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Filling the Federal Courts in an Election Year

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Essay

FILLING THE FEDERAL COURTS IN AN ELECTION YEAR

*Carl Tobias**

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I. INTRODUCTION

PRESIDENT Bill Clinton appointed unprecedented numbers and percentages of highly qualified female and minority lawyers to the federal bench during his initial half-term in office, substantially surpassing the records of Presidents Ronald Reagan, George Bush and Jimmy Carter. The Clinton administration invoked an efficacious, uncontroversial selection process and filled a significant percentage of the 113 judicial openings that existed when it assumed office.

Some federal court observers questioned whether the Chief Executive could maintain this commendable record during his presidency's third

* Professor of Law, University of Montana: I wish to thank 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.

year. More specifically, they wondered if Republican Party control of the United States Senate, which must approve nominees, and the impending 1996 presidential election might slow the confirmation process; reduce the number of female and minority attorneys named; and increase the number of appointees who are less controversial and more moderate politically.

Now that the first session of the 104th Congress has adjourned, it is important to analyze the Clinton administration's success in naming judges. This Essay undertakes that effort by concentrating on the appointment of women and minorities to the federal courts. The initial section of the piece briefly explores modern judicial selection, focusing on the policies and procedures for choosing judges, and the lawyers named, during the Carter, Reagan and Bush presidencies.

The Essay then evaluates the judicial selection goals enunciated, the practices employed, and the attorneys appointed, in the Clinton administration's third year. I ascertain that President Clinton named substantial numbers and percentages of extremely capable women and minorities, although the Senate did not consider two of the Administration's nominees who had Judiciary Committee hearings, and fifty judicial vacancies remained when the Senate recessed.¹ The paper correspondingly finds that the effective selection process applied during President Clinton's first half-term continued to operate smoothly, as witnessed by the numerous, highly competent lawyers whom the Administration nominated and appointed.

I also determine that President Clinton filled many judicial openings and that he bears little responsibility for the seats that are empty. Moreover, it is important to have on the bench the complete complement of judges authorized. For example, only that full contingent can satisfactorily expedite the disposition of cases, decrease existing civil backlogs in numerous districts and ameliorate the pressures which the 1994 crime legislation will impose on the justice system. Ascertaining that the Administration has instituted procedures which could foster the appointment of additional, very able women and minorities and the elimination of all vacancies, I assess why President Clinton should attempt to achieve this objective and how his Administration might realize that purpose.²

1. Telephone interview with Deborah Lewis, Alliance for Justice, Washington, D.C. (Jan. 22, 1995).

2. See Carl Tobias, *Increasing Balance on the Federal Bench*, 32 Hous. L. Rev. 137 (1995); Carl Tobias, *Keeping the Covenant on the Federal Courts*, 47 SMU L. Rev. 1861 (1994). See also Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 B.Y.U. L. Rev. 1257; Carl Tobias *Closing the Gender Gap on the Federal Courts*, 61 U. Cin. L. Rev. 1237 (1993); Carl Tobias, *More Women Named Federal Judges*, 43 Fla. L. Rev. 477 (1991); Carl Tobias, *The Gender Gap on the Federal Bench*, 19 Hofstra L. Rev. 171 (1990); Carl Tobias, *The Federal Judiciary Engendered*, 5 Wis. Women's L.J. 123 (1990).

II. RECENT FEDERAL JUDICIAL SELECTION

The recent history of federal judicial selection deserves comparatively limited analysis in this Essay because that experience has been comprehensively examined elsewhere.³ The goals articulated, the procedures followed, the lawyers appointed and the judges' decisionmaking during the Carter, Reagan and Bush presidencies are treated, as judicial selection by these administrations enhances understanding of President Clinton's performance.

A. CARTER ADMINISTRATION

President Jimmy Carter was the initial Chief Executive who specifically promised to increase the numbers and percentages of female and minority federal judges and who implemented affirmative steps to fulfill that pledge.⁴ The most efficacious technique that President Carter employed was merit-based nominating panels for circuit and district courts,⁵ and these commissions successfully sought, found, and promoted the candidacies of exceptionally competent female and minority attorneys.⁶

President Carter's efforts to name very capable women and minorities proved quite successful. A number of these judges had to meet stricter standards than other lawyers who were considered and appointed and seemed better qualified than colleagues chosen through more conventional means,⁷ while the female and minority judges had qualifications that equalled those of their predecessors in terms of several significant criteria.⁸ Many of these women and minorities, such as Supreme Court Justice Ruth Bader Ginsburg and Circuit Judges Harry Edwards and Stephanie Seymour, have been excellent judges.⁹ Their contributions to

3. See, e.g., DAVID O'BRIEN, *JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION* (1988); Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 *JUDICATURE* 282 (1993); Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 B.Y.U. L. REV. 1257, 1258-74.

4. See, e.g., Steve McGonigle, *Clinton's Judges Changing Face of Federal Judiciary*, *BATON ROUGE ADVOCATE*, Sept. 4, 1994, at 7B. I rely substantially in this subsection on Tobias, *supra* note 3, at 1259-64 and on Elliot E. Slotnick, *Judicial Selection: Lowering the Bench or Raising it Higher?: Affirmative Action and Judicial Selection During the Carter Administration*, 1 *YALE L. & POL'Y REV.* 270 (1983); see also *infra* note 13 and accompanying text (demonstrating the small number of female and minority federal judges).

5. 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).

6. See Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 *JUDICATURE* 136, 141 (1987); Carl Tobias, *The Gender Gap on the Federal Bench*, 19 *HOFSTRA L. REV.* 171, 174 (1990).

7. This is controversial and depends on the definition of qualified. See Slotnick, *supra* note 4, at 298.

8. *Id.* at 280-98; cf. Sheldon Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 *JUDICATURE* 488, 492-93 (1979) (claiming that female and minority Carter appointees on whole "may even be more distinguished than . . . white males chosen by Carter and previous administrations").

