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## Dear President Bush

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## Dear President Bush\*

*Carl Tobias\*\**

Congratulations on winning an extremely close election to become the forty-third President. Now, you must apply all of the political and organizational ability exhibited in the campaign if you are to discharge successfully the daunting responsibilities of governing. One critical duty that the Constitution assigns the chief executive is the power to nominate and, with the Senate's advice and consent, to appoint federal judges.<sup>1</sup> These life-tenured officials resolve the most controversial issues of the day, implicating, for example, abortion, the death penalty, and federalism. Judicial selection has assumed even greater significance today in light of changed public perceptions that the courts are increasingly the final arbiters of societal disputes, as *Bush v. Gore*<sup>2</sup> so tellingly illustrates.

The opportunity to shape the bench is yours. President Bill Clinton named half of the current appellate and district judges, as well as two Supreme Court Justices during his tenure in office. However, ninety vacancies remained on the lower federal courts when you were inaugurated. There also will be two hundred additional openings in the next four years, as active Article III judges assume senior status, resign, or die and as Congress authorizes new judicial positions. Moreover, several Supreme Court Justices might retire. Capitalizing on this situation will require the exercise of consummate skill because your lack of a public mandate and the new Senate composition may exacerbate the task's already complex nature by further politicizing it. Indeed, the facility with which you treat the crucial responsibility to choose judges will affect profoundly both the federal courts and your legacy.

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\* This piece was written immediately after the 2000 election.

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1. U.S. CONST. art. II, § 2, cl. 2.
2. 531 U.S. 98 (2000).

## I. A SELECTIVE HISTORY OF MODERN FEDERAL JUDICIAL SELECTION

When Jimmy Carter was elected president in 1976, few female and a minuscule number of minority judges served on the federal appeals or district bench.<sup>3</sup> President Carter assigned the appointment of more women and minorities a top priority and instituted special efforts to attain this objective. For instance, he requested that senators seek out, identify, and propose female and minority candidates, as well as create district court nominating commissions that would facilitate their selection.<sup>4</sup> Nearly sixteen percent of Carter appointees were women, and more than twenty percent were minorities.<sup>5</sup>

Ronald Reagan claimed that his 1980 victory was a mandate from the electorate to make the bench more politically conservative.<sup>6</sup> The President searched for and appointed many judges with those ideological views but chose very few female or minority lawyers. In fact, less than two percent of his appointments were African Americans.<sup>7</sup> When your father, George Bush, captured the White House in 1988, he honored President Reagan's commitment

3. See Robert J. Lipshutz & Douglas B. Huron, *Achieving a More Representative Federal Judiciary*, 62 JUDICATURE 483, 483 (1979); Elliott 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, 271 (1983).

4. See generally ALAN NEFF, THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES AND CANDIDATES 33-35 (1981); *Federal Judicial Selection: The Problems and Achievements of Carter's Merit Plan*, 62 JUDICATURE 463 (1979) (This issue is solely devoted to President Carter's method of federal judicial selection.).

5. See, e.g., Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 322, 325 (1989) [hereinafter Goldman, *Reagan's Judicial Legacy*]; Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYUL REV. 1257, 1261 [hereinafter Tobias, *Rethinking*]. For more discussion of the Carter Administration, see SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 236-84 (1997).

6. See, e.g., DAVID M. O'BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 60 (1988); Sheldon Goldman, *Reagan's Judicial Appointments at Mid-term: Shaping the Bench in His Own Image*, 66 JUDICATURE 334, 347 (1983).

7. See Goldman, *Reagan's Judicial Legacy*, *supra* note 5, at 322, 325; Tobias, *Rethinking*, *supra* note 5, at 1269. For more discussion of the Reagan Administration, see GOLDMAN, *supra* note 5, at 285-345; O'BRIEN, *supra* note 6, at 60-64.

by moving the courts to the right.<sup>8</sup> Your father named numerous relatively conservative judges and few minorities.<sup>9</sup> However, he did choose many women.

