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PRESIDENT CLINTON'S COVENANT AND THE FEDERAL COURTS

CARL TOBIAS*

President Bill Clinton has eloquently invoked the concept of a new covenant with the American people. Claiming that the populace elected him with a mandate for change, the President has appointed individuals to high-level positions, particularly in the Cabinet, who have made the new government look like America. In no branch of the federal government are these ideas more apposite than the Third Branch.

The Republican administrations of President Ronald Reagan and President George Bush compiled dismal records of federal judicial selection over the last dozen years. President Reagan appointed a minuscule seven African-American lawyers out of the 368 federal judges (1.9 percent) whom he named in his two terms.¹ President Bush appointed only eleven African-American attorneys out of the 194 judges (5.7 percent) whom he placed on the bench.² The number of African-Americans on the courts actually decreased during the Reagan and Bush Administrations.³ The records of the Republican presidents contrast markedly with the record of Democratic President Jimmy Carter. The Carter Administration appointed thirty-seven African-American lawyers out of 258 judicial appointments (14.3 percent).⁴ Indeed, President Carter named more African-Americans in his four-year tenure than did Republican Presidents Nixon, Ford, Reagan and Bush, who selected only twenty-seven African-Americans over their two decades in office.⁵

These statistics are even more striking in light of one salient fact. President Reagan and President Bush had substantially larger, and considerably more experienced, pools of African-American attorneys from whom to appoint judges than did President Carter.⁶ Since the time of the Carter Administration, many more African-Americans have graduated from law school and engaged in rigorous legal practices which have prepared them to be excellent federal judges. For example, numerous African-American attorneys have actively participated in high-impact voting rights litigation

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1. See Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 321, 325 (1989).

2. See *The Federal Courts at a Crossroads*, ANNUAL REPORT 1992 (Alliance for Justice/Judicial Selection Project, Wash., D.C.) 1992, at 4.

3. *Id.*

4. See Goldman, *supra* note 1, at 322, 325. *Accord The Federal Courts at a Crossroads*, *supra* note 2, at 4.

5. See *The Federal Courts at a Crossroads*, *supra* note 2, at 4.

6. See *id.* at 3.

as counsel for the NAACP Legal Defense Fund,⁷ have earned partnerships in large law firms,⁸ and have been writing much cutting-edge scholarship in law schools.⁹ The National Bar Association estimates that there are now nearly 30,000 African-American practitioners in the United States.¹⁰

Equally troubling is the dearth of other minorities who sit on the federal bench. There is only one Native American federal judge in the entire nation.¹¹ President Bush appointed a lone Asian-American to the courts, and that individual is a Pacific Islander named to a judgeship in Guam.¹² The Bush Administration correspondingly placed fewer Latinos on the federal courts than either President Reagan or President Carter.¹³ Moreover, the number of Latinos and Asian-Americans on the bench increased only slightly during the dozen years in which the Republicans controlled the White House.¹⁴ It is also important to remember that the total number of African-American, Latino and Asian-American lawyers increased from 23,000 in 1980 to 51,000 in 1989.¹⁵

There are several significant reasons why the Republican administrations should have appointed more minorities to the federal judiciary and why President Clinton must promptly increase the number of minority federal judges. One of the most important reasons is the substantial, highly-qualified pool, of minority attorneys which now exists. Moreover, it is critical to have the diverse perspectives, especially from personal life experiences, that many minorities bring to judicial service. For example, numerous minority judges heighten the sensitivity of the federal courts to the increasingly complex issues of public policy, such as allocation of scarce resources and affirmative action, which federal judges must resolve.¹⁶ Most minority judges can more easily appreciate certain difficulties, such as finding jobs and balancing employment and familial responsibilities,

7. See, e.g., Margaret Cronin Fisk, *Profiles In Power: The 100 Most Influential Lawyers In America*, NAT'L L.J., Mar. 25, 1991, at S2, S4.

8. See Claudia MacLachlan & Rita Henley Jensen, *Progress Glacial for Women, Minorities*, NAT'L L.J., Jan. 27, 1992, at 1, 31-32 (statistical survey demonstrating increase in African-American partners in law firms during period 1981-91).

9. See, e.g., Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989); J. Clay Smith, Jr., *Emerging Voices In the Academic State: A Bibliographic Survey of Select Writings By Minority Members of the AALS Section on Minority Groups, 1978-1988*, 33 HOW. L.J. 339 (1990).

10. Telephone interview with Maurice Foster, Director of Special Projects, National Bar Association (Nov. 4, 1993).

11. See Annual Report of the Judicial Equal Employment Opportunity Program Administrative Office of the United States Courts for the Twelve Month Period Ending September 30, 1992; Judith Resnik, "Naturally" Without Gender: *Women, Jurisdiction and the Federal Courts*, 66 N.Y.U. LAW REV. 1682, 1704 n.83 (1991).

12. See *The Federal Courts at a Crossroads*, *supra* note 2, at 3.

13. *Id.* at 3-4. President Bush named nine Latinos, but President Reagan appointed thirteen Latinos and President Carter named sixteen Latinos. *Id.* at 4.

14. See *id.* at 4-5.

15. *Id.* at 3.

16. 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, 272-73 (1983).

which many minorities face.¹⁷ Some evidence concomitantly suggests that numerous members of the American public have greater confidence in a federal judiciary that more closely reflects the racial composition of American society.¹⁸

President Clinton has a valuable opportunity to make the courts resemble America, because there presently are approximately 125 vacant judgeships and he probably will make 300 appointments in the next four years. Numerous measures would enable the Clinton Administration to increase the numbers and percentages of minorities on the bench. President Clinton and those officials responsible for judicial selection should clearly state that the appointment of more minority attorneys is an important priority of the new administration. The individuals who recruit judges should diligently search for, find, and promote the candidacies of well-qualified minority lawyers.

President Clinton must strongly encourage senators to forward the names of very competent minority attorneys, while administration officials should work closely with the senators in proposing potential nominees. Judicial recruiters must also confer with other traditional sources, such as state and local bar associations. The administration officials should make special efforts to contact less traditional sources, such as minority political organizations and women's groups. These entities are more likely to know many minority lawyers who would be excellent federal judges but who have engaged in less traditional legal practices.

President Clinton should institute the suggestions above. If his administration undertakes a concerted effort to recruit minority attorneys, it can appoint excellent judges, make the courts look like the United States, and keep the President's covenant with the American people.

17. See, e.g., Marion Zenn Goldberg, *Carter-Appointed Judges: Perspectives on Gender*, 26 TRIAL, Apr. 1990, at 108; Elaine Martin, *Men and Women on the Bench: Vive la Difference?*, 73 JUDICATURE 204, 204 (1990).

18. See, e.g., Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 253 (1978). Cf. *Clinton v. Bush, The Candidates on Legal Issues*, 78 A.B.A. J., Oct. 1992, at 57-58 (analogous suggestion of Candidate Clinton).