selection also employed affirmative approaches to achieve the administration's goals. Those who recruited candidates implemented President Reagan's policy directive to make the courts more conservative by diligently searching for lawyers with appropriate ideological viewpoints and forwarding their names to the President.

The officials applied a number of techniques to effectuate this instruction, including several important innovations.<sup>41</sup> One innovation was placing substantial responsibility for selection in the Justice Department Office of Legal Policy. The Reagan administration systematized screening procedures, even instituting the unprecedented practice of having Justice Department employees extensively interview all serious candidates in Washington.<sup>42</sup>

Administration personnel also consulted the substantive decisionmaking of federal circuit and district court judges in

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39. See Martin, *supra* note 7, at 138-41; Slotnick, *supra* note 5, at 545-71; Tobias, *supra* note 1, at 174. Indeed, President Reagan named only three women out of eighty-seven judges during his first two years. See Goldman, *supra* note 17, at 325.

40. I rely substantially in this paragraph on O'BRIEN, *supra* note 1, at 60-64; Fowler, *supra* note 1, at 309-10; Goldman, *supra* note 17, at 319-20; see also William F. Smith, Attorney General's Memorandum on Judicial Selection Procedures (1981), reprinted in 64 JUDICATURE 428 (1981).

41. I rely substantially in the next three paragraphs on O'BRIEN, *supra* note 1, at 60-62; Fowler, *supra* note 1, at 309-10; Goldman, *supra* note 17, at 319-20.

42. See, e.g., O'BRIEN, *supra* note 1, at 60-62; Goldman, *supra* note 17, at 319.

ascertaining their fitness for service on higher courts.<sup>43</sup> Some observers, accordingly, have accused President Reagan of considering ideological propriety, and even of relying on litmus tests respecting questions such as abortion, in deciding whether to elevate judges to the next tier in the federal court system.<sup>44</sup> Professor Sheldon Goldman has observed that the Reagan administration arguably participated in the "most systematic judicial philosophical screening" of candidates in the country's history,<sup>45</sup> although he found "no evidence that judicial candidates were asked how they would rule in any case" and concluded that the administration did not apply litmus tests.<sup>46</sup>

A second significant innovation was the President's Committee on Federal Judicial Selection.<sup>47</sup> The counsel to the President chaired that entity, which included high-ranking officials in the White House and Justice Department.<sup>48</sup> The committee had great symbolic and pragmatic importance. It symbolized the significance that President Reagan attached to control of the selection process as one means of naming judges who might enable the administration to realize its social agenda.<sup>49</sup> As a practical matter, the committee could analyze candidates and consider philosophical factors and political concerns, such as their support from Republican senators.<sup>50</sup>

Another important aspect of President Reagan's approach to judicial selection was the relative lack of communication between his administration and the American Bar Association (ABA) Standing Committee on Federal Judiciary.<sup>51</sup> Professor

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43. See, e.g., Lewis, *supra* note 36; Tim Weiner, *White House Builds Courts in Its Own Image*, PHILA. INQUIRER, Oct. 7, 1990, at A-1.

44. See, e.g., Lewis, *supra* note 36; Weiner, *supra* note 43. President Reagan also emphasized prior judicial and prosecutorial experience in considering candidates for district courts. See Martin, *supra* note 7, at 138-41; see also Goldman, *supra* note 17, at 319-20.

45. See Goldman, *supra* note 17, at 319-20; see also O'BRIEN, *supra* note 1, at 60-62.

46. See Goldman, *supra* note 17, at 320; see also Sheldon Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 JUDICATURE 324, 326 (1987).

47. See Goldman, *supra* note 17, at 320; see also Goldman, *supra* note 33, at 315. See generally O'BRIEN, *supra* note 1, at 61.

48. See Fowler, *supra* note 1, at 310; Goldman, *supra* note 17, at 320; Goldman, *supra* note 33, at 315.

49. See Goldman, *supra* note 17, at 320; see also Goldman, *supra* note 33, at 315.

50. See O'BRIEN, *supra* note 1, at 61; Goldman, *supra* note 17, at 320.

51. For discussion of the ABA Committee's role in evaluating nominees, see AMERICAN BAR ASSOCIATION, THE ABA'S STANDING COMMITTEE ON FEDERAL JUDI-

Goldman observed that no prior Republican administration had maintained such a distant relationship with the committee.<sup>52</sup> He attributed this circumstance to Justice Department dissatisfaction with the committee's system for evaluating nominees, a regime which often resulted in ratings less favorable than the administration desired.<sup>53</sup>

Republican Party control of the Senate during President Reagan's first six years in office facilitated the entire appointment process.<sup>54</sup> The Senate Judiciary Committee obviously had great incentives to approve nominees as rapidly as possible and to accommodate the administration. The confirmation proceedings consisted of rather perfunctory hearings in which a few senators asked nominees unenlightening questions. When the Democrats recaptured the Senate in the 1986 elections, the committee processed nominees with less alacrity and the hearings became somewhat more substantive.<sup>55</sup>

President Reagan's attempt to place Judge Robert Bork on the Supreme Court aptly epitomized his administration's judicial selection efforts.<sup>56</sup> To solidify a conservative majority on the Court, the President nominated Judge Bork, who was widely regarded as holding very conservative views on numerous issues of constitutional interpretation.<sup>57</sup> Most senators and much of the public believed that Judge Bork's perspectives

CIARY: WHAT IT IS AND HOW IT WORKS (1991); O'BRIEN, *supra* note 1, at 81-94; see also *infra* notes 82-87, 143-144 and accompanying text.

52. See Goldman, *supra* note 17, at 320; see also O'BRIEN, *supra* note 1, at 61; Goldman, *supra* note 33, at 316.

53. See Goldman, *supra* note 17, at 320; see also O'BRIEN, *supra* note 1, at 61. Because the Carter administration maintained a non-controversial, relatively traditional relationship with the committee, that relationship was not discussed above. See generally *id.* at 58.