When Bill Clinton became president in 1992, observers found that he de-emphasized political ideology, while stressing competence and diversity in the selection process.<sup>10</sup> As the chief executive, Clinton appointed highly capable judges who enhanced political, gender, and racial balance, naming unprecedented numbers of women and minorities.<sup>11</sup> Nevertheless, there were ninety judicial vacancies at his administration's conclusion.

## II. JUDICIAL SELECTION DURING THE NEXT FOUR YEARS

### A. Goals and Reasons for Achieving the Objectives

#### 1. Merit and Filling the Judicial Vacancies

You should formulate clear, praiseworthy selection goals. You must emphasize merit by seeking to guarantee that nominees are extremely intelligent, industrious, and independent; possess much integrity; and have balanced judicial temperament. You also should strive to fill all of the current vacancies. If the judiciary comprises exceptionally able jurists and operates with all 844 active appeals and trial court judges whom Congress has authorized, it most effectively can decrease the large civil backlogs in numerous districts; promptly, economically, and equitably decide the growing, increasingly complex, civil and criminal caseloads; and felicitously address the appellate "crisis of volume."<sup>12</sup>

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8. Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 296 (1993) [hereinafter Goldman, *Bush's Judicial Legacy*]; Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 296-98 (1991) [hereinafter Goldman, *The Bush Imprint*]; Tobias, *Rethinking*, *supra* note 5, at 1270-74.

9. Goldman, *Bush's Judicial Legacy*, *supra* note 8, at 296; Goldman, *The Bush Imprint*, *supra* note 8, at 296-98; Tobias, *Rethinking*, *supra* note 5, at 1270-74.

10. See generally Sheldon Goldman & Elliott Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 265 (1999); Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309 (1996); Joan Biskupic, *Clinton Given Historic Opportunity to Transform Judiciary*, WASH. POST, Nov. 19, 1996, at A19.

11. See, e.g., Goldman & Slotnick, *supra* note 10, at 276-77, 281-88; Carl Tobias, *Choosing Judges at the Close of the Clinton Administration*, 52 RUTGERS L. REV. 827, 839, 846 (2000) [hereinafter Tobias, *Choosing Judges*].

12. See, e.g., JUD. CONF. OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 103-05 (1995), available at <http://www.uscourts.gov/lrp/CVRPGTOC.HTM>; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990) [hereinafter REPORT OF

## 2. Political Ideology

You also must resolve more vexing issues. One conundrum is the weight to assign ideology. In the election, you characterized Antonin Scalia and Clarence Thomas as your “favorite” Justices and said that you would place “strict constructionists” on the lower courts.<sup>13</sup> Some of your supporters may consider these statements as campaign pledges to enhance balance on the bench and to counter the ostensibly liberal views of Clinton appointees. For example, Senator Orrin Hatch (R-Utah), the Senate Judiciary Committee Chair at the outset of the 107th Congress, promised during 1996 to “stand firm and exercise the advice and consent power to insure that President Clinton [did] not pack the judiciary with liberal activists.”<sup>14</sup> Your striking success in galvanizing Republican support reflected the party’s strong desire to recapture the White House. Judicial selection, thus, appears to offer a politically cost-free means of cultivating conservative constituencies.<sup>15</sup>

Before you embrace ideology, however, consider several countervailing factors. First, the need to offset judges whom President Clinton named seems less than compelling. Even if the notion of “judicial activism” could be clearly defined, it cannot be confined to these jurists or to liberals.<sup>16</sup> Indeed, the Justices

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THE FEDERAL COURTS]; STAT. DIV., ADMIN. OFF. OF THE U.S. CTS., JUDICIAL BUSINESS OF THE U.S. COURTS: 1999 ANNUAL REPORT OF THE DIRECTOR 16, 19, 20, 23-25, available at <http://www.uscourts.gov/judbus1999/contents.html>.