9. See, e.g., Carl Tobias, *Keeping the Covenant on the Federal Courts*, 47 *SMU L. REV.* 1861, 1863, 1867 (1994) (Justice Ginsburg and Judge Edwards); Paul Richter & David Sav-

courts' decisionmaking and to the smooth functioning of the justice system indicate the need for diverse viewpoints, often gleaned from personal life experiences, which numerous female and minority attorneys bring to judicial service.¹⁰ The jurists whom President Carter named have been rather solicitous of individuals' rights and of legislative intent expressed in statutes, while providing comparatively open court access to parties with limited resources.¹¹

President Carter appointed 41 female lawyers out of 258 judges (15.9%) during his term of service.¹² These results represented dramatic improvement over the records of prior administrations. When the Carter administration came into office, only one woman and two African-Americans out of ninety-seven judges served on courts of appeal and a mere five women and twenty African-Americans or Latinos out of four hundred were district judges.¹³

B. REAGAN ADMINISTRATION

President Ronald Reagan won the 1980 election with what he characterized as a mandate to make the federal government, including the courts, more conservative.¹⁴ The President proclaimed that his primary objective in selecting nominees was to make the bench less liberal.¹⁵ The Chief Executive correspondingly appeared to consider the appointment of judges a comparatively cost-free way of appealing to conservative elements of the Republican Party.¹⁶

age, "Wow" Candidate is Sought for High Court, L.A. TIMES, May 29, 1993, at A18 (mentioning Judge Seymour as possible Supreme Court nominee).

10. See Tobias, *supra* note 9, at 1867 (discussing Justice Ginsburg's career); *id.* at 1874 (discussing other values of diversity). The judges' service on the judiciary can also make it more representative of society. See Tobias, *supra* note 3, at 1276.

11. See, e.g., Tobias, *supra* note 3, at 1262-63; See also Sheldon Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 JUDICATURE 345, 355 (1981) (analyzing Carter appointees' political viewpoints). I appreciate that some observers would find these views to be indicia of unsuccessful selection. See Tobias, *supra* note 3, at 1262-64.

12. Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 322, 325 (1989); Patricia M. Wald, *Women in the Law*, TRIAL, Nov. 1988, at 75. President Carter also appointed 37 African-Americans out of 258 judges (14.3%) in his 4-year tenure. See Goldman, *supra* at 322, 325. Of the 258 appointees, 16 were Latinos and 2 were Asian-Americans. See ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROJECT, ANNUAL REPORT 4 (1992) (copy on file with author) [hereinafter JSP ANNUAL REPORT]. All recent administrations have increased the numbers and percentages of women appointed over time. See Carl Tobias, *Closing the Gender Gap on the Federal Courts*, 61 U. CIN. L. REV. 1237, 1240 (1993).

13. Robert J. Lipshutz and Douglas B. Huron, *Achieving A More Representative Federal Judiciary*, 62 JUDICATURE 483 (1979); see also Slotnick, *supra* note 4, at 271. See generally Elaine Martin, *Women on the Federal Bench: A Comparative Profile*, 65 JUDICATURE 306 (1982).

14. I rely substantially in this subsection on O'BRIEN, *supra* note 3, at 60-64; Goldman, *supra* note 12.

15. See, e.g., O'BRIEN, *supra* note 3, at 60; Sheldon Goldman, *Reagan's Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image*, 66 JUDICATURE 335, 337 (1983).

16. See, e.g., Ruth Marcus, *Bush Quietly Fosters Conservative Trend in Courts*, WASH. POST, Feb. 18, 1991, at A4; Neil Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. TIMES, Apr. 10, 1990, at A1. See generally O'BRIEN, *supra* note 3, at 60-63.

President Reagan attempted to make the courts less liberal in numerous ways. For instance, he rejected most of the Carter administration's goals and processes. More specifically, President Reagan eliminated President Carter's merit-based selection commission for appeals courts and relied less on the district court panels.¹⁷ The Reagan administration concomitantly eschewed virtually all special efforts that President Carter instituted to promote the candidacies of capable female and minority lawyers.¹⁸

President Reagan employed traditional selection methods, namely senatorial courtesy and patronage, and infrequently consulted with the Senate Judiciary Committee.¹⁹ The Republican Chief Executive and officials responsible for judicial recruitment also invoked affirmative measures to make the courts less liberal. For example, personnel who worked on judicial selection sought attorneys with conservative ideological perspectives and evaluated the opinions of lower court judges to discern whether they should sit on higher courts.

President Reagan attained his expressly-declared objective of creating more conservative courts. The lawyers placed on the bench were comparatively homogeneous in terms of gender, race and political viewpoints. The Republican administration named only 31 women out of 372 judges (8.3%) throughout its 2 terms.²⁰ Numerous Reagan appointees have decided cases conservatively. For instance, they have narrowly interpreted the Constitution and congressional statutes and have limited federal court access.²¹

C. BUSH ADMINISTRATION

President Bush relied substantially on the Reagan administration's goals and processes for choosing judges. For example, President Bush observed, as had Reagan before him, that his principal objective in selecting judges was to make the federal bench more conservative, and he in-

17. Exec. Order 12,059 § 4(d), reprinted in 28 U.S.C. § 44 (Supp. 1992), revoked by Exec. Order 12,305, reprinted in 28 U.S.C. § 44 (Supp. 1992); Exec. Order 12,097 § 1-104, reprinted in 28 U.S.C. § 133 (Supp. 1992), revoked by Exec. Order 12,553, reprinted in 28 U.S.C. § 133 (Supp. 1992); see also O'BRIEN, *supra* note 3, at 61.

18. See Martin, *supra* note 6, at 141; Elliot E. Slotnick, *Gender, Affirmative Action and Recruitment to the Federal Bench*, 14 GOLDEN GATE U. L. REV. 519, 545-61 (1984).

19. I rely substantially in this paragraph on O'BRIEN, *supra* note 3, at 60-62; Goldman *supra* note 12, at 319; Lewis, *supra* note 16; and Tim Weiner, *White House Builds Courts in Its Own Image*, PHIL. INQUIRER, Oct. 7, 1990, at A1.

20. Goldman, *supra* note 12, at 322, 325. African-Americans constituted only 1.9% (7 out of 368) of the attorneys whom President Reagan named in his 2 terms. *Id.* at 321, 325. Of 368 lawyers, 13 were Latinos and 2 were Asian-Americans. See JSP ANNUAL REPORT, *supra* note 12, at 4.

