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Dear President Clinton

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Dear President Clinton

CARL TOBIAS*

Congratulations on winning another term as President!** In discharging the formidable responsibilities of governing, few will be more important or difficult than judicial selection, a critical duty which the Constitution assigns you. The President nominates and, with the Senate's advice and consent, appoints these life-tenured officers who resolve disputes over Americans' fundamental freedoms. Indeed, ten days after you won, Senator Orrin Hatch (R-Utah), who will chair the Senate Judiciary Committee in the 105th Congress, pledged to "stand firm and exercise the advise and consent power to insure that President Clinton does not pack the judiciary with liberal activists who will make mincemeat of our Constitution and laws."¹ Because the senator believed that many of your appointees issued overly liberal opinions and that re-election concerns no longer restrain you, he found that "especially careful scrutiny of judicial nominees will be imperative."² These ideas may be post-election political posturing, as the chair recently indicated: "My attitude is Clinton won the presidency. His job is to nominate and ours is to confirm, and we should not be making a political sideshow out of this."³ The comments resemble more closely the senator's view after the 1994 elections that the Committee would approve all nominees who were "qualified, in good health, and un-

derstand the role of judges."⁴ However, you should treat his first expression as a wake-up call.

The appointment of federal judges affords you a valuable opportunity to leave a lasting legacy. A laudable goal for your second administration would be filling all of the twenty-six vacancies on the appeals courts and the sixty-seven openings on the district courts with exceptional judges who bring gender, racial and political diversity to federal judicial service. The difficult question is how you can most effectively attain this objective.

I. JUDICIAL SELECTION DURING THE INITIAL TERM

You compiled an excellent record in choosing judges.⁵ You and administration officials who were responsible for selection enunciated clear goals and efficacious procedures for achieving them. For example, you publicly stated that appointees would be very intelligent, have measured temperament, and enforce constitutional rights while enhancing gender and racial balance. You and your aides also asked senators to help nominate extremely competent, diverse lawyers. You apparently attained your selection purposes. During the first term, you named 202 judges: sixty-two (thirty-one percent) are women and fifty-seven (twenty-eight percent) are minorities.⁶ They earned the highest rankings

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**This article was written in anticipation of President Clinton's winning re-election in 1996. Therefore, many of the numerical references in this article were estimations which may or may not have been borne out by future events.

1. Neil A. Lewis, *Utah Senator Scolds Critics of Prosecutor in Whitewater*, N.Y. TIMES, Nov. 16, 1996, at 12.

2. *Id.*

3. See Joan Biskupic, *Clinton Given Historic Opportunity to Transform Judiciary*, WASH. POST, Nov. 19, 1996, at A19.

4. See Neil A. Lewis, *New Chief of Judiciary Panel May Find an Early Test With Clinton*, N.Y. TIMES, Nov. 18, 1994, at A31. See generally Gary A. Hengstler, *At the Seat of Power*, A.B.A.J., Apr. 1995, at 70.

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

6. Telephone interview with Mike Lee, Alliance for Justice, Washington, D.C. (Sept. 3, 1996). These numbers and percentages are unprecedented.

since the American Bar Association (ABA) began rating candidates in the 1950s⁷ and possessed all the qualities critical to exceptional judicial service. For example, Seventh Circuit Judge Diane Wood had been the Deputy Assistant Attorney General in the Justice Department's Antitrust Division. Many, such as Second Circuit Judge Pierre Leval, who was a preeminent federal district judge, had served on federal or state courts.

Some observers urged that you appoint more politically partisan or liberal judges to offset the clear intent of Presidents Ronald Reagan and George Bush in naming conservatives.⁸ You resisted this importuning, characterized your appointees as "mainstream judges" and refused to premise selection on "rigid adherence to a strict ideological agenda."⁹ Yours is the first administration since Dwight D. Eisenhower to reduce politicization of the process.¹⁰

You also deserve praise for filling many of the 113 judicial vacancies which existed when you assumed office. Upon adjournment of the 104th Congress in early October, however, there were eighteen appeals court and forty-four district court openings,¹¹ numbers that will increase as active judges assume senior status. In short, you have named very able, diverse judges since 1993. Your administration must attempt to realize even more success during the next term.

II. JUDICIAL SELECTION DURING THE SECOND TERM

A. Goals and Reasons for Their Attainment

You and your aides should anticipate predictable difficulties and be sufficiently flexible to address unforeseeable problems. You must promptly reevaluate and consider recalibrating the first-term selection objectives and then clearly enunciate second-term goals and implement efficacious means for attaining them. Re-election has freed you to institute policies and practices that you find best for the courts and the country, as Senator Hatch has perceptively recognized.¹²

One crucial goal is filling all of the present judicial vacancies. Only the full complement of judges authorized can reduce large civil backlogs in many districts, promptly resolve increasingly complicated criminal cases, and treat the appellate "crisis of volume."¹³ It is critical to appoint judges who have intelligence, industriousness and balanced temperament to conclude disputes over basic liberties and growing litigation with scarce resources expeditiously, economically and fairly.¹⁴ You should also continue to enhance gender and racial diversity. Female and minority judges may help colleagues appreciate complex issues, such as discrimination, which judges often face;¹⁵ limit gender and racial bias in the courts;¹⁶ and increase public confidence in the judiciary by making it resemble more closely society's composition.¹⁷ You, as well, must rectify the bench's gender and racial

7. See Tobias, *supra* note 5, at 315; see also, Neil A. Lewis, *In Selecting Federal Judges, Clinton Has Not Tried to Reverse Republicans*, N.Y. TIMES, AUG. 1, 1996, at A20.