13. See, e.g., Neil A. Lewis, *The 2000 Campaign: The Judiciary*, N.Y. TIMES, Oct. 7, 2000, at A28; David G. Savage, *More Than Just the Oval Office at Stake; Supreme Court: The Next President’s Appointments Could Shape the Outcome of Decisions for Decades*, L.A. TIMES, Oct. 2, 2000, at A1; see also Jeffrey Ghannam, *Going Head to Head*, 86-Oct. A.B.A. J. 42, 43 (2000) (providing similar views of Governor Bush).

14. Neil A. Lewis, *Utah Senator Scolds Critics of Prosecutor in Whitewater*, N.Y. TIMES, Nov. 16, 1996, at A12. For more analysis of Senator Hatch’s role as chair, see Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 744, 752 (1997) [hereinafter Tobias, *Choosing Federal Judges*]; *An Interview with Senator Orrin Hatch on Courts, Legislation, and Judicial Nominees*, THE THIRD BRANCH, Nov. 1995, available at <http://www.uscourts.gov/ttb/nov95/hatch.htm>.

15. Appointing conservatives is an article of faith for those with conservative views on social issues, such as abortion and school prayer. “No more Souters” is their rallying cry. See, e.g., David G. Savage, *Clinton Warns of Bush’s Effect on Supreme Court*, L.A. TIMES, Oct. 25, 2000, at A1.

16. *Compare Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 889 (4th Cir. 1999), *aff’d sub nom. United States v. Morrison*, 529 U.S. 598 (2000), with *Brzonkala*, 169 F.3d at 890 (Wilkinson, J., concurring); see also Jeffrey Rosen, *The Next Court*, N.Y. TIMES, Oct. 22, 2000, § 6 (Sunday Magazine), at 74, 76, 77-78.

you favor receive trenchant criticism for being activists in the service of conservatism.<sup>17</sup> Rather few Clinton appointees apparently engage in activism or are very liberal because President Clinton de-emphasized political views, and stressed gender and racial balance, and competence, choosing many attorneys who had prior judicial experience.<sup>18</sup> In fact, President Clinton described them as “mainstream judges,”<sup>19</sup> while he rejected “rigid adherence to a strict ideological agenda”<sup>20</sup> and liberal observers’ importuning to name jurists who would counter judges chosen by Republicans.<sup>21</sup> Even Senator Hatch conceded that Carter “appointees were farther to the left” than Clinton appointees.<sup>22</sup> If you emphasize conservatism, nonetheless, it might be justified as a foil to Clinton, but you should expect the same criticisms that Republicans leveled at him and that Democrats lodged at the Reagan and Bush Administrations. Excessive reliance on ideology will provoke sharp resistance and may prove counterproductive.

The 2000 presidential and senatorial elections comprise an equally salient countervailing factor. One clear conclusion from your race is the absence of a mandate,<sup>23</sup> which the even Senate split accentuates.<sup>24</sup> In short, the presidential

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17. See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 112 (1998) (Stevens, J., concurring); see also *Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting); *Bush*, 531 U.S. at 157 (Breyer, J., dissenting). See generally SCOTT D. GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (1999); DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, *THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA* 82 (1996); BERNARD SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK* 3-5 (1990). Choosing conservative jurists, such as Justice Scalia, who may possess less measured temperament, actually can be less effective than naming jurists, such as Chief Justice William Rehnquist, Justice William Brennan, or the Clinton appointees. For example, balanced temperament can facilitate agreement on controversial issues.

18. See, e.g., *Goldman & Slotnick*, *supra* note 10, at 273-82; Tobias, *Choosing Judges*, *supra* note 11, at 838-39, 846.

19. See Biskupic, *supra* note 10; see also *supra* notes 10-11, *infra* note 27, and accompanying text.

20. See Biskupic, *supra* note 10; see also *supra* notes 10-11, *infra* note 27, and accompanying text.

21. See 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; Neil A. Lewis, *In Selecting Federal Judges, Clinton Has Not Tried to Reverse Republicans*, N.Y. TIMES, Aug. 1, 1996, at A20.

22. See Biskupic, *supra* note 10; see also *supra* notes 3-5 and accompanying text. The Clinton Administration may be the first since that of Dwight D. Eisenhower to decrease politicization of judicial selection.