54. For discussion of the Senate's role in the appointment process, see O'BRIEN, *supra* note 1, at 65-80; Elliot E. Slotnick, *The Changing Role of the Senate Judiciary Committee in Judicial Selection*, 62 JUDICATURE 502 (1979).

55. The difference was minimal—one of degree, not kind. Cf. Fish, *supra* note 11 (describing rapid processing under Carter administration); Fowler, *supra* note 1, at 325-31 (describing similar roles of the Judiciary Committee in Carter and Reagan Administrations); Roger J. Miner, *Advice and Consent in Theory and Practice*, 41 AM. U. L. REV. 1075, 1081, 1085 (1992) (documenting how the process of nomination and advice and consent has recently "broken down for now and may not be functioning as the Framers intended" principally because Presidents and senators have ceded power to staff).

56. See GITENSTEIN, *supra* note 1; cf. BORK, *supra* note 32, at 271-349 (Judge Bork's account of nomination proceedings).

57. See GITENSTEIN, *supra* note 1, at 18-54, 76-137, 153-63. *But see* BORK, *supra* note 32, at 69-100, 139-221, 241-65.

were outside the mainstream of American legal thought, and the Senate soundly rejected his appointment after an acrimonious battle.<sup>58</sup>

Despite this defeat, President Reagan ultimately accomplished his explicitly articulated goal of making the courts more conservative, although he probably exceeded public consensus. This increased conservatism is seen in the 368 judges whom President Reagan named.<sup>59</sup> His appointees were very similar in terms of gender, race, and political viewpoint. African-Americans constituted a mere 1.9% (7 out of 368) of the attorneys whom President Reagan placed on the courts during his two terms.<sup>60</sup> Women comprised only 7% (28 out of 368) of the judges named.<sup>61</sup> The tiny numbers and percentages of minorities and women appointed become even more compelling in light of several salient facts. President Carter named seven times the percentage of African-Americans and double the percentage of women, even though he had a substantially smaller, less experienced pool of minority and female lawyers on which to draw.<sup>62</sup>

Conservatism can also be witnessed in the judicial determinations of President Reagan's appointees. Many of those judges, once in office, have resolved cases in a conservative manner. For example, they have narrowly interpreted the Constitution and congressional legislation, have curtailed federal court access, and have sharply limited the rights of criminal defendants.<sup>63</sup> The Supreme Court has persisted in restrictively reading much civil rights law, and Congress has responded by passing numerous civil rights restoration statutes.<sup>64</sup> These developments culminated in the disastrous 1988 Term, in

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58. See GITENSTEIN, *supra* note 1, at 76-117, 153-63, 182-249, 267-96. *But see* BORK, *supra* note 32, at 139-221, 241-343.

59. See Goldman, *supra* note 17, at 322, 325.

60. *Id.*

61. *Id.*

62. See *supra* notes 17-18 and accompanying text.

63. See Goldman, *supra* note 17, at 328-29; *cf.* Steve Alumbaugh & C.K. Rowland, *The Links Between Platform-Based Appointment Criteria and Trial Judges' Abortion Judgments*, 74 JUDICATURE 153 (1990) (finding Reagan appointees far more likely than Carter appointees to resist pro-abortion claims). See generally O'BRIEN, *supra* note 1, at 60-64.

64. See Roy L. Brooks, *Beyond Civil Rights Restoration Legislation: Restructuring Title VII*, 34 ST. LOUIS U. L.J. 551, 552-53 (1990) (recounting Court-Congress point, counterpoint and enumerating restoration acts). See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

which the Court narrowly applied numerous civil rights laws.<sup>65</sup> Congress reacted to those rulings by adopting the Civil Rights Act of 1991.<sup>66</sup>

## 2. *The Bush administration*

The Bush administration's approach to federal judicial selection warrants less treatment here, because it mirrored in many respects the process which the Reagan administration employed. For instance, President Bush expressly subscribed to the identical major purpose of creating a more conservative federal judiciary,<sup>67</sup> considered judicial appointments a valuable means for cultivating conservative components of his political coalition,<sup>68</sup> and relied heavily on senatorial courtesy and patronage.<sup>69</sup>

The Bush administration, however, dissimilarly treated some aspects of judicial selection. For example, President Bush assumed a different approach to the Supreme Court nomination process, a response the failed Bork nomination may have prompted.<sup>70</sup> The President submitted the names of stealth candidates, a strategy which proved successful with Justice David Souter.

The administration apparently thought that similar tactics would lead to Judge Thomas' confirmation.<sup>71</sup> His sparse judi-

65. See, e.g., *Martin v. Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). See generally Symposium, *The United States Supreme Court's 1988 Term Civil Rights Cases*, 64 TUL. L. REV. 1351 (1990).

66. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C. and 2 U.S.C.). See generally Carl Tobias, *Civil Rights Procedural Problems*, 70 WASH. U. L.Q. 801 (1992). Measuring accurately the quality of appointees' judicial service is problematic. See *supra* notes 19-20 and accompanying text. For one assessment of the Reagan and Bush appointees, see *infra* notes 112-117 and accompanying text.

67. See, e.g., Lewis, *supra* note 36; Letter from President George Bush to Senator Robert Dole (Nov. 30, 1990) (copy on file with author) [hereinafter Letter]; see also *supra* notes 29-36 and accompanying text.

68. See, e.g., Lewis, *supra* note 19; Marcus, *supra* note 36; see also *supra* note 36 and accompanying text.

69. See, e.g., Goldman, *supra* note 19, at 295-97; Lewis, *supra* note 36; see also *supra* notes 40-41 and accompanying text.

