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Dear Judge Mikva

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FORUM

To the editors:

Dear Judge Mikva,

Congratulations on your recent appointment as White House Counsel for President Bill Clinton.¹ You are one of the few individuals who has had the opportunity to serve in the highest echelons of all three branches of the federal government. You represented part of Chicago in the United States House of Representatives from 1969 until 1979 when President Jimmy Carter named you to the United States Court of Appeals for the District of Columbia Circuit. You then served on that court, most recently as Chief Judge, until President Clinton appointed you White House Counsel.²

The Clinton Administration has undoubtedly assigned you a host of pressing responsibilities critical to the success of the Clinton Presidency, and to Clinton's efforts to secure a second term in office. In the short term, you have focused attention on the passage of the crime bill, the efforts to enact a health care reform measure and the remainder of the administration's 1994 legislative agenda, as well as issues involving the 1994 races for the Senate and the House.³ Over the long term, you will confront the continuing problems posed by the Whitewater investigation. You must work closely with a former circuit court colleague, Judge Kenneth Starr, who now heads the probe, and attempt to minimize the investigation's potential to distract the administration from the critical substantive responsibilities of governing.

I am writing to urge that you apply in the executive branch the considerable expertise which you attained and honed over a lifetime of service in the legislative and judicial branches of our tripartite system of government, to the critical task of federal judicial selection that uniquely partakes of those coordinate branches. The White House Counsel now has an unusual opportunity to assist President Clinton in improving the

1. See Henry J. Reske, *A New White House Counsel*, A.B.A. J., Oct. 1994, at 32; *Mikva Moves from Courthouse to White House*, THE THIRD BRANCH, Sept. 1994, at 1.

2. See Douglas Jehl, *Man in the News: Abner Joseph Mikva*, N.Y. TIMES, Aug. 11, 1994, at A15; see also Abner J. Mikva, *Sturm und Drang at the D.C. Circuit*, 57 GEO. WASH. L. REV. 1063 (1989); Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. MIAMI L. REV. 159 (1993).

3. This letter was originally written from the perspective of October 8, 1994, the date on which Congress adjourned. Changes have been made to reflect the current political situation.

federal civil and criminal justice systems and perhaps in earning some political capital by facilitating the appointment of excellent judges to the significant number of judicial vacancies that presently exist.

If passage of the crime bill was so crucial to the political future of the Clinton Administration and to members of Congress, filling the judgeships that are currently open should be equally important. Filling the vacancies would enable the federal courts to process cases more efficiently and to reduce the staggering civil backlog in district courts. For instance, on March 31, 1994, there were 219,424 civil cases pending, 14,658 of which had been pending for more than three years.⁴ A recent study by the Administrative Office of the United States Courts also showed that senior federal judges, who have assumed an increasing workload, remain an inadequate substitute for placing full-time judges in presently empty seats.⁵ Indeed, in the 1993 year-end report on the judiciary, Chief Justice William H. Rehnquist observed that "there is perhaps no issue more important to the judiciary right now than this serious judicial vacancy problem."⁶ It is also important to remember that life-tenured judges resolve questions that are vital to the lives and the liberties of their fellow citizens. All of these factors mean that the appointment of federal judges could afford the Clinton Administration its greatest opportunity to leave a lasting legacy.

The White House Counsel must actively participate in the administration's efficacious and expeditious filling of the judicial openings that now exist on the United States Courts of Appeals and the Federal District Courts.⁷ When President Clinton assumed office in January 1993, 113 seats were vacant. More than seventy judgeships remained open on the August 11 date that he appointed you White House Counsel, despite concerted efforts by the White House Counsel's Office and the Department of Justice to fill them. This means that Republican presidents have appointed approximately sixty percent of the sitting federal bench and a majority of judges on nearly all of the circuit courts.⁸

The reasons why so many vacancies remain are less significant than the pressing need to fill them, although numerous explanations can be

4. See Alliance for Justice, *Judicial Selection Project Mid-Year Report 4* (1994).

5. See Patrick Walker, *The Work of Senior Judges in the U.S. District Courts During 1985, 1990 and 1992* (1994); see also Henry J. Reske, *Keeping Pace with Judicial Vacancies*, A.B.A. J., July 1994, at 34.