21. Goldman, *supra* note 12, at 330; cf. Steve Alumbaugh & C.K. Rowland, *The Links Between Platform-Based Appointment Criteria and Trial Judges' Abortion Judgements*, 74 JUDICATURE 153 (1990) (observing that Reagan appointees are much more likely than Carter appointees to reject pro-choice abortion claims). See generally O'BRIEN, *supra* note 3, at 60-64.

voked senatorial courtesy and patronage.²² But the Bush administration's purposes and procedures did depart somewhat from those of its predecessor. Most importantly, President Bush adopted efficacious techniques for appointing highly competent women and minorities to judgeships, but he implemented these measures only after two years in office and they were less thorough than President Carter's endeavors.²³ Thus, the Republican Chief Executive was able to achieve his goal of making the courts less liberal; however, some evidence indicates that the attorneys named are more moderate than the judges whom President Reagan selected.²⁴ President Bush's appointees were correspondingly more diverse in terms of gender and race. President Bush named 36 female lawyers out of 192 appointees (18.7%) during his term in office.²⁵

The percentage of women named to the bench in the Bush administration established a record then, although certain factors limit this apparent success. For example, the Chief Executive selected a number of these female attorneys after the controversial proceedings to confirm Justice Clarence Thomas, and also in 1992, when the Bush administration was desperately seeking reelection.²⁶

III. JUDICIAL SELECTION DURING THE THIRD YEAR OF THE CLINTON PRESIDENCY

A. DATA

In President Clinton's third year in office, he appointed seventeen female lawyers out of fifty-three judges (thirty-two percent) and eight minority attorneys out of fifty-three judges (fifteen percent).²⁷ The numbers and percentages of women and minorities whom the Clinton administration named are completely without precedent; they strikingly contrast with the judicial selection record of President Reagan and substantially surpass the results attained by the Bush and Carter administrations.²⁸ For example, President Clinton appointed more female judges during his first three years in office than the Reagan administration named in two terms and President Bush appointed during four years.²⁹

22. See, e.g., Letter from President George Bush to Senator Robert Dole (Nov. 30, 1990) (copy on file with author) [hereinafter Letter]; Goldman, *supra* note 3, at 295-97; Lewis, *supra* note 16; see also *supra* notes 14-15, 19 and accompanying text.

23. See, e.g., Letter, *supra* note 22; Goldman, *supra* note 3, at 297.

24. See, e.g., Goldman, *supra* note 3, at 295-98; Neil A. Lewis, *Selection of Conservative Judges Insures a President's Legacy*, N.Y. TIMES, July 1, 1992, at A13.

25. Goldman, *supra* note 3, at 287, 293; Tobias, *supra* note 12, at 1237 n.3 and accompanying text; see also *supra* note 12. African-Americans comprised 5.2% (10 out of 192) of President Bush's appointees. See Goldman, *supra* note 3, at 287, 293. Of the 192 judges, 9 were Latinos and 1 was an Asian-American. See JSP ANNUAL REPORT, *supra* note 12, at 4.

26. Tobias, *supra* note 12, at 1240-42; see also Tobias, *supra* note 3, at 1270-74.

27. Lewis interview, *supra* note 1.

28. See *supra* notes 12-20, 25 and accompanying text; see also Al Kamen, *Vow on Federal Judges Still on Hold*, WASH. POST, Oct. 29, 1993, at A25.

29. See *supra* notes 20, 25, 27 and accompanying text.

Indeed, white males have comprised approximately forty percent of the judges whom the Clinton administration has named.³⁰

The attorneys whom the Democratic Chief Executive appointed are exceptionally competent. The lawyers are apparently quite intelligent, industrious, and independent, while they seem to have much integrity and appropriately-measured judicial temperament. The American Bar Association (ABA) has rated sixty-three percent of President Clinton's nominees as well-qualified, which is ten points higher than the rankings assigned to Reagan and Bush nominees.³¹

A number of the individuals whom the Clinton administration named have enjoyed distinguished careers. For instance, A. Wallace Tashima was a highly-regarded federal district judge in the Central District of California before President Clinton elevated him to the United States Court of Appeals for the Ninth Circuit.³² The Clinton administration also appointed to the Seventh Circuit Judge Diane Wood, who had served as a Deputy Assistant Attorney General in the Antitrust Division of the Justice Department and as a faculty member at the University of Chicago Law School.³³

The total number of attorneys whom President Clinton has named during his initial 3 years constitutes substantial progress toward filling the 113 judicial vacancies which existed when he assumed office. When Congress recessed in December 1995, fifty openings remained, and the Senate had not considered for confirmation two Administration nominees.³⁴

B. REASONS FOR PRESIDENT CLINTON'S SUCCESS

It is easy to ascertain why President Clinton appointed and nominated such a large number of highly competent female and minority attorneys during his third year in office. Perhaps most important, the Chief Executive is keeping the covenant which he made with the citizens of the United States and effectuating pledges which he took during the presidential campaign.

For instance, Governor Clinton promised during 1992 that he would name to the courts only women and men who were very intelligent, who promised to have balanced judicial temperament, and who had evinced

30. Lewis interview, *supra* note 1; see also Al Kamen, *Filling the Robes*, WASH. POST, Sept. 7, 1994, at A19.

31. Lewis interview, *supra* note 1; see also DEPARTMENT OF JUSTICE, CLINTON ADMINISTRATION JUDICIAL RECORD, ANALYSIS OF JUDICIAL NOMINATIONS (1994) [hereinafter 1994 DOJ RECORD] (copy on file with author); Joan Biskupic, *Clinton Avoids Activist in Judicial Selections*, WASH. POST, Oct. 24, 1995, at A1; Henry J. Reske, *Judicial Vacancies Declining*, A.B.A. J., Jan. 1994, at 24 (providing Clinton nominee rankings).

32. See, e.g., Steve Albert, *Clinton Nominates L.A. Judge for Ninth Circuit*, THE RECORDER, Apr. 7, 1995, at 2; Henry Weinstein, *Clinton Nominates L.A. Judge to U.S. Appeals Court*, L.A. TIMES, Apr. 10, 1995, at B1.

33. See, e.g., Janan Hanna & John O'Brien, *Phelan: Firm "Very, Very Viable" Despite Loss of Key People*, CHI. TRIB., July 4, 1995, at B3; John Flynn Rooney, *New 7th Circuit Judge Seen as "More Liberal" Member*, CHI. DAILY L. BULL., July 3, 1995, at 1.

34. Lewis interview, *supra* note 1.

concern about, and a commitment to, individual rights which the Constitution protects, while the candidate pledged to increase gender and racial diversity on the bench.³⁵ In 1995, the President explained how he had honored these commitments:

I have made an extra effort to look for qualified candidates who could serve with distinction and make a contribution to this country and make the Federal bench reflective of the American population. I have not done it with any quota system in mind, and I have not guaranteed anybody a job.³⁶

During the third year of the Clinton administration, those responsible for judicial selection carefully implemented the President's promises, even as the pace of nomination and confirmation slowed considerably in comparison with 1994.³⁷ The United States Senate judiciously exercised its advice and consent authority. Numerous senators were responsive to the Clinton administration's goals in choosing judges and cooperated with President Clinton and his assistants. Quite a few senators correspondingly used or revived district court nominating commissions to designate, and foster the candidacies of, very competent female and minority attorneys, while the senators forwarded the names of many women and minorities.