70. See *supra* notes 56-58 and accompanying text.

71. I rely substantially here on contemporaneous newspaper accounts. See generally TIMOTHY M. PHELPS & HELEN WINTERITZ, *CAPITOL GAMES: CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION* (1992); PAUL SIMON, *ADVICE AND CONSENT* (1992); Symposium, *Gender, Race and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1279 (1992) [hereinafter Symposium].

cial record contradicted President Bush's assertion that Judge Thomas was the best possible candidate for the Court.<sup>72</sup> Numerous observers criticized the President for nominating Judge Thomas because he was an African-American and very conservative, instead of nominating many other African-American lawyers who possessed greater experience but had more moderate political views.<sup>73</sup>

The confirmation proceedings were extremely contentious.<sup>74</sup> The administration and Republican senators chose to rely substantially on character issues, emphasizing Judge Thomas' ability to overcome a poverty-stricken background.<sup>75</sup> Democrats on the Senate Judiciary Committee questioned Judge Thomas' qualifications for service on the Supreme Court while probing the jurist's philosophy of judging and his views on constitutional and statutory interpretation.<sup>76</sup> Judge Thomas steadfastly refused to participate in meaningful dialogue regarding anything substantive, behavior which became absurd when the nominee claimed that he had never seriously considered *Roe v. Wade*.<sup>77</sup>

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72. See *The Supreme Court; Excerpts from News Conference Announcing Court Nominee*, N.Y. TIMES, July 2, 1991, at A14; see also Leslie H. Gelb, *Untruths . . .*, N.Y. TIMES, Oct. 27, 1991, § 4, at 15. Judge Thomas had served on the District of Columbia Circuit Court for less than eighteen months when President Bush nominated him. See Neil A. Lewis, *Panel Backs Appeals Court Nominee*, N.Y. TIMES, Feb. 23, 1990, at A16.

73. See, e.g., Erwin Chemerinsky, *October Tragedy*, 65 S. CAL. L. REV. 1497 (1992); Gelb, *supra* note 72; see also A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992); *supra* note 26.

74. See *Hearings Before the Senate Judiciary Comm. on the Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States*, 102d Cong., 1st Sess. (1991) [hereinafter *Thomas Hearings*]. See generally NOMINATION OF CLARENCE THOMAS TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, S. EXEC. REP. NO. 15, 102d Cong., 1st Sess. (1991); Symposium, *supra* note 71.

75. See, e.g., *Excerpts from Senate's Hearings on the Thomas Nomination*, N.Y. TIMES, Sept. 11, 1991, at A22 [hereinafter *Thomas Hearings Excerpts*] (opening statement of Clarence Thomas); see also Higginbotham, *supra* note 73, at 1026. See generally GITENSTEIN, *supra* note 1, at 323-46.

76. See, e.g., *Thomas Hearings Excerpts*, *supra* note 75 (statements of Sen. Biden and Sen. Kennedy); *The Thomas Hearings; Excerpts from Senate's Hearings on the Thomas Nomination*, N.Y. TIMES, Sept. 12, 1991, at A20 (statements of Sen. Leahy and Sen. Metzenbaum).

77. 410 U.S. 113 (1973). The process degenerated into a public spectacle in which Professor Anita Hill accused Judge Thomas of sexual harassment and he responded with allegations of a "hi-tech lynching." The senators, for their part, ineptly handled the matter. They asked vacuous and misleading questions under the glare of television lights as millions of viewers were simultaneously captivated



The Bush administration departed in other ways from President Reagan's approach to judicial selection. For instance, President Bush stated that he sought to appoint judges who would interpret the law, not "legislat[e] from the bench," thereby modifying somewhat President Reagan's formulation.<sup>78</sup> Moreover, the Bush administration centralized responsibility in the office of White House Counsel, C. Boyden Gray, which partially reduced Justice Department participation.<sup>79</sup> President Bush also undertook greater efforts to seek out and nominate highly qualified women and minorities, although his administration only did so after two years in office and these endeavors were less thorough than President Carter's efforts.<sup>80</sup> The Bush administration did not scrutinize judicial candidates' political philosophies as systematically as the Reagan administration, but it had little need to analyze closely those Reagan district court appointees who constituted a substantial percentage of President Bush's appellate court nominees.<sup>81</sup>

Another way that the Reagan and Bush administrations differed was their relationships with the ABA Standing Committee on Judiciary.<sup>82</sup> During President Bush's tenure, relations with the committee deteriorated even more. Attorney General Richard Thornburgh requested that the ABA disavow consideration of nominees' ideological or political perspectives in evaluating them.<sup>83</sup> The ABA responded that it only examined those views when they became relevant to nominees' qualifications, such as integrity, competence, and judicial tempera-

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and repelled by the bizarre public display. *See also* Chemerinsky, *supra* note 73, at 1503; Gelb, *supra* note 72. *See generally* RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992); Symposium, *supra* note 71.

78. *See, e.g., Bush v. Clinton: The Candidates on Legal Issues*, A.B.A. J., Oct. 1992, at 57 [hereinafter *Bush v. Clinton*]; *The Candidates Respond*, A.B.A. J., Oct. 1988, at 52, 57; *see also supra* note 33 and accompanying text.

79. *See, e.g., Sheldon Goldman, Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 285, 296 (1993); Goldman, *supra* note 19, at 297; Miner, *supra* note 55, at 1080.

80. *See, e.g., Goldman, supra* note 19, at 297; Letter, *supra* note 67; *see also supra* notes 5-12 and accompanying text.

81. *See, e.g., Lewis, supra* note 36; Marcus, *supra* note 36; *see also Goldman, supra* note 19, at 294; *supra* notes 43-46 and accompanying text.

82. I rely substantially here on Goldman, *supra* note 19. *See also supra* notes 51-53 and accompanying text.

83. *See Goldman, supra* note 19, at 295.

ment.<sup>84</sup> The Attorney General found the Association's explanation inadequate, stating that it jeopardized committee involvement in the nomination process.<sup>85</sup> The Attorney General and the committee eventually reached an agreement in which the ABA expressly disavowed any consideration of ideological or political perspectives in the rating process, and the committee reassumed responsibility for reviewing nominees' qualifications.<sup>86</sup> Nonetheless, President Bush recently expressed lingering concerns about the committee's objectivity,<sup>87</sup> thus indicating that the dispute was not satisfactorily resolved.