6. See William H. Rehnquist, *Year-End Report on the Federal Judiciary* (1993); see also Al Kamen, *Filling the Robes*, WASH. POST, Sept. 7, 1994, at 19.

7. As of October 8, 1994, 53 judicial vacancies remained to be filled on federal district and appeals courts. See Department of Justice, Office of Policy Development, Clinton Administration Judicial Record (Oct. 8, 1994) [hereinafter DOJ Record].

8. See Alliance for Justice, *supra* note 4, at 7.

posited. One is that quite a few Carter appointees wanted, or felt some obligation, to assume senior status or to retire during a Democratic administration because a Democratic president had named them. After Bill Clinton captured the presidency in 1992, these judges elected to take senior status or to retire after years of dedicated service.

Another explanation is that President Clinton simply failed to nominate judges with sufficient expediency at the outset of his term, although he nominated and appointed as many judges as President Ronald Reagan and considerably more than President George Bush had by comparable points in their presidencies.⁹ The failure to nominate and name greater numbers of lawyers to the bench can be explained in numerous ways.

All new presidential administrations require considerable "start-up" time. The start-up problem for the Clinton Administration was probably exacerbated because the Democratic Party had not controlled the White House for a dozen years.¹⁰ This meant, for example, that the administration had few personnel with recent judicial selection experience. This situation was further compounded by the somewhat delayed appointment of Janet Reno as Attorney General and by the complications that attended the resignation of William Sessions as Director of the Federal Bureau of Investigation. Moreover, Justice Byron White resigned from the United States Supreme Court within two months of President Clinton's inauguration. Searching for, finding, and guaranteeing the confirmation of a highly competent successor to Justice White consumed substantial time, energy and effort.

An additional reason for the Clinton Administration's failure to name more judges during 1993 was that the Senate had not yet confirmed numerous nominees. When the Congress adjourned in November 1993, approximately twenty-five of the forty-eight lawyers whom President Clinton had nominated were still awaiting Senate confirmation.¹¹ In fairness, however, the Senate Judiciary Committee processed nominees rather expeditiously in 1993, and President Clinton submitted the names of a significant percentage of these nominees immediately before the first session of the 103d Congress adjourned.¹²

9. See Carl Tobias, *Keeping the Covenant on the Federal Courts*, 47 SMU L. REV. 1861, 1862-67 (1994); see also Alliance for Justice, *supra* note 4, at 3 (finding President Clinton's nomination pace considerably faster than either of his two predecessors, but noting that he began with three times as many vacancies). See generally Reske, *supra* note 5.

10. I rely substantially in this paragraph on Tobias, *supra* note 9, at 1872-73.

11. See *id.* at 1866-67.

12. See Alliance for Justice, *supra* note 4, at 3-4; see also *Clinton Faces 113 Federal Court Vacancies; 48 Names Sent to Senate in 1993, Study Finds*, BNA Daily Rep.

The Clinton Administration appointed and nominated unprecedented numbers and percentages of women and minorities in its initial year of service. All of the attorneys whom President Clinton named and nominated were exceptionally well-qualified, exhibiting the intelligence, industry, independence, and judicial temperament necessary to render excellent judicial service. For instance, Judge Pierre Leval was widely regarded as one of the preeminent federal district court judges in the nation before his elevation to the Second Circuit, while Judge Martha Daughtrey was a distinguished judge in the Tennessee state court system before being named to the Sixth Circuit.¹³

When President Clinton appointed you White House Counsel in early August 1994, he had sent to the Senate the names of thirty lawyers who were awaiting confirmation. Sixty judicial seats remained vacant. The pace of nomination and confirmation did quicken over the course of 1994, despite numerous obstacles to the prompt nomination and confirmation of candidates. For example, Philip Heymann and Webster Hubbell, the initial Deputy and Associate Attorneys General, resigned, as did Bernard Nussbaum, the first White House Counsel.

