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The D.C. Circuit as a National Court

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ESSAY

The D.C. Circuit as a National Court

CARL TOBIAS*

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I. INTRODUCTION

Every President since Franklin Delano Roosevelt has appointed lawyers from across the country to the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) and has been accused of ignoring the members of the D.C. Bar. For example, during Democratic presidencies Harry Truman appointed David Bazelon from Illinois by way of the Department of Justice, John F. Kennedy appointed Skelly Wright from New Orleans, and Jimmy Carter appointed Ruth Bader Ginsburg from Columbia Law School. Similarly, during Republican presidencies Dwight D. Eisenhower appointed Warren Burger from Minnesota by way of the Justice Department, Richard Nixon appointed George MacKinnon from the same state, and Ronald Reagan appointed Stephen Williams from the University of Colorado Law School. This venerable, bipartisan tradition of nationwide recruitment for appointment to the D.C. Circuit has served the District and the nation well, yielding some of the court’s and America’s finest judges.

* Professor of Law, University of Montana. I wish to thank Beth Brennan, James Conwell, Mark Gitenstein, Melissa Harrison, and Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this Essay, and the Harris Trust for its generous, continuing support. Errors that remain are mine.

The practice of seeking nominees nationally to fill vacancies on the D.C. Circuit recently faced a serious challenge. Many members of the D.C. Bar, who have long opposed this practice, developed a proposal to change the D.C. Circuit appointment procedure. The proposal, which the association circulated to federal judges, the Clinton Administration, and bar leaders, sought the establishment of an eleven-member judicial selection commission. The commission would have been comprised of seven members named by the D.C. Bar's board of governors and four members, including three non-lawyers, chosen by the D.C. Delegate, Eleanor Holmes Norton. The commission would have compiled the names of at least three possible candidates and forwarded them to the President or to the D.C. Delegate, who would have committed in advance to submit a recommendation from that list.

For the proposal to take effect, the President, the D.C. Delegate, and the D.C. Bar must have approved the proposal. Although the D.C. Delegate and the D.C. Bar apparently agreed to adopt the proposal, the Clinton Administration seemingly supported changes. The procedures finally adopted apply only to the selection of district court judges, United States Attorneys, and United States Marshals for the D.C. federal courts. Nonetheless, the proposal warrants analysis because it raised issues that will be perennially aired and that are critical to judicial selection for, and the future of, the D.C. Circuit.¹

This Essay first examines the developments that led the D.C. Bar to draft the proposal. The Essay then critically evaluates the proposal by comparing it to the benefits of conducting a nationwide search for nominees to the D.C. Circuit. The Essay concludes that reliance on national pools is preferable and offers suggestions for future judicial selection in the D.C. Circuit.

II. DEVELOPMENTS THAT LED TO THE PROPOSAL

The events that prompted the D.C. Bar to craft the proposal deserve considerable treatment here.² They enhance understanding of the proposal, judicial selection for the D.C. Circuit, and the recommendations in

1. The procedures finally adopted are reproduced in APPENDIX A. The proposal is reproduced in APPENDIX B. My primary purpose in this Essay is to employ the proposal as a surrogate for evaluating the important issues that it raises. I scrutinize the proposal's particulars and its mechanics, such as the commission's composition, only insofar as they implicate these issues. Although the procedures adopted apply primarily to appointments for the United States District Court for the District of Columbia, this Essay only addresses appointments to the D.C. Circuit, because these appointments raise more difficult issues.

2. See Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 B.Y.U. L. REV. 1257; see also Charles McC. Mathias, Jr., *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200, 202-03 (1987); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1502-

the fourth section of this Essay. Although the practice of nationwide recruitment can be traced to the administration of Franklin Delano Roosevelt, the developments most relevant to this Essay began during Jimmy Carter's presidential administration.

A. *Carter Administration*

Many facets of President Carter's national judicial selection efforts resemble the approach that he followed in the D.C. Circuit.³ For instance, his administration depended less than prior administrations on traditional selection procedures, such as senatorial courtesy and patronage, by opening the process to greater public involvement and seeking judicial candidates from a broad, diverse pool.⁴ Moreover, the President emphasized and attained the goal of appointing highly-competent women and minorities to the appeals courts, including the D.C. Circuit.⁵

Officials responsible for judicial recruitment emphasized the qualifications that were important to resolving the unusual caseload of the D.C. Circuit.⁶ These qualifications include: (1) the substantial intelligence and energy needed to treat complex issues of science and technology; (2) a compelling command of the Constitution and the separation of powers doctrine; (3) an understanding of the interaction between the branches of government and the legislative and administrative processes; and (4) a keen appreciation for the pragmatic realities of governing in the modern administrative state.