The president generally relied on practices for selecting nominees which were similar to the procedures employed by the Carter administration; however, these measures differed minimally from President Bush's mechanisms and only partially from the techniques used by President Reagan.³⁸ Officials in the White House and the Department of Justice shared responsibility for choosing candidates. White House employees participated more actively in identifying nominees than Justice Department personnel, who assumed primary responsibility for scrutinizing lawyers' professional qualifications after their designation as serious candidates.³⁹

35. See, e.g., William J. Clinton, *Judiciary Suffers Racial, Sexual Lack of Balance*, NAT'L L.J., Nov. 2, 1992, at 15-16 (providing promise and pledge); *Bush v. Clinton: The Candidates on Legal Issues*, 78 A.B.A. J. Oct. 1992, at 57-58 (providing promise and pledge); see also Stephen Labaton, *Clinton May Use Diversity Pledge to Remake Courts*, N.Y. TIMES, Mar. 8, 1993, at A1 (providing pledge).

36. *Excerpts from the President's News Conference*, N.Y. TIMES, Mar. 4, 1995, at A9. President Clinton also named so many highly-qualified women and minorities because he apparently has views on the courts and has relied upon selection objectives and procedures which resemble those of President Carter more than those of his two Republican predecessors. See Tobias, *supra* note 3, at 1258-74; Tobias, *supra* note 9, at 1868.

37. I rely substantially in this paragraph on Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 290 (1995).

38. Tobias, *supra* note 3, at 1258-74. This sentence and much in the remainder of this subsection are premised substantially on the author's personal conversations with individuals who are knowledgeable about the selection procedures that the Clinton administration employed, and on Goldman, *supra* note 37, at 278-79.

39. Goldman, *supra* note 37, at 278-79; Ruth Marcus, *Judge in Line for White House Counsel Post*, WASH. POST, Aug. 9, 1994, at A7; Chris Reidy, *Clinton Gets His Turn*, BOSTON GLOBE, Aug. 8, 1993, at 69; conversations *supra* note 38; see also Goldman, *supra* note 3, at 285 (suggesting that Clinton administration White House had assumed responsibility similar to Bush administration White House).

The Judicial Selection Group, which the White House Counsel chairs and which consists of White House and Department of Justice staff, held weekly meetings.⁴⁰ During those sessions, members of the entity designated the practitioners whom President Clinton should consider, which potential nominees required additional investigation and how best to balance the goal of suggesting the most competent individuals with political practicalities.⁴¹ The White House Counsel recommended to the Chief Executive one or more persons for each vacancy.⁴² The President himself was actively involved in the process of choosing nominees, being consulted during several phases, and occasionally proposing names or requesting additional possibilities.⁴³

Senatorial patronage and courtesy were significant to the identification of nominees for the district courts, while the Clinton administration exercised ongoing deference to senators who represent the states in which the judicial openings arose.⁴⁴ Most senators suggested the names of several attorneys from whom the Chief Executive eventually chose a nominee. The president also supported the use of district court nominating panels which numerous senators employed.⁴⁵ The White House retained greater control over the choice of appellate court nominees; however, President Clinton was receptive to the views of senators from the geographic regions in which the judges would be stationed.⁴⁶

The Chief Executive and his aides informally consulted on candidates with the Senate Judiciary Committee, which has primary responsibility for the confirmation process, and with individual senators before formally nominating lawyers and seeking Senate approval.⁴⁷ Senator Orrin Hatch (R-Utah), the Chair of the Judiciary Committee, treated President Clinton's nominees rather similarly to the way that Senator Joseph Biden (R-Del.), his predecessor, handled the Reagan administration's nominees during the third year of its second term.⁴⁸ For instance, the Judiciary Committee voted favorably on all nominees, although some candidates

40. Goldman, *supra* note 37, at 278-79; conversations, *supra* note 38.

41. Goldman, *supra* note 37, at 279; see also Joan Biskupic, *Despite 129 Clinton Appointments, GOP Judges Dominate U.S. Bench*, WASH. POST, Oct. 16, 1994, at A20.

42. Goldman, *supra* note 37, at 279.

43. See *id.*; *U.S. Bench Looks More Like U.S.: Clinton Raises Ratio of Women, Minority Judges*, ARIZ. REPUBLIC, Oct. 24, 1994, at A9.

44. David A. Andelman, *Justice Affirmed: Clinton Administration Appointments to Federal Courts*, MGMT. REV., June 1994, at 34; Neil A. Lewis, *Clinton is Considering Judgeships for Opponents of Abortion Rights*, N.Y. TIMES, Sept. 18, 1993, at A1; Michael York, *Clout Sought in Choosing U.S. Judges*, WASH. POST, Feb. 5, 1993, at D3; see also conversations *supra* note 38.

45. Neil A. Lewis, *Unmaking the G.O.P. Court Legacy*, N.Y. TIMES, Aug. 23, 1993, at A10; see also *supra* note 6 and accompanying text; conversations *supra* note 38.

46. Andelman, *supra* note 44, at 34; Reidy, *supra* note 39, at 69. The Clinton administration has not reinstated the Circuit Judge Nominating Commission employed during the Carter administration. See also *supra* note 5 and accompanying text. President Clinton maintained substantial responsibility for selecting his Administration's first two Supreme Court Justices and will actively participate in choosing future High Court nominees.

47. Conversations, *supra* note 38.

48. Neil A. Lewis, *New Chief of Judiciary Panel May Find an Early Test With Clinton*, N.Y. TIMES, Nov. 18, 1994, at A31; see also Carl Tobias, *Forum: Dear Judge Mikva*, 1994

whom the majority party considered politically unpalatable may have never been formally nominated.