8. See, e.g., Ted Gest, *Disorder in the Courts? Left and Right Both Gripe About Clinton's Taste in Judges*, U.S. NEWS & WORLD REP., Feb. 12, 1996, at 40; Lewis, *supra* note 7; Anna Puga, *Clinton Judicial Picks May Court the Right*, BOSTON GLOBE, Dec. 29, 1995, at 1.

9. Biskupic, *supra* note 3. Senator Hatch even conceded that Carter "appointees were further to the left" than yours. *Id.*

10. See Harvey Berkman & Claudia MacLachlan, *Clinton's Picks - Not So Liberal*, NAT'L J., Oct. 21, 1996, at A1; Biskupic, *supra* note 3; Lewis, *supra* note 1. In fairness, most female and minority judges may increase political balance. See Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U. S. Court of Appeals*, 67 JUDICATURE 165, 168 (1983); Tobias, *supra* note 5, at 322; see also Goldman, *supra* note 5, at 285, 288; Donald R. Songer et. al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Court of Appeals*, 56 J. POL'Y 425 (1994).

11. See interview *supra* note 6; see also *infra* note 30 and accompanying text (suggesting reasons for vacancies); Carl Tobias, *Dear Judge Mikva*, 1994 WIS. L. REV. 1579, 1580 (when 103rd Congress adjourned, there were fifty-three vacancies).

12. See Lewis, *supra* note 2 and accompanying text.

13. See Tobias, *supra* note 11, at 1580 (discussing district court backlogs); see also REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990) (discussing crisis of volume); *Record-Setting Workloads Confront Federal Courts*, THE THIRD BRANCH, July 1996, at 2. Six of 28 seats are vacant on the 9th Circuit which has the largest appellate docket.

14. Congress could authorize new judgeships, but that approach is controversial because the need for judges may vary across appeals courts and districts; diverse measures can treat dockets; judgeships could seem costly, and you would be able to name numerous new judges.

15. See, e.g., Marion Z. Goldberg, *Carter-Appointed Judges-Perspectives on Gender*, TRIAL, Nov. 1990, at 108; 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).

16. See REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE (1992); FEDERAL COURTS STUDY COMMITTEE REPORT, *supra* note 13, at 169; Lynn H. Schafraan, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 ARIZ. ST. L.J. 237, 238 (1989).

17. See Slotnick, *supra* note 15, at 272-73; Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 B.Y.U. L. REV. 1257, 1276.

imbalance which Presidents Reagan and Bush fostered.¹⁸

You might want to consider enhancing political balance. For example, some have implored you to choose judges who can counter many Reagan and Bush appointees, such as Supreme Court Justices Antonin Scalia and Clarence Thomas, who were named to make the bench more conservative.¹⁹ Because the Republican Presidents so single-mindedly sought this objective, you could justify pursuit of the opposite goal, but would incur criticism similar to that lodged at them. Remember that highly qualified female and minority judges might increase political balance because these judges may differently view certain substantive issues.²⁰

B. Attaining Goals

You can best fill the current openings with efficacious procedures. You should appoint additional very competent female and minority judges by applying that process and by redoubling efforts which invoke novel approaches or untapped resources. District court appointments deserve emphasis because you have deferred to senators where the openings arise.²¹ Many senators promoted the candidacies of able women and minorities. You should laud them and ask others to institute similar efforts, publicly reiterating your commitment to name female and minority lawyers. Your aides and senators should enlist sources, especially less traditional ones, such as women's groups. You must also work with the nine female senators, who can persuade their colleagues to suggest more women and minorities. Critical are the abilities and contacts of female and minority attorneys, who comprise a fourth of the bar, and of lawyers, such as Attorney General Janet Reno, and Roberta Ramo, who was the first female ABA President.²²

You must exercise much diplomacy and political insight, seeking help from members of Congress in both parties. You might rely on Senators Joseph Biden (D-Del.) and Arlen Specter (R-Pa.) who have Judiciary Committee experience, and respected former solons, such as Senators Howell Heflin, Sam Nunn, and Alan Simpson. Do not forget *eminences*, such as William Coleman and Robert Strauss, who have advised Democratic and Republican presidents.