The aforementioned qualifications for judicial service led officials to conduct nationwide searches for the finest judges, including practic-

12 (1992); see generally MARK GITENSTEIN, *MATTERS OF PRINCIPLE* (1992); DAVID M. O'BRIEN, *JUDICIAL ROULETTE* (1988).

3. See W. Gary Fowler, *A Comparison of Initial Recommendation Procedures: Judicial Selection Under Reagan and Carter*, 1 *YALE L. & POL'Y REV.* 299, 299-300, 307-09 (1983); 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); see also Tobias, *supra* note 2, at 1259-64 (comprehensive treatment of President Carter's national judicial selection efforts).

4. See Fowler, *supra* note 3, at 307-09, 331; cf. O'BRIEN, *supra* note 2, at 49-80 (discussing senatorial courtesy and patronage); see generally Slotnick, *supra* note 3, at 296-98.

5. See, e.g., Fowler, *supra* note 3, at 299-300, 307-09; Elliot E. Slotnick, *Gender, Affirmative Action and Recruitment to the Federal Bench*, 14 *GOLDEN GATE U. L. REV.* 519, 530-35 (1984); Slotnick, *supra* note 3, at 271-77. When President Carter became Chief Executive only one woman and two African-Americans served among the ninety-seven appellate court judges, and only five women and twenty African-Americans or Latinos served among the 400 district court judges. See Robert J. Lipshutz & Douglas B. Huron, *Achieving A More Representative Federal Judiciary*, 62 *JUDICATURE* 483 (May 1979); see also Slotnick, *supra* note 3, at 271; see generally Elaine Martin, *Women on the Federal Bench: A Comparative Profile*, 65 *JUDICATURE* 306 (1982).

6. See *infra* notes 87-91 and accompanying text.

ing attorneys within the District of Columbia, attorneys within the administration, and others actively involved in government. President Carter's Circuit Judge Nominating Commission played a significant role in the searches by promoting highly qualified women and minorities.⁷

The Carter Administration's recruitment efforts were successful in realizing its judicial selection goals. President Carter's four appointees to the D.C. Circuit all had impeccable paper qualifications and rigorous practical experience that made them peculiarly well qualified to serve on the appeals court.⁸ Each judge attended, and most taught at, prestigious law schools.⁹

Before President Carter appointed former Chief Judge Patricia McGowan Wald to the D.C. Circuit in 1979, she clerked for Judge Jerome Frank of the Second Circuit and was the Assistant Attorney General for Legislative Affairs.¹⁰ Chief Judge Abner Mikva clerked for the United States Supreme Court and served in the House of Representatives before his appointment in 1979.¹¹ Judge Harry Edwards was a professor at a number of distinguished law schools, including the University of Michigan Law School, Harvard Law School, University of Pennsylvania Law School, and Duke Law School, before President Carter appointed him to the D.C. Circuit in 1980.¹² Judge Ruth Bader Ginsburg was a professor at Columbia Law School and litigated many pathbreaking gender discrimination cases in the Supreme Court prior to her appointment in 1980.¹³

When President Carter nominated and the Senate confirmed these

7. See LARRY BERKSON & SUSAN CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES* (1980); see also ALAN NEFF, *THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES, AND CANDIDATES* (1981). These commissions were similar to the panel that the D.C. Bar proposed. The administration's success in placing highly-qualified women and minorities on the federal courts was extraordinary, because it drew candidates from a relatively small, comparatively inexperienced, pool of lawyers. See Tobias, *supra* note 2, at 1262 n.18.

8. *Biographies, The United States Court of Appeals for the District of Columbia Circuit, September 1989-August 1990*, 59 GEO. WASH. L. REV. 1420-21 (1991).

9. For example, Chief Judge Abner Mikva graduated from the University of Chicago Law School and taught at the University of Pennsylvania Law School, while Judge Harry Edwards graduated from and taught at the University of Michigan School of Law. *Id.* at 1420-21.