23. President Reagan claimed that he had a public mandate to make the federal government, in general, and the courts, specifically, more conservative. See *supra* note

results afford no mandate to choose conservatives, and the Senate returns leave little flexibility, while both phenomena dictate that you proffer compromise nominees. Thus, you should treat your statements about favorite Justices and strict constructionists as campaign rhetoric, not ironclad pledges, and you, therefore, should de-emphasize ideology.

### 3. Diversity

Similarly complex is the relevance that you should accord gender and racial diversity. Observers criticized your non-judicial appointments in Texas because they included few too women and minorities.<sup>25</sup> This charge mirrors criticisms directed at Presidents Reagan and Bush for selecting tiny numbers of minority lawyers. Do not forget that your father named many women,<sup>26</sup> while President Clinton chose unprecedented numbers of female and minority counsel.<sup>27</sup> These efforts offset somewhat the racial imbalance that the Republican administrations maintained and the lack of gender diversity perpetuated by President Reagan. Nevertheless, disparities remain.

There are several important reasons why you should appoint more women and minorities. First, female and minority jurists can enhance their colleagues' understanding of complex issues, such as abortion and discrimination, which the bench addresses.<sup>28</sup> Second, female and minority judges will reduce gender and racial bias in the courts.<sup>29</sup> Moreover, selection of these jurists would be a sign

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6 and accompanying text.

24. This changed when Senator Jeffords became an independent. David Rogers, *Sen. Jeffords Defects from GOP, Creating Era of 'Tripartisanship'*, WALL ST. J., May 25, 2001, at A16.

25. See, e.g., Nicholas D. Kristof, *The 2000 Campaign: Running Texas*, N.Y. TIMES, Oct. 16, 2000, at A1; *supra* notes 7 & 9. But see Ghannam, *supra* note 13, at 43; but cf. Jeffrey Toobin, *Women in Black*, NEW YORKER, Oct. 30, 2000, at 77 (discussing conservative female judges in Texas).

26. See, e.g., Goldman, *Bush's Judicial Legacy*, *supra* note 8, at 286; Tobias, *Rethinking*, *supra* note 5, at 1273; see also Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477, 477 (1991) [hereinafter Tobias, *More Women*].

27. See, e.g., *supra* notes 10-11.

28. See, e.g., Marion Z. Goldberg, *Carter-Appointed Judges—Perspectives on Gender*, TRIAL, Apr. 1990, at 108; Sheldon Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488, 494 (1979); Slotnick, *supra* note 3, at 272-73.

29. See, e.g., REPORT OF THE FEDERAL COURTS, *supra* note 12, at 169; NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS & ETHNIC FAIRNESS, FINAL REPORT (1997), available at [http://www.ce9.uscourts.gov/web/OCELibra.nsf/eb93ae8ffb1fcb7488256394006a5c7e/5925a569c39bbbff882564e70002017d/\\$FILE/finalrep.pdf](http://www.ce9.uscourts.gov/web/OCELibra.nsf/eb93ae8ffb1fcb7488256394006a5c7e/5925a569c39bbbff882564e70002017d/$FILE/finalrep.pdf); Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21

of your commitment to improving conditions for women and minorities in the nation, in the justice process, and in the legal practice. The public also has greater confidence in a bench whose composition reflects that of the society.<sup>30</sup>

You must attempt to fill all ninety openings with highly competent judges who increase gender and racial diversity. Once you have canvassed potential selection goals thoroughly and enunciated clear, laudable objectives, you should develop efficacious measures to realize them.

### *B. Procedures for Achieving Your Goals*

In the campaign, you promised to reduce partisan bickering and to urge Senate action on nominees within sixty days of nomination.<sup>31</sup> These are worthy ideals, although certain political and institutional realities might frustrate their achievement. For instance, some individuals and entities participating in selection consume much time. Resource and related intrinsic limitations mean that Federal Bureau of Investigation “background checks,” American Bar Association (“ABA”) Standing Committee on Judiciary qualification ratings, and Judiciary Committee candidate investigations may slow efforts to process nominees.<sup>32</sup> Relatively arcane operating procedures and the press of other business could preclude completion of Senate scrutiny in two months.<sup>33</sup> Furthermore, senators from the areas with vacancies can veto consideration; unanimous consent permits one member to delay floor action, and cloture requires sixty votes. Despite these obstacles, you can foster incremental improvement by attempting to set deadlines, streamline nominee evaluation, and promote bipartisanship through cultivation of Democrats.<sup>34</sup>

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ARIZ. ST. L.J. 237, 238 (1989).