The Bush administration ultimately realized the goal of making the federal courts more conservative, even though it lacked a clear popular mandate to do so, as the stormy proceedings to confirm Justice Thomas demonstrate.<sup>88</sup> Certain evidence suggests, however, that Bush appointees are somewhat less doctrinaire than those of President Reagan.<sup>89</sup> An important example is Justice Souter, whose moderate voting record on a number of constitutional issues has led writers to classify him as one member of a new centrist coalition which includes Justice Sandra Day O'Connor and Justice Anthony Kennedy.<sup>90</sup>

President Bush's appointees were also more diverse in terms of gender and race. Women comprised 18.7% (36 out of 192) of the judges whom he selected, while African-Americans constituted 5.2% (10 out of 192).<sup>91</sup> The Bush administration also named the youngest judges in American history, which

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84. *Id.*

85. *Id.*

86. *Id.*; cf. Charles E. Anderson, *Thornburgh on the Record*, A.B.A. J., Jan. 1991, at 56 (attributing controversy to ABA's adoption of resolution favoring abortion rights); see also Marianne Lavelle, . . . *And Role of the ABA*, NAT'L L.J., Aug. 6, 1990, at 43.

87. See *Bush v. Clinton*, *supra* note 78, at 58.

88. See *supra* notes 71-77 and accompanying text.

89. See, e.g., Goldman, *supra* note 19, at 295-98; Lewis, *supra* note 19. But see Bill Clinton, *Judiciary Suffers Racial, Sexual Lack of Balance*, NAT'L L.J., Nov. 2, 1992, at 15.

90. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2803 (1992) (joining Court's opinion with Justices O'Connor and Kennedy); *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2146 (1992) (concurring with Justice Kennedy); see also Scott P. Johnson & Christopher E. Smith, *David Souter's First Term on the Supreme Court: The Impact of a New Justice*, 75 JUDICATURE 238 (1992). See generally Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 27-34 (1992).

91. Telephone Interview with George Kassouf, Alliance for Justice, Washington, D.C. (Nov. 2, 1992).

means that its appointees will continue to have influence well into the twenty-first century.<sup>92</sup>

In sum, this examination of judicial selection under the administrations of Presidents Carter, Reagan, and Bush illustrates that the process has been problematic in numerous ways. The assessment also finds that the public has become increasingly disenchanted with the selection process. The next section, accordingly, offers suggestions which draw substantially on the most efficacious techniques employed by previous administrations, Democratic and Republican.<sup>93</sup>

## II. SUGGESTIONS FOR THE FUTURE

### A. *Judicial Selection Goals*

#### 1. *Selecting judges based on merit*

Merit is the goal which should animate the new administration's policy of federal judicial selection. President Clinton must appoint only those attorneys who will be excellent judges. Nominees should be distinguished lawyers with superb qualifications. For instance, the attorneys must have been involved in extremely rigorous legal activity, although the work's challenging character is more important than its precise form.<sup>94</sup> Nominees should also be highly intelligent and very industrious while evidencing balanced dispositions. For example, the lawyers must have the type of broad intellect, willingness to labor vigorously, and appropriately measured judicial temperament that will enable them to discharge properly the federal courts' significant responsibilities, implicating such

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92. See, e.g., Clinton, *supra* note 89; Lewis, *supra* note 19.

93. The suggestions are meant to be rather idealistic but are tempered by certain pragmatic and political realities. For instance, the recommendations suggest the de-emphasis of senatorial patronage and courtesy while calling for senators to retain substantial responsibility in judicial selection. See *infra* notes 131-132 and accompanying text. This recognizes the potential for senatorial influence to undermine merit while acknowledging that senators can make helpful contributions, will resist ceding one of the last vestiges of pure patronage, and are essential to President Clinton's achievement of other goals, especially economic ones. The suggestions also assume that the traditional lower court confirmation process will change minimally, given the 100 vacant seats; other priorities, such as the economy and foreign policy initiatives; and the level of interest and resources that senators will devote to selection. See *supra* notes 54-55 and accompanying text.

94. See, e.g., Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477, 485 (1991); Tobias, *supra* note 1, at 181; see also *infra* note 123 and accompanying text.

issues as the death penalty and abortion. Nominees should possess additional qualities which are less easily described but that are essential to superior judicial service. These include impeccable integrity and substantial independence. In short, merit must be the touchstone of selection.

It is important at this particular juncture that the administration name the finest judges. Some observers have declared that the federal judiciary is in crisis, beleaguered by such phenomena as the litigation explosion, litigation abuse, increasingly complicated civil lawsuits, and an expanding criminal docket primarily attributable to the war on drugs.<sup>95</sup> Although these propositions are controversial,<sup>96</sup> there is widespread agreement that the federal courts constitute a scarce public resource.<sup>97</sup> The Supreme Court and Congress have also enlarged district judges' discretion through procedural changes, such as amendments to the Federal Rules of Civil Procedure and more deferential appellate review.<sup>98</sup> The above considerations mean that President Clinton must appoint judges who can resolve cases efficiently, fairly, and correctly while exercising their significant discretion in ways which strike the appropriate balance between expeditious and just disposition.

## 2. *Creating balance*

Although the new administration probably ought to treat merit as paramount, it should also seriously consider other factors that could serve as goals. An important example is the enhancement of balance, in terms of gender, racial diversity, and political perspectives, on the federal courts.

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95. See, e.g., S. REP. NO. 416, 101st Cong., 2d Sess. 6-32 (1990), reprinted in 1990 U.S.C.C.A.N. 6803, 6808-35; RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985). See generally FEDERAL COURTS STUDY COMMITTEE, *WORKING PAPERS AND SUBCOMMITTEE REPORTS* (1990).

96. See, e.g., Marc Galanter, *The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921; Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115 (1991). See generally Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 288-89 (1989).

97. See, e.g., POSNER, *supra* note 95; Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 2-9 (1990); Robel, *supra* note 96.

98. See, e.g., FED. R. CIV. P. 16; *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). See generally Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984); Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933 (1991).

The administration can simultaneously attain these goals of merit and balance, primarily because they are compatible. For instance, the large, highly qualified pool of female and minority attorneys that presently exists makes it possible to increase merit, diversity, and political balance on the federal bench.<sup>99</sup> Balance, therefore, warrants additional exploration.