Immediately after the 1994 elections, Senator Hatch reportedly stated that the Committee would approve nominees who were "qualified, in good health, and understand the role of judges,"⁴⁹ and this is what essentially happened. Senator Hatch concomitantly admonished that the Committee might reject controversial nominees;⁵⁰ however, the Clinton administration apparently forwarded the names of very few nominees who could be so characterized.⁵¹ Senator Hatch asked some candidates their views on substantive issues, such as affirmative action and governmental takings of private property.⁵² The nominees were not troubled by the queries and answered them, but some observers have described the questions as analogues of litmus tests that were criticized in the 1980s.⁵³

President Clinton formally submitted names at a steady pace, while the Judiciary Committee held hearings on one circuit court nominee and several district court nominees per month.⁵⁴ Senator Conrad Burns (R-Mt.) imposed holds on all nominees to the Ninth Circuit until Congress split that appeals court, and this effort succeeded until Senator Burns removed the holds in early January, 1996; but the entire Senate rejected this request.⁵⁵

The President and his assistants continued earlier efforts to seek, find and nominate very competent female and minority lawyers.⁵⁶ Prominent administration officials expressly and forcefully declared that the appointment of talented women and minorities was quite important, while numerous personnel who participate in judicial recruitment, such as Attorney General Janet Reno are female or minority attorneys. Quite a

WIS. L. REV. 1579; Neil A. Lewis, *Partisan Gridlock Blocks Senate Confirmation of Federal Judges*, N.Y. TIMES, Nov. 30, 1995, at A16.

49. Lewis, *supra* note 48, at A31.

50. *Id.*

51. Biskupic, *supra* note 31; Joan Biskupic, *Facing Fights on Court Nominees, Clinton Yields*, WASH. POST, Feb. 13, 1995, at A23; Ana Puga, *Clinton Judicial Picks May Court the Right*, BOSTON GLOBE, Dec. 29, 1994, at 1; *see also* Al Kamen, *A Nominee of Peculiar Qualifications*, WASH. POST, Aug. 2, 1995, at A23; Eva M. Rodriguez, *Blowin' in the Wind*, LEGAL TIMES, Mar. 27, 1995, at 6.

52. Joan Biskupic, *Flap Over Hatch's Questions to Judicial Nominees/Democrats Worry About Creation of "Litmus Test"*, S.F. CHRON., Mar. 13, 1995, at A5.

53. Biskupic, *supra* note 52; *see also* Sheldon Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 JUDICATURE 324, 326 (1987) (discussing idea of litmus tests). *See generally* Goldman, *supra* note 12, at 320.

54. Al Kamen, *Window Closing on Judicial Openings*, WASH. POST, June 12, 1995, at A17.

55. *See, e.g., Court Watch: Partisan Game*, L.A. TIMES, June 23, 1995, at B8; *Montana Senator Tries to Force Court Breakup*, SEATTLE TIMES, June 11, 1995, at B1. *See generally* Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. — 1995.

56. The Administration had previously urged senators to transmit the names of female and minority lawyers and to rely on current, or revive earlier, district nominating commissions, some of which panels senators voluntarily revitalized. A senior White House official said in 1993 that "we have spoken to each and every Democrat in the Senate and told them we expect the recommendations to include women and minorities." Lewis, *supra* note 45, at A10; *see also* McGonigle, *supra* note 4, at 8B.

few senators were also predisposed to search for, discover and recommend female and minority candidates. Administration officials responsible for judicial selection and these senators solicited, and depended upon, the assistance and suggestions for potential nominees, of such nontraditional sources, as women's organizations, public interest groups, and minority political organizations.⁵⁷

Certain information suggests that the Clinton administration evidenced a somewhat decreased willingness to nominate candidates who might prove politically controversial. Illustrative were the decisions against re-submitting the names of an attorney and a state court judge who were nominated to district court seats in California during 1994.⁵⁸ White House Counsel Abner Mikva correspondingly observed that the Administration would not support candidates when "objections are raised that mean [nominees] won't get hearings or that we will end up with a fight that looks like it won't go anywhere" while emphasizing that "we're still looking for the best people we can get."⁵⁹

The reluctance to pursue the confirmation of controversial nominees may be an advisable caution reflecting political pragmatism. After all, a prolonged confirmation battle over one controversial candidate could threaten the President's opportunity to fill the federal bench.⁶⁰ Indeed, Professor Goldman found it "reasonable to expect that [the Administration] will neither provoke a fight with Republicans, nor will it wish to exhaust political resources on confirmation battles assuming there is a level of reasonableness on the part of the Republican leadership."⁶¹

It is also important to understand that President Clinton and his aides have consistently maintained that they are according less significance to increasing political balance on the courts than to naming highly competent women and minorities. During 1995, the Administration seemed committed to placing additional female and minority lawyers on the bench. The slight decline in the numbers and percentages of women and minorities appointed, however, may reflect a modicum of compromise and greater willingness to name more moderate appointees.

In short, the President enjoyed considerable success when choosing judges during 1995. The Clinton administration named substantial numbers and percentages of very capable female and minority attorneys, continuing to surpass the efforts of Presidents Reagan, Bush and Carter. The Chief Executive and his aides articulated clear goals for appointing

57. See *supra* notes 44-45 and accompanying text.

58. Biskupic, *supra* note 51; Puga, *supra* note 51; see also *supra* notes 50-51 and accompanying text.

59. Biskupic, *supra* note 51, at A1; *infra* note 92 and accompanying text; see also 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.

60. Carl Tobias, *Increasing Balance on The Federal Bench*, 32 Hous. L. Rev. 137, 156 (1995).

61. Goldman, *supra* note 37, at 291.

judges and applied efficacious selection processes, particularly for identifying and naming highly-competent female and minority lawyers.

This success is more impressive in light of the difficulties which the Clinton administration confronted during its third year of service. Perhaps most important were the complications posed by Republican Party control of both the Senate and the House. This meant that President Clinton and his staff had to expend considerable time, effort and energy in responding to political initiatives, such as the Contract with America, and reforms involving, for instance, the budget, public assistance and the legal system.⁶² International issues, particularly implicating Bosnia, also required substantial commitments of Administration resources.

The Chief Executive and his assistants also faced problems that were more directly related to judicial selection. Because President Clinton's political party constituted a minority of the Senate, efforts to facilitate the nomination and confirmation of judicial candidates were complicated. For example, Senator Hatch controlled the scheduling of Judiciary Committee hearings on nominees, while Senator Robert Dole (R-Kan.), the majority leader, was responsible for scheduling floor votes on candidates whom the Committee approved.⁶³ A consideration that apparently assumed increasing significance throughout 1995 was the possibility that the Republican Party might win the 1996 presidential election and, therefore, recapture the right to make judicial appointments.

Additional important problems, including a few which involved the White House Counsel's Office and the Justice Department, may also have distracted personnel responsible for judicial selection in the White House and the Department of Justice. A significant illustration was the ongoing Whitewater investigations being performed by the independent counsel and by Congress, which deflected the attention of White House staff, particularly lawyers in the Office of White House Counsel. Similarly distracting were congressional probes into the Administration's handling of the volatile situations at Waco and Ruby Ridge.