30. See, e.g., Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 253 (1978); Slotnick, *supra* note 3, at 272-73; Tobias, *Rethinking*, *supra* note 5, at 1276. The facility with which your administration resolves this issue also might indicate how inclusive your presidency will be.

31. See, e.g., Maria L. LaGanga, *Bush Vows to Cure a Dysfunctional D.C.*, L.A. TIMES, June 9, 2000, at A14; Governor Bush Delivers Remarks on Government Reform at Knoxville Event (June 8, 2000) (transcript available through the Federal Document Clearing House, available at <http://www.fdch.com/net4.html>).

32. See, e.g., Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319, 333-37 (1994); Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527, 532-39 (1998).

33. A trenchant example was the need to respond to the September 11 terrorist attacks.

34. For valuable, recent proposals that could facilitate selection, see Thomas O. Sargentich, *Report of the Task Force on Federal Judicial Selection of Citizens for*



## 1. General Procedures

First, you publicly must announce your goals and practices. Clearly explaining the ideas will inform those involved in selection and the public, and it should facilitate appointments. You must decide what responsibility to lodge in the White House and the Department of Justice, as well as how much to honor the preferences of senators from states where openings arise. Presidents Clinton, Bush, and Reagan left control over all Supreme Court and most appellate nominees in the White House, deferred to senators on many district court vacancies, and assigned to the Department of Justice major responsibility for investigating attorneys once they became serious candidates.<sup>35</sup> The choice of Justices and circuit judges deserves little analysis, as you probably will maintain control over selection. For example, White House Counsel should ensure that staff understands your objectives and employs the best means to attain them. The choice of Justices also will depend on unpredictable factors, such as who resigns and whether it is an election year, but the appointments' significance and their potential to consume already scarce resources for lower court recruitment require that you plan for this contingency by compiling a "short list" of strong candidates. Because recent administrations with diverse philosophies found similar measures effective, dramatic change is not indicated.

You must work closely with the Senate Judiciary Committee, which exercises primary responsibility for the confirmation process; its Chair; and specific Senate members. For instance, the Chair could be a valuable ally, as he schedules nominee committee hearings and votes, and can affect floor action on lawyers whom the panel approves. You should seek his counsel freely on the confirmation process and particular candidates. Informal consultation also will improve selection. Thus, before actually nominating candidates, you should solicit views of the Chair, and from influential senators and lawmakers from areas where seats open. Remember to enlist aid from the Senate Majority Leader, who controls floor consideration of nominees and has keen appreciation of the chamber's operations.

You should attempt to derive instructive insights from history. For example, consultation has facilitated confirmation during most recent presidencies. Moreover, Republicans blamed delay on submission immediately before Senate recesses of many Clinton nominees, some of whom the then-majority found unacceptable; these phenomena purportedly frustrated committee review.<sup>36</sup> Your administration can avoid this situation by steadily tendering

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*Independent Courts*, 51 ADMIN. L. REV. 1031, 1038-43 (1999); *Eliminating Unnecessary Delays in Filling Federal Judicial Vacancies*, 83 JUDICATURE 100, 100 (1999).