*a. Gender and racial diversity.* The administration could consult the current composition of the federal judiciary, asking whether the courts should be differently constituted along the lines of gender, race, or political viewpoints. Enhanced gender and racial diversity are significant factors that candidate Clinton promised his administration would closely consider.<sup>100</sup> For example, President Clinton might enlarge the numbers of female and African-American judges.

There are several important reasons why the country needs the diverse viewpoints which many women and minorities bring to judicial service. For instance, most female judges can more easily appreciate specific difficulties, such as securing jobs, balancing employment and familial responsibilities, and encountering gender discrimination, that numerous women face.<sup>101</sup> Female and minority judges could also heighten the courts' sensitivity to the increasingly complex issues of public policy which must be resolved. These questions include allocation of scarce resources and affirmative action.<sup>102</sup> Some evidence correspondingly suggests that many citizens, such as poverty-stricken individuals, have greater confidence in a federal judiciary which more closely approximates the gender and racial composition of American society.<sup>103</sup> The appointment of additional women and minorities might also enhance political

99. Nominees' meritorious qualifications and the quality of judicial service that appointees render are similar, but not identical, concepts. For instance, meritorious qualifications are not a guarantee of excellent service, but they are strong indicators. See *supra* notes 19-20, 25-27, 66 and accompanying text; *infra* notes 112-117 and accompanying text.

100. See *Bush v. Clinton*, *supra* note 78, at 57-58; Clinton, *supra* note 89.

101. See, e.g., Marion Z. Goldberg, *Carter-Appointed Judges: Perspectives on Gender*, TRIAL, Apr. 1990, at 108; Elaine Martin, *Men and Women on the Bench: Vive la Difference?*, 73 JUDICATURE 204, 204 (1990). See generally Judith S. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 FORDHAM L. REV. 111, 122-26 (1988).

102. See, e.g., Goldman, *supra* note 16, at 494; Slotnick, *supra* note 2, at 272-73.

103. See, e.g., Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 253 (1978); cf. *Bush v. Clinton*, *supra* note 78, at 57-58 (similar suggestion by candidate Clinton); Clinton, *supra* note 89 (same).

balance, because they will have more moderate political perspectives than most Reagan and Bush appointees.<sup>104</sup>

*b. Political balance.* The administration, when consulting the existing composition of the federal bench, could ask whether the judiciary should be differently comprised in terms of its political views. Greater political balance is an important factor which candidate Clinton intimated he would examine.<sup>105</sup> His administration might consider how candidates as judges would resolve numerous substantive issues. For instance, President Clinton could nominate attorneys who would provide broad citizen access to the courts; interpret enactments in a manner sympathetic to congressional intent, recognizing the difficulties of legislating with blinding clarity for every contingency; and expansively regard individual constitutional rights.<sup>106</sup>

The interrelated propositions respecting court access and statutory interpretation are justifiable, because the administration and the Senate can properly attempt to insure that the nominees proposed, and the judges confirmed, will be solicitous of congressional intent expressed in the substantive legislation that Congress has passed and that the Executive Branch must enforce.<sup>107</sup> The idea as to constitutional rights is a rather con-

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104. Several of these concepts may be overstated or crudely instrumental, as two prominent Republican appointees illustrate. Supreme Court Justice Clarence Thomas and Circuit Judge Edith Jones have been very conservative judges, evidencing little empathy for individuals accused of crime or who pursue post-conviction relief. *See, e.g., Hudson v. McMillian*, 112 S. Ct. 995, 1004 (1992) (Thomas, J., dissenting) (evincing little sympathy in Eighth Amendment case for inmate who was badly beaten); Tobias, *supra* note 1, at 179-80 (discussing display by Judge Jones of problematic judicial temperament in death row appeals).

105. *See Bush v. Clinton, supra* note 78, at 57-58; Clinton, *supra* note 89.

106. I am not advocating that he do so, because this activity could be characterized as using litmus tests that liberals accused President Reagan of employing and because it is no more appropriate for Democrats than Republicans to treat judicial appointments as a means of courting political constituencies. *See supra* notes 36, 43-44, 68 and accompanying text; *infra* note 120. Candidate Clinton promised to appoint only judges "who believe in . . . the right to choose" abortion. *See Joan Biskupic, Court Vacancies Await President*, WASH. POST, Nov. 6, 1992, at A1. Use of litmus tests is inadvisable, and President Clinton should clearly state that his administration will not employ them.

107. For example, Senator Grassley has attempted to protect senatorial prerogatives by questioning recent Supreme Court nominees on their views of statutory interpretation. *See, e.g., Nomination of Judge Antonin Scalia: Hearings Before the Senate Comm. on the Judiciary 99th Cong., 2d Sess. 63-69 (1986)* (discussion between Sen. Grassley and Judge Scalia); *Thomas Hearings, supra* note 74, at 65-68, 177-502 (statements of Sen. Grassley and Judge Thomas); *see also* Carl Tobias, *Examining Thomas' Ideas on Statutory Analysis*, LEGAL TIMES, Sept. 9, 1991, at

troversial, but extremely legitimate, view of the courts' role, which finds substantial support in much jurisprudence of the Warren Court.<sup>108</sup>

*B. Additional Justifications for the Goals of Merit and Balance: The Republican Administrations' Record*

Additional propositions support treating merit and balance as important goals. Most significant is the record of judicial selection that the Republican administrations compiled over a twelve-year time frame in which they appointed two-thirds of the present federal bench.<sup>109</sup> During this period, the Republican chief executives exceeded popular consensus in nominating conservative Supreme Court candidates. President Reagan chose most, and President Bush selected many, of the circuit and district court judges principally because the appointees had conservative political and philosophical perspectives and would placate conservative elements in the Republican Party. Of the judges named, African-Americans constituted less than two percent of President Reagan's appointees, and only five percent of President Bush's.<sup>110</sup> The substantive decisionmaking of these Republican appointees has been conservative; the judges have narrowly interpreted individuals' constitutional rights and congressional statutes while limiting federal court access.<sup>111</sup>

Although President Reagan clearly, and President Bush apparently, elevated conservative political factors over merit, ascertaining whether their appointments actually eroded the bench's quality is problematic.<sup>112</sup> It is fair to surmise, howev-

33. See generally Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 402-05 (1989) (tracing historical development of view that courts should be solicitous of congressional intent); Robert F. Williams, *Statutes As Sources of Law Beyond Their Terms in Common-Law Cases*, 50 GEO. WASH. L. REV. 554, 558 (1982) (same).