Notwithstanding the admirable efforts of the Clinton administration, fifty judicial openings remained and the Senate Judiciary Committee had not considered two nominees for confirmation when Congress recessed during December 1995.⁶⁴ Once the second session of the 104th Congress convened in January 1995, there were fifty judicial vacancies.⁶⁵

In sum, President Clinton and his aides enjoyed significant success during the third year in office, given the substantial complications which they

62. See Republican Contract With America, Sept. 28, 1994, available in LEXIS, News Library, Hottop File. See generally William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719 (1995); Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699 (1995).

63. See *supra* notes 47-55 and accompanying text. Senator Dole's presidential aspirations may have additionally complicated judicial selection. See Kamen, *supra* note 54, at A17; see also *supra* note 55 and accompanying text.

64. Lewis interview, *supra* note 1.

65. *Id.*

faced. The Clinton administration should attempt to achieve even more in the future, although it will confront considerably greater difficulty, particularly because 1996 is an election year. Nevertheless, the Administration must try to accomplish more by continuing to depend on the judicial selection goals and processes described above and by effectuating several recommendations given in the next section.

IV. SUGGESTIONS FOR THE FUTURE

A. WHY MORE WOMEN AND MINORITIES SHOULD BE APPOINTED

The reasons why the Clinton administration should appoint and nominate additional very able female and minority lawyers to federal judge-ships deserve relatively limited discussion here. They have been examined above and have been thoroughly explored elsewhere.⁶⁶ The resources that President Clinton and his staff devoted to finding, nominating and naming highly capable women and minorities concomitantly demonstrate their understanding that these are significant priorities.

One of the most important reasons for placing more highly qualified female and minority lawyers on the federal courts is the different perspective which most of these attorneys will bring to the bench. The lawyers may increase their colleagues' comprehension of complicated policy questions, such as abortion and affirmative action, which the judiciary must treat.⁶⁷ Appointing additional women and minorities could also reduce gender and racial prejudice in the federal courts.⁶⁸ Some evidence concomitantly suggests that the populace has greater confidence in a federal judiciary whose constitution more closely resembles that of American society.⁶⁹ Naming more female and minority practitioners to the federal bench⁷⁰ is also an important sign of a presidential administration's commitment to enhancing circumstances for women and minorities in the nation, in the federal courts, and in the legal profession.⁷¹

66. See, e.g., Goldman, *supra* note 8; Martin, *supra* note 6; Slotnick, *supra* note 4.

67. See, e.g., Marion Z. Goldberg, *Carter-Appointed Judges - Perspectives on Gender, TRIAL*, Apr. 1990, at 108; Goldman, *supra* note 8, at 494; Slotnick, *supra* note 4, at 272.

68. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (Apr. 2, 1990); Lynn H. Schafran, *Gender Bias in the Courts: An Emerging Focus For Judicial Reform*, 21 ARIZ. ST. L.J. 237, 238, 271-73 (1989). See generally PRELIMINARY REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE (1992).

69. Tobias, *supra* note 3, at 1276; see also Slotnick, *supra* note 4, at 272-73. Research also suggests that numerous female and minority judges might enhance substantive decisionmaking. 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); 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); see also Elaine Martin, *Men and Women on the Bench: Vive la Difference?*, 73 JUDICATURE 204, 208 (1990). But cf. *supra* note 11 (acknowledging that this claim is controversial). A number of these judges, including Justice Sandra Day O'Connor and Justice Thurgood Marshall, have rendered distinguished service.

70. Tobias, *supra* note 12, at 1244; Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477, 483 (1991).

71. Tobias, *supra* note 6, at 176; Tobias, *supra* note 67, at 483; see also Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. MIAMI L. REV. 159, 175-76 (1993).

An additional telling reason for appointing more female and minority attorneys is the need to remedy the lack of gender, racial and political balance on the present federal bench, sixty percent of whose members were named by Presidents Reagan and Bush. Fewer than two percent of Reagan appointees were African-Americans, while President Bush named one Asian-American and only nine Latinos.⁷² Moreover, Republican appointees were seemingly named principally because they held conservative political perspectives.⁷³

The failure of the Reagan and Bush administrations to appoint more female and minority judges is troubling because they had much bigger, more experienced, pools of female and minority practitioners on which to draw than did President Carter. For example, there were 62,000 women in the profession during 1980 but 140,000 in 1988.⁷⁴ Numerous female attorneys have actively participated in rigorous legal practices.⁷⁵ The number of African-American, Latino and Asian-American lawyers concomitantly increased from 23,000 to 51,000 between 1980 and 1989, while these attorneys have been engaged in a broad range of equally challenging legal work.⁷⁶

Another important reason to name additional female and minority judges is the need to fill all current vacancies so that the federal courts will have the complete complement of judges authorized. Appointing practitioners to those openings would help the courts resolve cases more efficiently and decrease the district courts' substantial civil backlogs.⁷⁷ Indeed, during April 1995, Guy Zoghby, the President of the American Judicature Society, requested that President Clinton and Republican members of the Senate "make a bipartisan commitment to fill judicial vacancies promptly [because those openings] threaten the federal courts' ability to resolve Americans' disputes fairly and interpret the law justly."⁷⁸

72. See *supra* note 25 and accompanying text.

73. Tobias, *supra* note 3, at 1264-74; see also Tobias, *supra* note 6, at 179-80.

74. See Tobias, *supra* note 12, at 1241 n.22.

75. *Id.* at 1246-47; Tobias, *supra* note 3, at 1280-81; see also Tobias, *supra* note 70, at 485. They have worked, for instance, at the Justice Department, public interest groups, and large law firms. See Tobias, *supra* note 12, at 1246-47; Tobias, *supra* note 9, at 1875.

76. JSP ANNUAL REPORT, *supra* note 12, at 3. For example, they have pursued landmark civil rights suits, practiced criminal law, or written pathbreaking legal scholarship. See Tobias, *supra* note 3, at 1280-81; Tobias, *supra* note 9, at 1875.

77. For instance, on March 31, 1994, there were 219,424 civil cases pending, and 14,658 had been pending for over three years. See ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROJECT MID-YEAR REPORT 4 (1994) (copy on file with author); see also David G. Savage, *Clinton Missing Opportunity on Court Vacancies, Some Say*, L.A. TIMES, Aug. 18, 1993, at A5 (suggesting civil cases backlogged because of judge shortage). Implementation of the 1994 crime legislation will worsen these problems by increasing the criminal docket. See Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

78. Letter from Guy A. Zoghby, President, American Judicature Soc'y, to Editors, NAT'L L.J., Apr. 3, 1995, at 20; see generally Tobias, note 60, at 153.