35. See *supra* notes 6-11 and accompanying text.

36. See, e.g., MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS 124-

manageable numbers of well-qualified candidates. You correspondingly might seek the advice of officials who have helped recruit judges since 1989.<sup>37</sup>

Keep in mind your presidency's rather nascent status and the role of politics, which suffuses the appointments process. Do not forget that selection will proceed slowly and receive close attention, especially at your administration's outset. Thus, you should evaluate politics' effects, especially on the choice of nominees. Newly-elected chief executives also have a reservoir of goodwill and exercise much authority when naming judges, but they have finite political capital to spend on the appointments.<sup>38</sup> Remember that a single controversy involving selection can derail the whole process, as recent disputes demonstrate.<sup>39</sup>

## 2. Special Efforts to Increase Diversity

You should pursue a course of action that will enhance gender and racial balance. One helpful starting point is your predecessors' endeavors. You should assess salutary ways to redouble the efforts of the first Bush and the Clinton Administrations. For example, each President wrote the senators in his political party, encouraging them to suggest women.<sup>40</sup> The choice of district court nominees requires more specific analysis, as recent chief executives have deferred to lawmakers where vacancies arose.<sup>41</sup> You might ask Senate members

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25, 333 (2000); Tobias, *Choosing Judges*, *supra* note 11, at 843; Orrin G. Hatch, *Judicial Nominee Confirmations Smoother Now*, DALLAS MORNING NEWS, June 27, 1998, at 9A; *see also* Goldman & Slotnick, *supra* note 10, at 268, 271-73.

37. Examples are Clinton Administration Assistant Attorney General Eleanor Dean Acheson and Deputy White House Counsel Bill Marshall, as well as Bush Administration White House Counsel Boyden Gray.

38. For the idea that President Clinton spent little political capital on selection, especially on controversial candidates, *see* Goldman & Slotnick, *supra* note 10, at 270; Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmation in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 315-22 (1999); Ana Puga, *Clinton Judicial Picks May Court the Right*, BOSTON GLOBE, Dec. 29, 1994, at 1.

39. These involved vacancies in the Utah district court and on the Federal Election Commission. *See, e.g.*, 146 CONG. REC. S4366 (daily ed. May 24, 2000); Lizette Alvarez, *Senate Deal Ends Logjam on Nominees and Judges*, N.Y. TIMES, May 25, 2000, at A19; Dan Carney, *Clinton's Deals with GOP on Judgeships Stir Discontent Among Democrats*, 57 CONG. Q. WKLY. 845 (Apr. 10, 1999); David G. Savage, *Federal Benches Left Vacant Over Utah Tug of War*, L.A. TIMES, May 10, 1999, at A1.

40. *See, e.g.*, Neil A. Lewis, *Unmaking the G.O.P. Court Legacy*, N.Y. TIMES, Aug. 23, 1993, at A10 (providing Clinton's request); Tobias, *More Women*, *supra* note 26, at 479-80 (providing Bush's request).

41. *See supra* note 35 and accompanying text. The president traditionally has retained virtually exclusive control over selection for the Supreme Court and much

to institute new or apply existing approaches, such as district judge nominating panels, which will delineate, and foster the selection of, female and minority counsel.<sup>42</sup> Senators and your assistants could enlist aid from traditional entities, such as bar associations, and less conventional ones, including women's and minority political groups, to identify promising candidates. You also must seek help from all thirteen female members of the Senate who can urge their colleagues to propose and promote confirmation of women and minorities. As essential will be the capabilities and networking of female and minority attorneys, who now constitute more than a quarter of the American bar; of women and minorities in your Cabinet; and of Martha W. Barnett, the ABA president.

### 3. Other Specific Action

You should assess, and perhaps invoke, other actions that will permit you to fill each empty seat and to name more female and minority judges. One direct measure would be to nominate talented candidates, numbers of whom are women and minorities, for the openings. If Democratic senators do not cooperate, you could force the issue by using the presidency as a bully pulpit to criticize them. A second idea is orchestrating the passage of a bill that authorizes new judgeships.<sup>43</sup> You can justify this approach because the Judicial Conference premises recommendations for additional positions on carefully-calibrated estimates of judges' workloads and court dockets,<sup>44</sup> both of which have expanded since 1990 when Congress last enacted comprehensive legislation.<sup>45</sup>

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control over selection for the appeals courts. *See supra* note 35 and accompanying text.

42. *See supra* note 4 and accompanying text.