108. See COX, *supra* note 32. But see BORK, *supra* note 32; cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (eloquent theoretical rendition of argument).

109. See *supra* notes 29-92 and accompanying text.

110. See *supra* notes 60, 91 and accompanying text. The Bush administration named a higher percentage of women than President Carter, although it had a substantially larger, more qualified, pool. See *supra* notes 62, 91 and accompanying text. One explanation for the dearth of African-American appointees may be that the Republican Presidents could find no more African-Americans whom they considered sufficiently conservative. See Dan Trigoboff, *Bush Judicial Nominees Blasted*, A.B.A. J., Mar. 1991, at 20; see also *supra* note 73; cf. *Bush v. Clinton*, *supra* note 78, at 57-58.

111. See *supra* notes 63-66, 88-90 and accompanying text.

112. The debate over quality here resembles that above. See *supra* notes 19-28

er, that the chief executives' nearly single-minded pursuit of conservative ideology sacrificed other important attributes, including competence, and could have diluted the courts' quality. Even conservative commentators have criticized Presidents Reagan and Bush for naming mediocre Supreme Court Justices.<sup>113</sup>

The controversy over Daniel Manion's fitness to serve on the Seventh Circuit additionally supports these ideas.<sup>114</sup> During the 1980s, Democratic senators became increasingly frustrated with President Reagan's nominations of attorneys whose candidacies seemed to be premised more on political considerations than on ability.<sup>115</sup> The Democrats forced that issue when the President nominated Manion. They argued that the lawyer's mediocre record as a practicing attorney meant that he was chosen principally for his sterling conservative credentials.<sup>116</sup> After a bitter nomination fight, the Senate confirmed Manion by the narrowest possible margin; Vice-President Bush voted to break a tie.<sup>117</sup> The Democrats, however, clearly indicated that they would consider as unacceptable future nominations which were primarily motivated by ideological factors.

### C. Resolution

In short, the Clinton administration could treat merit and balance as significant goals. Several propositions above show that diversity and political balance have important intrinsic value. For example, the public has greater respect for, and

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and accompanying text.

113. See, e.g., Bruce Fein, *A Court of Mediocrity*, A.B.A. J., Oct. 1991, at 74; see also O'BRIEN, *supra* note 1, at 62 (statement of Professor Philip Kurland); Thomas: *The Least Qualified Nominee So Far?*, NAT'L L.J., Sept. 16, 1991, at 5; cf. Tom Wicker, *A Court of Mediocrity*, N.Y. TIMES, Oct. 6, 1991, at A17 (liberal observer).

114. I rely substantially here on conversations with Mark Gitenstein [hereinafter Conversations], who was minority counsel of the Senate Judiciary Committee at the time, and Philip Shenon, *Senate Ending Judicial Fight, Gives Manion Final Approval*, N.Y. TIMES, July 24, 1986, at A1. See also NOMINATION OF DANIEL A. MANION, S. EXEC. REP. NO. 16, 99th Cong., 2d Sess. (1986) [hereinafter MANION REPORT]. See generally Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. REV. 273, 305-16 (1989).

115. See Shenon, *supra* note 114 (discussing Manion's limited federal court experience); Gitenstein conversations, *supra* note 114.

116. See Shenon, *supra* note 114 (Manion's father was founder of the John Birch Society); see also MANION REPORT, *supra* note 114; Tobias, *supra* note 1, at 183.

117. See Shenon, *supra* note 114.



confidence in, a federal judiciary whose constitution closely reflects society's gender and racial composition and political views.<sup>118</sup> Therefore, the dearth of African-American judges named by the Republican Presidents might lead President Clinton to place numerous African-Americans on the bench, even if other attorneys have superior qualifications.<sup>119</sup> The Republicans' practically wholehearted pursuit of conservatism in selecting federal judges could similarly support Democratic attempts to name equally liberal appointees.<sup>120</sup> Although the new administration may be tempted to follow, and could justify, this approach, its adoption would be inadvisable, principally because President Clinton can simultaneously achieve merit and balance.<sup>121</sup>

An important reason for this compatibility is that a substantial, extremely well-qualified pool of female and minority lawyers now exists. A number of these attorneys have been actively involved in very rigorous types of legal activity, some of which may be less traditional than practice in large law firms, that effectively requires many attorneys to become administrators.<sup>122</sup> Certain forms of lawyering, such as conducting high-impact voting rights litigation for the NAACP, or environmental litigation for the Sierra Club, working in the offices of federal public defenders or United States attorneys, or writing trenchant scholarship on the federal courts, could better equip lawyers to be excellent judges.<sup>123</sup>

118. See *supra* note 103 and accompanying text.

119. I obviously use the last clause for rhetorical purposes. See also *supra* note 12 and accompanying text.

120. Indeed, the judicial appointments policy pursued, and the judges named, over three terms by Presidents Reagan and Bush might enable the new administration to support such clearly partisan premises for appointment as liberalism and the cultivation of the Democratic Party's liberal wing, although it ordinarily would be no more appropriate for Democrats than for Republicans to appoint judges primarily on these bases.

121. See *supra* note 99.

122. See *supra* note 94 and accompanying text.

123. Working in a United States Attorney's Office might be preferable experience for service on the district bench; writing trenchant scholarship may be preferable for appellate courts. See also *supra* note 94 and accompanying text. This substantial, well-qualified pool also obviates other difficulties. It enables the administration to minimize the controversy that surrounds affirmative action and quotas. See *supra* note 22 and accompanying text; see also STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991). The pool also permits the administration to avoid appearing vindictive; the trite formulation is that two wrongs do not make a right. See Stephen L. Carter, *No Known Cure for the Abuse of Power*, N.Y. TIMES, Oct. 4, 1992, § 4, at 17.