B. RECOMMENDATIONS FOR APPOINTING MORE WOMEN AND MINORITIES

Suggestions for how the Clinton administration can appoint more very capable female and minority lawyers to the bench warrant relatively brief treatment here. A number of analogous recommendations have been made elsewhere,⁷⁹ and some are afforded above, while the Chief Executive and his assistants are clearly already committed to naming additional women and minorities and have instituted effective processes for achieving this goal.

A few suggestions can be offered, nonetheless. President Clinton and his aides could consider means of redoubling efforts to search for, identify and appoint more highly competent women and minorities. The Chief Executive and administration employees should expand their aggressive efforts to name female and minority practitioners, exploring new ways of proceeding and invoking formerly untapped resources.

The choice of Supreme Court Justices and appeals court judges deserve comparatively limited examination because the White House has retained considerable responsibility for nominees to those courts.⁸⁰ The President and the White House Counsel, accordingly, will essentially need to guarantee that White House personnel responsible for judicial selection, who should be quite loyal employees, understand the importance of appointing additional female and minority lawyers and use the best procedures for realizing this objective. Experience over the Clinton administration's initial three years suggests that these individuals appreciate this goal and have implemented very efficacious processes.

The objectives and practices for appointing district court judges require closer analysis because, in making such appointments, the President has deferred to senators from the locales in which the judges will sit.⁸¹ Senators' concerns or the Administration's encouragement has apparently prompted many senators to undertake, or continue to employ, mechanisms for designating and promoting the candidacies of quite talented female and minority lawyers and to tender the names of numerous women and minorities. President Clinton might consider praising those senators who have helped him attain his judicial selection goals, while urging the remaining senators to initiate analogous efforts.

The Chief Executive could repeat once again in an important public forum his clear commitment to appointing greater numbers of well qualified female and minority lawyers. The president might even write specifically to senators, enlisting their aid in tendering the names of women and

79. See, e.g., Tobias, *supra* note 12, at 1245-49; Tobias, *supra* note 3, at 1274-85. See generally Goldman, *supra* note 37.

80. See *supra* note 46 and accompanying text.

81. See *supra* note 44 and accompanying text.

minorities⁸² and in implementing measures, such as nominating commissions, which will search for and foster the appointment of these practitioners.⁸³

Presidential staff working on judicial selection and members of the Senate should correspondingly ask for the input and assistance of other sources who will know about able female and minority attorneys. They should also work closely with Senator Hatch and the entire Committee by, for example, consulting on potential nominees. In addition, administration personnel and senators ought to contact traditional sources, such as bar associations, that could afford some assistance. More important will be less conventional entities, such as women's groups or minority political organizations. The Clinton administration also must seek the assistance of all of the female senators, who can convince their colleagues to suggest more women and minorities, thereby helping President Clinton to foster potential nominees' candidacies.

The qualifications and networking abilities of female and minority attorneys, who now comprise more than one-quarter of practicing lawyers in the nation, will be crucial to the effort. As important could be the endeavors and contacts of women and minorities in the Cabinet, such as Attorney General Janet Reno; of female and minority officials throughout the federal government; and of Hillary Rodham Clinton, who chaired the American Bar Association Commission on Women in the Profession.⁸⁴

C. RECOMMENDATIONS RELATING MORE SPECIFICALLY TO 1996

The Clinton administration enjoyed considerable success in appointing a significant number of very capable women and minorities to the federal bench and in filling numerous judicial vacancies during 1995. The pace of confirmation was somewhat slower than in 1994, as might have been expected and as some federal court observers predicted, partly because the Republican Party controlled the Senate and the Judiciary Committee.⁸⁵ President Clinton and his assistants must foresee and prepare for difficulties that will arise in 1996, problems which the presidential election year will certainly exacerbate.

Professor Goldman recently admonished that "predictions can be hazardous, especially in a volatile political climate."⁸⁶ Nonetheless, it is possible to posit reasonably reliable prognostications and to afford suggestions by drawing upon relevant precedents, while attempting to allow for the peculiar circumstances of 1996, and extrapolating into the fu-

82. President Bush wrote a similar letter. *See supra* note 22; *see also supra* note 56 (quoting White House official who stated that the Administration had encouraged all Democratic senators to support women and minorities).

83. *See supra* notes 45, 57 and accompanying text.

84. Tobias, *supra* note 12, at 1248-49.

85. *See also* Goldman, *supra* note 37, at 290-91 (predicting slower pace); Tobias, *supra* note 60, at 156.

86. Goldman, *supra* note 37, at 290.

ture. The most applicable analogue seems to be 1988 because it was an election year, President Reagan's final year as Chief Executive, and a time when the opposition political party controlled the Senate. Senator Biden, as Judiciary Chair, expeditiously and equitably processed the Reagan administration's circuit and district court nominees.⁸⁷ In fairness, 1992 is probably the next most relevant precedent, as it also was an election year, President Bush's last year in the White House, and a period when Democrats remained a majority in the Senate. During 1992, the Senate confirmed sixty-six Bush administration nominees; however, the Judiciary Committee conducted no confirmation hearings for fifty-four additional attorneys whose names the Chief Executive submitted.⁸⁸

Senator Hatch now appears likely to continue processing President Clinton's nominees at the 1995 pace for some portion of 1996, perhaps until the Democratic and Republican national conventions convene. The Judiciary Chair seems to be showing his respect for tradition involving the confirmation process, appears cognizant of the two recent precedents examined above, and seems attentive to the need for having the full complement of federal judges authorized on the bench.⁸⁹ At some time during 1996, however, Senate consideration of nominees will slow dramatically and eventually cease. Even if Senator Hatch is willing to continue processing candidates, the Republican Party leadership will increasingly pressure him to leave a number of vacancies in the hopes that the Republican presidential candidate could fill them.

President Clinton and those staff members whose duties encompass judicial selection should consider several recommendations for responding to the election year scenario that I projected above. The Democratic Chief Executive and those personnel ought to continue working as closely as possible with Senator Hatch, especially by consulting him on candidates; with Judiciary Committee members, particularly other Republicans and Senator Biden; and with additional senators who can be of assistance because, for instance, they represent states where the judges will sit.

Should Senator Hatch resist these overtures or threaten to delay or halt the confirmation process prematurely, Administration officials could remind the Judiciary Chair of his predecessor's relative solicitude for nominees whom Presidents Reagan and Bush tendered during 1988 and 1992, respectively.⁹⁰ In the unlikely event that Senator Hatch slows or stops judicial selection early in 1996, President Clinton might take the question to the American people, or even make it an election issue.