43. *See* S. 3071, 106th Cong. (2000); S. 1145, 106th Cong. (1999); *see also* WILLIAM H. REHNQUIST, 2001 YEAR-END REPORT ON THE FEDERAL JUDICIARY, available at <http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html>. *See generally* Tobias, *Choosing Federal Judges*, *supra* note 14, at 749; *Can the Federal Courts Cope Without More Judges?*, THE THIRD BRANCH, Nov. 1999, at 1, available at <http://www.uscourts.gov/ttb/nov99ttb/cope.html>; *Judicial Conference Asks Congress for New Judgeships*, THE THIRD BRANCH, Aug. 2000, at 2, available at <http://www.uscourts.gov/ttb/aug00ttb/judconf.html>.

44. *See, e.g.*, JUD. CONF. OF THE U.S., PROCEEDINGS OF THE JUDICIAL CONFERENCE 21-23 (Mar. 16, 1999); Tobias, *Choosing Federal Judges*, *supra* note 14, at 753. *But see* CHARLES E. GRASSLEY, CHAIRMAN'S REPORT ON THE APPROPRIATE ALLOCATION OF JUDGESHIPS IN THE UNITED STATES COURTS OF APPEALS (Mar. 8, 1999), available at <http://www.senate.gov/~grassley/releases/1999/p9r03-07.htm#chrpt>; J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1161-63 (1994).

45. *See* Judicial Improvements Act of 1990, Title II, Pub. L. No. 101-650, 104 Stat. 5089 (codified in scattered sections of U.S.C.); *see also supra* note 12 (affording

You even might allow the Democrats to suggest some nominees in return for confirmation of Republican candidates or approval of a judgeships statute.<sup>46</sup> Indeed, one bold compromise would be resubmitting particular Clinton nominees or elevating certain of your predecessor's district court appointees. Remember, President Clinton named Roger L. Gregory as the first African-American member of the Fourth Circuit through a recess appointment.<sup>47</sup> The Democratic chief executive concomitantly placed on the appeals courts Ann Claire Williams and Sonia Sotomayor, whom Presidents Reagan and Bush had named to the district bench.<sup>48</sup>

### III. CONCLUSION

Now that you have entered the White House, attention must focus on the formidable duties of governing. Judicial selection is one area in which your presidency will receive much scrutiny. The development of clear goals and efficacious procedures for securing those objectives will facilitate the appointment of excellent judges, many of them women and minorities, to all ninety vacancies. How carefully you discharge this complex, delicate task may be a critical test of your administration's political and organizational skills.

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the relevant docket data). *See generally* GERHARDT, *supra* note 36, at 302 & n.38.

46. *See* Goldman & Slotnick, *supra* note 10, at 271; *see also* S. 1145, 106th Cong. (1999). Passing a statute may be fruitless, absent an improved confirmation process. *See* Bermant et al., *supra* note 32, at 320-23; Tobias, *More Women*, *supra* note 26.

47. *See* President William J. Clinton, Remarks on the Recess Appointment of Roger L. Gregory to the United States Court of Appeals for the Fourth Circuit and an Exchange with Reporters, in 36 WKLY. COMP. PRES. DOC. 3163, 3180 (Dec. 27, 2000); Neil A. Lewis, *Clinton Names a Black Judge; Skirts Congress*, N.Y. TIMES, Dec. 28, 2000, at A1; *see also* U.S. CONST. art. II, § 2, cl. 3; United States v. Woodley, 751 F.2d 1008, 1011 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986). *See generally* Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM.L.REV. 1758 (1984). You astutely renominated Judge Gregory, whom the Senate confirmed in 2001.

48. *See* Tobias, *Choosing Judges*, *supra* note 11, at 841-42, 846. You wisely nominated, and the Senate confirmed, Judge Barrington Parker for the Second Circuit in 2001. President Clinton had appointed Judge Parker to the Southern District of New York. Chief Justice William Rehnquist recently urged the Senate to expedite the confirmation process and Congress to pass a judgeship bill. *See* REHNQUIST, *supra* note 43.