10. *Id.* at 1420. Jerome Frank taught at the Yale Law School, was a leader of the Realist movement, and wrote the pathbreaking book *LAW AND THE MODERN MIND* (1930) before President Roosevelt appointed him to the Second Circuit in 1941. See generally G. EDWARD WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 123-28, 137-39 (1978).

11. *Biographies, supra* note 8, at 1420.

12. *Id.* at 1420-21. Professor Edwards co-authored several casebooks. See, e.g., HARRY T. EDWARDS & JAMES J. WHITE, *PROBLEMS, READINGS AND MATERIALS ON THE LAWYER AS A NEGOTIATOR* (1977).

13. *Biographies, supra* note 8, at 1421; see also *Califano v. Goldfarb*, 430 U.S. 199, 200 (1977) (pathbreaking Supreme Court gender discrimination case); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637 (1975) (same). Judge Ginsburg's appointment to the United States Supreme Court

individuals, the D.C. Bar expressed no sentiment that the D.C. Circuit's membership be drawn from attorneys practicing in the District of Columbia. Indeed, numerous past presidents, the current president, and the president-elect of the D.C. Bar unanimously urged the Senate to confirm Judge Wald promptly.¹⁴ This support for each of these nominees was understandable because Judge Wald was a highly-regarded long-standing member of the D.C. Bar, and Judge Mikva was a D.C. insider during his tenure in the United States Congress.¹⁵ Moreover, Judges Edwards and Ginsburg possessed expertise in areas such as administrative practice and procedure that are important to the work of the D.C. Circuit.¹⁶

Numerous observers believe that all of these Carter appointees have rendered outstanding service.¹⁷ Each judge has ably handled the complex cases that are filed in the appeals court while continuing to be an active participant in scholarly debate.¹⁸ Many judges and lawyers considered Judge Wald to be an innovative administrator and dedicated conciliator during her half-decade tenure as Chief Judge.¹⁹

These views, however, are not universally held. Some conservative writers and politicians have criticized these appointments as affirmative action for the bench, intimating that the jurists were less qualified.²⁰ The critics apparently disagreed with the judges' substantive decision-

makes even more compelling the issues treated in this Essay because there are now two vacancies on the D.C. Circuit.

14. See *Selection and Confirmation of Federal Judges: Hearings Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 135, 189-94 (1980) (D.C. Bar support for Judge Wald); *Selection and Confirmation of Federal Judges: Hearings Before the Senate Comm. on Judiciary*, 96th Cong., 1st Sess. 159 (1980) (D.C. Bar support for Judge Mikva); *infra* notes 31-40, 45-46 and accompanying text (D.C. Bar concerns that led to development of proposal); see also Laura A. Kieman, *Slow Drain of Talent Continues Unabated*, WASH. POST, June 18, 1979, at C1 (D.C. Bar leadership urging Judge Wald's confirmation).

15. See *Biographies*, *supra* note 8, at 1420 (Judge Wald was an attorney for Neighborhood Legal Services Program and Center for Law and Social Policy, among other organizations); see also *supra* note 10 and accompanying text.

16. See *supra* notes 12-13 and accompanying text.

17. See, e.g., Lawrence Marshall, *Tribute to Honorable Patricia M. Wald*, 140 F.R.D. 491 (1992); Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 909 n.2 (1990) (tribute to Judge Ginsburg). I recognize that this is controversial in part because it is so difficult to assess the quality of judicial service. See Tobias, *supra* note 2, at 1262-63; cf. *infra* notes 20-22 and accompanying text (criticizing Carter appointees' service).

18. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Patricia McGowan Wald, *The "New Administrative Law"—With the Same Old Judges in It?*, 1991 DUKE L.J. 647.

19. See, e.g., Terry Carter, *After Bork, A Rift Widens*, NAT'L L.J., Mar. 28, 1988, at 1; Kenneth Karpay, *D.C. Circuit's Revolving Door*, LEGAL TIMES, Dec. 28, 1987, at 2; see also *infra* note 62 and accompanying text; see generally Patricia McGowan Wald, ". . . Doctor, Lawyer, Merchant, Chief," 60 GEO. WASH. L. REV. 1127 (1992).