The Chief Executive and assistants with judicial selection responsibilities should anticipate, and plan immediately for, the president's participa-

87. See *supra* note 48 and accompanying text.

88. Kamen, *supra* note 54, at A17 (stating that 66 nominees were confirmed); Jerry Gray, *Dole Defends Threat to Bar a Vote on Surgeon General*, N.Y. TIMES, May 5, 1995, at A20 (stating that 54 nominees received no hearing).

89. See *supra* notes 47-55 and accompanying text.

90. See *supra* notes 48-51 and accompanying text.

tion in his re-election campaign. Throughout 1996, that involvement will increasingly grow, preoccupy the Chief Executive, and distract his attention from naming judges. As general propositions, therefore, President Clinton might consider participating somewhat less actively in judicial selection and entrusting greater responsibility to his closest advisors, such as Judge Mikva, who have accumulated substantial expertise in identifying promising candidates and facilitating their appointment.⁹¹

More specifically, the Chief Executive and his aides must insure that they supply the Senate with a substantial number of nominees, thereby countering the possibility that candidates would not be confirmed because the Judiciary Committee has insufficient nominees to process. This means that the White House must transmit the names of as many nominees as possible to the Senate when it convenes in January 1996 and must guarantee that the Committee has ample numbers of nominees for as long as the Senate is willing to consider them.

The Clinton administration should continue following its 1995 practices of forwarding to the Senate extremely competent nominees, of eschewing reliance on gender or racial quotas, and of avoiding fights over controversial candidates which could jeopardize the opportunity to appoint the maximum number of judges.⁹² Perhaps the most difficult question that President Clinton must confront is whether, and if so how much, he is willing to deemphasize the objectives of enhancing gender and racial balance to fill all of the current openings.

This query cannot be definitively answered for several reasons. The question implicates a complex mix of variables. Some, including the identities of 1996 presidential candidates, defy accurate prediction. Others, such as the possibility of an international conflict, are unforeseeable. The preferable approach, therefore, may require case-specific analysis of the present judicial vacancies and future openings as they occur and the establishment of certain priorities. Setting priorities could implicate, for instance, particular vacancies' relative significance in terms of the number of openings in specific circuits and districts, those courts' existing caseloads and backlogs, and the ease with which the seats can be filled.

Several courts afford more concrete examples. Illustrative is the United States Court of Appeals for the District of Columbia Circuit, which is widely regarded as the country's second most important court and as closely divided ideologically. The circuit currently has one vacancy. The court's significance means that the need to fill this opening probably warrants rather high priority, even as the seat's very importance

91. See *supra* notes 27-65 and accompanying text. The president might also consider entrusting more responsibility to others, such as senators who represent states in which vacancies arise for district court seats.

92. See *supra* notes 58-61 and accompanying text. President Clinton and Administration officials had earlier suggested that they considered the competence of candidates more important than their ideology. See, e.g., *supra* notes 36, 41, 50-51, 58-59; see also Biskupic, *supra* note 51.

might require some flexibility concerning the nominee's political perspectives.⁹³

The Ninth Circuit offers an equally instructive, if relatively complicated, example. The appeals court is considered among the most liberal circuits, includes approximately equal numbers of judges whom Democratic and Republican presidents have appointed, and has three vacancies. The comparative facility with which Judge Tashima and Judge Sidney Thomas secured Senate approval in 1996 can be ascribed to several considerations which inform understanding of the confirmation process. For instance, Judge Tashima rendered distinguished service on the Central District of California for fifteen years and reportedly enjoys a close personal relationship with Senator Hatch.⁹⁴ Judge Thomas concomitantly was a highly-competent practitioner and was an active participant in Democratic Party politics, while his moderate political perspectives made him rather uncontroversial.⁹⁵

In comparison, Professor William Fletcher has encountered greater difficulty in being confirmed because he was perceived as relatively controversial, as possessing less centrist viewpoints, and as President Clinton's friend, and also because of the complications created by Senator Burns's imposition of holds on all Ninth Circuit nominees.⁹⁶ These factors suggest that the Administration might assign a comparatively low priority to filling the remaining Ninth Circuit seat, unless this can be felicitously achieved. President Clinton and his assistants should proceed, if they can easily identify a very capable, uncontroversial candidate whom the senators from the state which has the opening would strongly support and Senator Hatch would favor.

When considering openings on the district courts, the Chief Executive and his assistants may want to consult numerous relevant phenomena. For example, they could target districts which have substantial backlogs and numerous vacancies, as the need to alleviate docket pressures should facilitate appointments. In searching for and designating strong candidates, the Administration might emphasize gender and racial diversity and competence in terms of ability to reduce backlogs. This means that women and minorities who have served as magistrate judges or state court trial judges and who have demonstrated their effectiveness in expe-

93. The Administration apparently recognized these ideas when it nominated Merrick Garland, who is viewed as a centrist, rather than Peter Edelman, who is perceived to be quite liberal. See Biskupic, *supra* note 31; Kamen, *supra* note 51; Kamen, *supra* note 54; Lewis, *supra* note 48; Rodriguez, *supra* note 51.

94. See *supra* note 32 and accompanying text.

95. See, e.g., Max Baucus, *Sid Thomas Will Bring Montana Values to the Ninth Circuit*, MONT. LAWYER, June 1995, at 8; Carl Tobias, SENATOR BAUCUS' PICK ABSOLUTELY EXCELLENT, *Billings Gazette*, June 4, 1995, at 9.

96. See, e.g., *Court Suffers as Political Games Roll On*, L.A. TIMES, Dec. 28, 1995, at B; Reynolds Holding, *Clinton Nominates Friend for U.S. Appeals Court*, S.F. CHRON., Apr. 27, 1995, at A18; Henry Weinstein, *Law Professor Nominated for Key Judgeship*, L.A. TIMES, Apr. 27, 1995, at A3; see also *supra* note 53 and accompanying text (discussing Senator Burns's attempt).

ding litigation's resolution would be the type of nominees who could rather easily win confirmation.

V. CONCLUSION

President Clinton compiled an excellent record of judicial selection during his third year of service. He clearly delineated the Administration's goals in naming judges and relied on effective processes for achieving the objectives. The Chief Executive appointed numerous highly competent female and minority attorneys while significantly reducing the number of judicial openings. If the president and his aides renew their efforts and carefully work with senators on both sides of the aisle, the Administration should be able to name considerably more very capable women and minorities and fill the vacancies during 1996.