C. Difficult Questions

You must anticipate and resolve several difficult questions which remain. One is whether you might realize less gender and racial diversity and political balance to fill the federal courts, and if so, how much. You could insist on enhanced diversity while yielding somewhat on political balance because, for example, more diverse judges will inherently foster balance. Moreover, your public views regarding selection,²³ your political positions during the last two years and the recent campaign, and the election which was not exactly a mandate for liberal appointments leave you little flexibility. You should also consider whether naming lawyers to offset the ideological perspectives of conservative judges is advisable or even counterproductive. For instance, jurists, such as your two Supreme Court appointees, who have moderate views and measured temperaments, may in fact be more effective in certain situations.²⁴

Some observers have actually claimed that your first-term appointments solidified a new centrism whereby the "courts no longer consider their role as an active solver of society's ills in the way that past courts advanced criminal defendants' rights, ensured school desegregation, protected blacks' voting rights and broke the ground to protect personal privacy from state interference."²⁵

18. African Americans were 1.9% of Reagan appointees and President Bush named one Asian American, although they had much larger, more experienced pools on which to draw than President Carter. See Goldman, *supra* note 5, at 285, 288; Tobias, *supra* note 5, at 322.

19. See Gest, *supra* note 8 and accompanying text.

20. See generally *supra* note 10.

21. Because your aides have efficaciously achieved your goals and the White House has controlled nominations of Justices and circuit judges, their selection deserves terse analysis.

22. See Tobias, *supra* note 17, at 1248-49 (Naming more female and minority judges will also increase political balance); see also *supra* note 10. You can easily identify others, such as law faculty and attorneys for public interest groups, who would increase balance.

23. See Biskupic, *supra* note 9 and accompanying text.

24. A related issue is whether you might compromise on Supreme Court nominees to fill the lower federal courts, and if so, how much. Enormous symbolic and actual significance attach to the Court, but it hears so few appeals that the regional circuits resolve virtually all cases, while district judges' rulings may actually affect more people than appellate decisions.

25. Biskupic, *supra* note 3. "The practical effect is to change significantly the idea that the judiciary will seek with any real assertiveness to address [social] problems, as [was its] province at least a decade before," said University of Chicago Provost Geoffrey Stone. *Id.*

This idea seems unrealistic and overstated. For example, the Constitution's general phrasing and the difficulty of drafting clear statutes mean that judges will continue to expound the law, and political and policy factors may well inform this activity.²⁶ Lawyers and parties will keep requesting judges to interpret the measures, while Congress cannot amend the Constitution and has repealed virtually no legislation under which the suits are brought.²⁷ Cursory perusal of advance sheets in the federal reporter system reveals many cases that require this treatment. Attorneys and parties even continue to pursue institutional reform litigation which is controversial because it asks judges to modify the behavior of large bureaucracies such as schools.²⁸ In short, no transformation has occurred, and none will soon. You, therefore, must appoint judges who will not shrink from their duty to expound the law and who appreciate and apply the ideas which attend the ongoing, vigorous debate over interpretation that ranges from Justice Scalia's textualism to Professor William Eskridge's dynamic construction.²⁹

You and Senator Hatch must work constructively together. When high-ranking public officials play politics with judicial selection, they degrade themselves, the process, the judges who are confirmed, the courts and public discourse. You should freely consult the chair on selection and on candidates and even seek his counsel, perhaps striking

compromises to secure support for certain goals. You must deal with the senator because Republicans have a 55-45 majority, but he must cooperate because you won the election and to avoid appearing overly partisan.

If the chair resists efforts to fill vacancies, you might mention the pressing needs to treat civil backlogs and to resolve criminal cases expeditiously, lest accused criminals go free. You could also gently remind the senator that some actions during the 104th Congress' second session may have reflected political gamesmanship. For example, 1976 was the last election year that the Senate confirmed so few judges. The twenty approved in 1996 sharply contrast with the sixty-six judges confirmed in 1992 and the forty-one judges approved in 1988 when Senator Biden was chair.³⁰ In the final analysis, the voters elected you to appoint the judges. You may need to remind Senator Hatch of that, and if he persists, take the issue to the American public.

III. CONCLUSION

You compiled an outstanding record of judicial selection during your initial term of office. If your administration employs efficacious procedures, it should be able to attain even more in the next four years, and leave a lasting legacy of excellence and diversity on the federal courts.

26. See PAUL D. CARRINGTON ET. AL., *JUSTICE ON APPEAL* 2-4 (1976); see generally William N. Eskridge, *Dynamic Statutory Interpretation* (1994).

27. Fifty statutes, dubbed "social legislation," even encourage litigation. See Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C.L. REV. 745, 754-57 (1987).

28. Fewer cases may now exist, but there were never many. See Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J. L. REF. 645, 668 (1988); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 485, 511 (1986).

29. See, e.g., *Fort Stewart School v. FLRA*, 495 U.S. 641 (1990); ESKRIDGE, *supra* note 26. See generally Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991).

30. See *Average Time Required to Fill Circuit and District Judgeships*, THE THIRD BRANCH, NOV. 1996, at 4; see also *Setting the Record Straight on Judicial Nominations*, 143 CONG. REC. S2538 (daily ed. Mar. 19, 1997) (statement of Sen. Biden).