The ongoing Whitewater investigations being conducted by the independent counsel and by Congress certainly distracted numerous members of the White House staff, including lawyers in the Office of White House Counsel. These developments culminated in Congress summoning a number of White House personnel to testify in the Whitewater hearings on Capitol Hill. The press of legislative business, such as the passage of the controversial crime legislation and consideration of health care proposals, also understandably slowed both the nomination and confirmation processes. In June, Senator Joseph Biden, Chair of the Senate Judiciary Committee, pledged that he would do everything in his power to expedite the confirmation process.¹⁴

By the time Congress adjourned in October 1994, the Clinton Administration had once again nominated and named record numbers and percentages of female and minority lawyers, all of whom had excellent qualifications. For example, Judge Jose Cabranes was mentioned as a possible nominee for several recent Supreme Court openings before his elevation to the Second Circuit, while Judge Diana Gribbon Motz was a highly respected jurist on the Maryland Court of Appeals before President Clinton appointed her to the Fourth Circuit.

for Executives, Jan. 3, 1994, at A1.

13. See Tobias, *supra* note 9, at 1877.

14. See Letter from Senator Joseph R. Biden, Jr., Chair, U.S. Senate Judiciary Comm., to Chief U.S. District Court Judges (June 1994).

Notwithstanding the efforts of the Clinton Administration and of the Senate Judiciary Committee, fifty-three judicial vacancies remained and fourteen attorneys had not been confirmed at the time of Congress' adjournment.¹⁵ The returning Congress faces approximately seventy judicial vacancies and some ten nominees awaiting confirmation, should President Clinton choose to resubmit the names of those candidates.¹⁶

You, as White House Counsel, can render an enormous service to the country, the federal judiciary and the Clinton Administration by facilitating the appointment of more judges. Now that the 104th Congress has convened, the White House Counsel's Office should help President Clinton be prepared to nominate as many lawyers as possible. Indeed, you should aspire to have the Chief Executive nominate attorneys for all the existing vacancies, although a more realistic goal may be the nomination of lawyers to one-half of those seats.

Of course, the attorneys nominated must possess qualifications as fine as those of the lawyers nominated and confirmed during 1993 and 1994, while the candidates should reflect gender, racial and political balance. You ought to implement these suggestions for all the reasons canvassed above, such as the burgeoning criminal caseload and concomitant backlogs.¹⁷

The Clinton Administration should continue to nominate and appoint competent female and minority lawyers because most of these attorneys will bring diverse perspectives to the federal courts. For instance, such lawyers could increase other judges' appreciation of complex questions of public policy that the federal judiciary must resolve, such as those surrounding abortion and the death penalty.¹⁸ The appointment of greater numbers of women and minorities to the bench might concomitantly limit gender and racial bias in the federal criminal and civil justice processes.¹⁹ It is also important to keep in mind that numerous

15. DOJ Record, *supra* note 7.

16. Because a new Congress has convened, the President must resubmit the nominees, some of whom may not be acceptable to relevant elected officials, such as newly elected senators. The ten nominees awaiting confirmation, therefore, are an estimate. The 70 vacancies are also an estimate because it is impossible to predict precisely how many judges will assume senior status, retire, resign, and die.

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

18. See, e.g., Sheldon Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488, 494 (1979); Elliot E. Slotnick, *Lowering the Bench or Raising it Higher? Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POL'Y REV. 270, 272 (1983).