The quality and magnitude of this pool mean that President Clinton need not sacrifice merit for balance. The administration's effort to name the very best judges may correspondingly warrant some, albeit minimal, compromise in terms of diversity or political perspectives. For example, the nation and the courts should not lose the talents of the next Lewis Powell, Harry Blackmun, or Henry Friendly because such an appointee would fail to enhance diversity or political balance.<sup>124</sup>

The stress on merit in choosing judges should lead to concomitant de-emphasis of political considerations, although they probably cannot be eliminated.<sup>125</sup> Indeed, many aspects of judicial selection are principally political. Attempts to extricate the process from politics, therefore, may be naive or prove futile. The preferable approach is to recognize and allow for the political nature of the process, maximizing the beneficial and minimizing the detrimental effects of politics, and being realistic about the role that politics plays.<sup>126</sup>

### III. PROCEDURES FOR ACHIEVING GOALS

The new administration can attain merit and balance in numerous ways. President Clinton and his advisers responsible for recruiting judges should first clearly articulate the administration's philosophy of, and procedures for, judicial selection. The President ought to provide this guidance in an executive order, because formal promulgation would afford notice, clarity, and regularity, which will be important to securing compliance, fostering cooperation of participants involved in selection, and increasing public confidence in the process.<sup>127</sup>

#### A. *Administration Personnel Responsible for Judicial Selection*

The capabilities of the administration officials who recruit judges will be as significant as the specific procedures ultimate-

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124. See, e.g., *Finley v. United States*, 490 U.S. 545, 564-65 (1989) (Stevens, J., dissenting) (Justice Stevens' tribute to Judge Friendly); Sandra Day O'Connor, *A Tribute to Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395 (1987).

125. I am indebted to Mark Gitenstein for most of the ideas in this paragraph. See also Stephen L. Carter, *Let's Fess Up to What's Been Going On*, LEGAL TIMES, Nov. 9, 1992, at 27. See generally GITENSTEIN, *supra* note 1.

126. See *supra* note 93 and accompanying text; *infra* note 132.

127. See *supra* notes 8, 10, 37-38 and accompanying text.

ly employed.<sup>128</sup> For instance, those officers' competence will have greater importance than whether the White House or the Department of Justice assumes primary responsibility in selecting judges.<sup>129</sup> They must exercise good judgment and know how to recognize merit and distinguish it from political factors. The persons should be conciliators who can work effectively with all participants in the selection process. The officials must also be willing to invoke the requisite authority to protect zealously the process' integrity by countering any activity which jeopardizes it. These threats could emanate from a plethora of sectors, such as other administration personnel who may wish to apply litmus tests, special interest groups that might seek to veto nominees, or senators who may favor the nomination of their political supporters. Moreover, the officials should have the complete confidence of the President. If the officers possess these attributes, they can recruit highly qualified judges.<sup>130</sup>

### B. *Suggested Procedures for Assembling Candidates*

The individuals responsible for selection must diligently seek out, find, and advocate candidates of the finest caliber. Each time President Clinton prepares to fill a judgeship, administration officials must assemble the best pool of potential candidates, drawn from a broad spectrum of lawyers. The officers ought to enlist the assistance of rather traditional sources, such as state and local bar associations.

Throughout the process, the officials must work closely with senators who represent the geographic areas in which judges are to sit, because senatorial help and cooperation will facilitate selection. The senators will undoubtedly be active

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128. This is especially true in light of other suggestions and certain assumptions made here. For example, given the roles envisioned for senators and the assumption that lower court confirmation proceedings will continue to lack substance, the abilities of administration officials will have compelling significance. See *supra* note 93 and accompanying text; *infra* note 132.

129. See GITENSTEIN, *supra* note 1, at 69-73, 82-87, 205-06 (describing problematic relationships between White House and Justice Department in Bork proceedings); see also *supra* notes 42, 47-50 and accompanying text.

130. The procedures attempt to strike appropriate balances among numerous considerations relevant to judicial selection. An important example is how open the process should be. It is difficult to quarrel with a process that maximizes openness, which might mean that many individuals should search for candidates. Nonetheless, more participants could be less effective because, for instance, they could politicize the process earlier and eliminate excellent candidates. In short, efficacious selection warrants some compromise in terms of openness.

participants, although the precise form of their involvement, which could range from suggesting candidates to vetoing attorneys whom the administration proposes, will depend on numerous variables that arise in specific situations.<sup>131</sup> The variables might include whether vacancies are in circuit courts which typically encompass multi-state regions, or district courts within one state; the particular senator's party affiliation; familiarity with individual candidates; and relationships with the administration, the other senators who represent the relevant regions, and members of the Senate Judiciary Committee.<sup>132</sup>

Administration officials should confer with additional sources when gathering the names of possible candidates. They ought to contact persons and groups that can suggest highly qualified lawyers whom traditional sources may not know because the attorneys engage in less traditional forms of legal endeavors.<sup>133</sup> Examples are individuals or representatives of organizations, such as women's groups, who served on the nominating commissions that proved so effective in recruiting female and minority candidates during the Carter administration.<sup>134</sup>

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131. Cf. Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745, 770 (1987) (treating situations comprised of multiple variables); Carl Tobias, *Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Administrative Proceedings*, 82 COLUM. L. REV. 906, 955 (1982) (same).

132. The procedures seek to maximize the best and minimize the least desirable aspects of the roles which senators, patronage and senatorial courtesy play in judicial selection. For instance, the procedures recognize that senators who represent areas in which judgeships must be filled will know many attorneys who would be excellent judges and call for the senators' active participation; they concomitantly acknowledge that senators might not know highly qualified candidates who have engaged in less traditional legal work and propose measures to treat this problem. The procedures also de-emphasize patronage and senatorial courtesy, because they could undermine merit even while recognizing that senators' cooperation will be critical to selection. Senators' loss of benefits from reduced reliance on patronage and senatorial courtesy may be offset, however, by the public perception that very meritorious judges have been appointed, the administration's devotion of its resources to the effort, and the deflection from senators of adverse publicity that might attend controversial candidates' nomination. See also Fowler, *supra* note 1, at 310-25 (finding Carter and Reagan administrations more successful in altering traditional procedures for circuit court nominees).