19. See, e.g., Marion Z. Goldberg, *Carter-Appointed Judges: Perspectives on Gender*, TRIAL, Nov. 1990, at 108; Carl Tobias, *Closing the Gender Gap on the Federal Courts*, 61 U. CIN. L. REV. 1237, 1243 (1993).

female and minority judges, including Justice Sandra Day O'Connor and Justice Thurgood Marshall, have rendered outstanding service.²⁰

An additional reason to nominate and name more women and minorities to the courts is to help remedy the lack of gender, racial and political balance on the present bench. For example, fewer than two percent of Reagan appointees were African Americans, while President Bush appointed one Asian American and only nine Latinos.²¹ A number of the Republican judges, such as Justice Clarence Thomas and Judge Edith Jones, were seemingly named principally because they held conservative political perspectives.²² The failure of the Republican presidents to name more female and minority judges is particularly problematic because Presidents Reagan and Bush had much larger, more experienced pools of lawyers on which to draw than did President Carter.²³ A significant number of these attorneys have engaged in a broad range of challenging legal practices.²⁴

You should attempt to achieve these objectives by exercising all the political expertise that you can muster on a number of fronts. The White House Counsel's Office must employ the efficacious selection procedures that are already in place to find candidates for those vacancies where it can accomplish the most. For instance, the Office's substantial control over the choice of nominees for many appeals court seats means that it ought to concentrate on vacancies at this level. More specifically, White House personnel should seek the names of highly qualified female and minority lawyers from women's groups and minority political organizations and work closely with senators from the circuits in which the judges will sit.²⁵

The Office should also encourage those senators who have primary responsibility for selecting district court nominees to choose their candidates promptly.²⁶ It should correspondingly urge senators to continue relying on, or to institute, effective measures for finding and

20. See Tobias, *supra* note 19, at 1244; Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477, 483 (1991).

21. See Tobias, *supra* note 9, at 1866 n.28.

22. See *id.* at 1873.

23. For example, 62,000 women were attorneys in 1980, but 140,000 women were attorneys in 1988. See Tobias, *supra* note 19, at 1241 n.22.

24. See generally Tobias, *supra* note 9, at 1875 (describing the distinguished and varied careers of several female and minority attorneys).

25. Senators traditionally have less responsibility for circuit court appointments. See also Tobias, *supra* note 9, at 1874-76 (affording additional suggestions).

26. For example, the Office can act in districts that have a Democratic senator who is not standing for election or two Republican senators who are not standing for election. In the latter situation, the senior elected Democratic official has traditionally assumed primary responsibility.

fostering the candidacies of numerous very capable female and minority attorneys and to forward their names for possible nomination.²⁷

Next, the Office should devote its attention to vacancies that it could not fill earlier because, for example, it was unable to identify the elected official principally responsible for selection. Since the November elections have indicated who the appropriate official is, the White House Counsel should follow procedures similar to those above. For example, it might be advisable to have President Clinton directly contact the officials, soliciting their assistance in proposing the names of highly competent female and minority lawyers.²⁸

Now that Congress has reconvened, President Clinton should renominate all candidates nominated in 1994 who remain acceptable to relevant members of the 104th Congress, while nominating the new group of attorneys whom the White House Counsel has assembled. You should then persuade the Senate Judiciary Committee to confirm the nominees as quickly and fairly as it can, a process that will be expedited by early, full consultation on candidates with the Committee.

Consultation is especially significant now that the Republican Party controls the Senate and the Senate Judiciary Committee. The Clinton Administration should closely confer with Senator Orrin Hatch (R-Utah), the new chair of Judiciary, and his GOP colleagues. Senator Hatch and Republican senators should be receptive to President Clinton's overtures, and they must place the federal courts' needs before partisan politics. The Republicans should also remember the prompt, equitable manner in which Senator Joseph Biden (D-Del.) processed President Reagan's lower federal court nominees during the Republican president's last two years in office after the Democratic Party had recaptured the Senate.

If the White House Counsel's Office implements the above suggestions, the Clinton Administration should be able to fill the existing judicial vacancies on the federal courts, improve the federal civil and

27. See Tobias, *supra* note 9, at 1875-76.

28. See *id.*

criminal justice systems and increase gender, racial and political balance on the federal bench. The recommendations' effectuation may well enable President Clinton to leave a clear imprint on the federal judiciary and even improve his reelection prospects.

Carl Tobias

Professor of Law, University of Montana. I wish to thank Tracey Baldwin and Peggy Sanner 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.