133. See *supra* notes 94, 123 and accompanying text.

134. The procedures do not contemplate revitalization of the judicial nominating commissions because the procedures provide many of the panels' benefits with fewer detriments. The commissions were an effective means of fostering the appointment of highly qualified female and minority judges. Nonetheless, the large number of participants involved and the more open procedures used may have impaired the panels' efficacy. Moreover, commission decisions involving membership

### C. *Suggestions for Recommending Finalists*

#### 1. *Narrowing the pool*

Once the officers have collected a large pool of potential candidates, the officials should designate a small number of the ablest attorneys by employing the indicia of merit enumerated above.<sup>135</sup> Narrowing the field to relatively few candidates, ideally less than five, will make the process manageable yet afford sufficient flexibility to meet unanticipated contingencies, such as last-minute political opposition. The officers probably should conduct confidential interviews with individuals who know these lawyers professionally and personally.<sup>136</sup> The sessions would illuminate and refine the merit determination; afford instructive insights on candidates' philosophical perspectives, if political balance becomes relevant; and avoid potentially embarrassing revelations. Close communications with senators who represent the area will be critical at this juncture.

#### 2. *Consultation*

The new administration should informally consult with the Senate before officially submitting the names of nominees.<sup>137</sup> The administration may want to propose multiple candidates for each judicial seat and seek the Senate Judiciary Committee's views of those whom it finds preferable. Consultation honors the Constitution's phrasing, which states that the President appoints with the *advice* and consent of the Senate.<sup>138</sup> Consultation should correspondingly enhance the administration's ability to secure consent, as senators will have

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and the candidates forwarded were very political. Revival of the commissions, especially in the district courts, would also be time consuming—a difficulty that is compounded in districts that have unfilled judgeships and are currently experiencing backlogs. Liberals and conservatives agree on certain of these ideas. *See, e.g.,* Goldman, *supra* note 17, at 319-20; Telephone Interview with George Kassouf, Judicial Selection Project, Alliance for Justice, Washington, D.C. (Nov. 17, 1992) (similar idea as to Clinton administration). If the new administration deems revitalization appropriate, it should experiment with re-instituting the circuit panels, as there would need to be fewer of them and fewer judicial vacancies to fill.

135. *See supra* notes 94-98 and accompanying text.

136. They must be sensitive to privacy concerns. *Cf. supra* note 77 (public spectacle in Thomas hearings).

137. *See* GITENSTEIN, *supra* note 1, at 333-46; Strauss & Sunstein, *supra* note 1, at 1518. *But see* William B. Reynolds, *The Confirmation Process: Too Much Advice and Too Little Consent*, 75 JUDICATURE 80 (1991).

138. U.S. CONST. art. II, § 2. *See generally* Mathias, *supra* note 1; Miner, *supra* note 55.

actively participated in considering candidates. Moreover, consultation is rather easy to accomplish and would minimize the possibility that nominees will prove controversial.<sup>139</sup>

The administration should concomitantly maintain open communications with Republican senators, even if it does not formally consult. This could facilitate confirmation and might repair relations that were frayed during the confirmation of Justice Clarence Thomas.<sup>140</sup> It may help resolve questions regarding the scope of legitimate inquiry in probing nominees, such as whether senators can insist that nominees answer queries about their political or judicial philosophies.<sup>141</sup> Democratic senators should extend courtesies to Senate Republicans like those that the Grand Old Party afforded Democrats between 1980 and 1986 when Republicans controlled the White House and Senate.<sup>142</sup>

### 3. ABA participation

The administration and the Senate must seek the valuable assistance of the ABA Standing Committee on Judiciary as the process nears completion. That entity should continue to discharge the responsibility for advising the Senate on candidates' qualifications which it has performed so capably for nearly a half-century.<sup>143</sup> Some observers have criticized the committee for relying too substantially on certain types of practice experience, and for being overly political when evaluating nominees.<sup>144</sup> The committee should be responsive to these concerns, although its input has essentially been helpful.

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139. The Clinton administration, therefore, should consult, although it has less need to do so than when different political parties control the Executive Branch and the Senate. *See supra* notes 54-55 and accompanying text. The cordial relations which Senator Joseph Biden, the Chair of the Senate Judiciary Committee, enjoys with Senator Orrin Hatch, the ranking minority member, means that committee processing of nominees should proceed rather smoothly.

140. *See supra* notes 71-77 and accompanying text.

141. This has been a particularly controversial issue. *See also* Chemerinsky, *supra* note 73, at 1503-06; *supra* notes 56-58, 71-77 and accompanying text. Compare Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 687 (1989) with Albert P. Melone, *The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality*, 75 JUDICATURE 68 (1991).

142. *See supra* notes 54-55, 139 and accompanying text.

143. *See supra* note 51 and accompanying text.

144. *See, e.g.*, Laurence H. Silberman, *The American Bar Association and Judicial Nominations*, 59 GEO. WASH. L. REV. 1092 (1992); *The Candidates Respond*, *supra* note 78, at 56; *supra* note 87 and accompanying text.

## IV. CONCLUSION

The inauguration of President Clinton, who will appoint at least three hundred Article III judges during the next four years, offers a valuable opportunity to reexamine the process of federal judicial selection. The Clinton administration should follow the suggestions afforded above in choosing these judges. If President Clinton implements this guidance, he will be able to appoint excellent judges and enhance public confidence in the process.<sup>145</sup>

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145. When this Article was in press, the Clinton administration concluded its first year of judicial selection. During that year, President Clinton nominated forty-eight individuals for positions on the federal bench; of those forty-eight, eighteen were women (37.5%) and thirteen were minorities (27.2%). Twenty-eight of the nominees have been confirmed; of those twenty-eight, eleven are women (39.3%) and seven are minorities (25%). Telephone Interview with George Kassouf, Alliance for Justice, Washington, D.C. (Jan. 4, 1994).