20. See, e.g., *Selection and Confirmation of Federal Judges: Hearing Before the Senate*

making and political perspectives.²¹ For example, some members of Congress even proposed legislation to modify the venue requirements so that there would be fewer opportunities to litigate in Washington, D.C.²²

B. *Reagan Administration*

The Reagan Administration's judicial selection objectives and processes as well as its appointees contrasted sharply with those of President Carter. The Republican President stated candidly that his principal goal in choosing judges was to create a more conservative judiciary.²³ Thus, the Reagan Administration rejected the selection procedures of the Carter Administration. For instance, President Reagan eliminated President Carter's circuit nominating commission²⁴ and made few efforts to seek out and nominate very qualified female and minority judges.²⁵ President Reagan reverted to conventional procedures for choosing judges,²⁶ such as relying substantially on patronage and senatorial courtesy and assembling pools of candidates that were not diverse in terms of gender, race, or political perspectives.²⁷

The Reagan Administration's application of these national goals

Comm. on the Judiciary, 96th Cong., 1st Sess. 2-5 (1979) (statement of Senator Harry F. Byrd); see also Fowler, *supra* note 3, at 334; Slotnick, *supra* note 3, at 274-75.

21. See Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 979, 999 (1982); see generally *Venue Reform: Sue West, Young Man?*, REGULATION, Jan./Feb. 1982, at 10.

22. See, e.g., S. 739, 96th Cong., 1st Sess. (1979); H.R. 754, 97th Cong., 1st Sess. (1981). This proposal was called "Sagebrush Venue," because its advocates represented western states. Cf. PAUL LAXALT ET AL., NATIONAL LEGAL CTR. FOR THE PUB. INTEREST, VENUE AT THE CROSSROADS (Steven R. Schlesinger ed. 1982) (analysis by advocates and opponents); see also Sunstein, *supra* note 21, at 977 n.9.

23. See, e.g., O'BRIEN, *supra* note 2, at 60; Fowler, *supra* note 3, at 336; see also Sheldon Goldman, *Reorganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 313, 327 (1985).

24. See Exec. Order No. 12,059 § 4(d), 43 Fed. Reg. 20,949 (1978), reprinted in 28 U.S.C. § 44 (Supp. 1992), revoked by Exec. Order No. 12,305, 46 Fed. Reg. 25,421 (1981), reprinted in 28 U.S.C. § 44 (Supp. 1992); see also *supra* note 7 and accompanying text; see generally Slotnick, *supra* note 5, at 530-31.

25. See, e.g., Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136, 138-41 (1987); Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 174 (1990); see also *supra* note 5 and accompanying text (special efforts of Carter Administration).

26. See Tobias, *supra* note 2, at 1266.

27. The President and his judicial selection officials also relied on affirmative mechanisms to accomplish the administration's purposes. See O'BRIEN, *supra* note 2, at 60-62; Tobias, *supra* note 2, at 1266-68. Judicial recruiters assiduously searched for candidates who held appropriately conservative views and submitted their names to President Reagan. For instance, these officials evaluated the substantive determinations of federal appellate and trial court judges to determine whether they should be elevated to higher tiers in the system. See Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. TIMES, Apr. 10, 1990, at A1; Tim Weiner, *White House Builds Courts In Its Own Image*, PHILADELPHIA INQUIRER, Oct. 7, 1990, at A1.

and procedures to selecting judges for the D.C. Circuit had telling effects. The President and personnel responsible for choosing judges may have stressed conservative political perspectives at the expense of other important qualities, such as judicial temperament. Moreover, they appeared to de-emphasize and ignore specialized expertise pertinent to the court's caseload and other qualities critical to service on the D.C. Circuit.

The Reagan Administration, like the Carter Administration, relied on the notion of the D.C. Circuit as a national court to justify naming judges from a nationwide pool. The Reagan Administration, however, conceptualized and implemented the "national" concepts very differently than the Carter Administration. For instance, President Reagan selected a few academics from law schools located outside Washington, D.C., primarily because they had conservative credentials.²⁸

President Reagan apparently chose other judges because they worked in prior Republican administrations, were former Republican elected officials, or were the proteges or friends of loyal or influential senators.²⁹ Perhaps most striking, President Reagan appointed three individuals whose home-state senators had allegedly rejected them as candidates for their local circuit courts.³⁰ The difficulties posed by this conceptualization of the D.C. Circuit and this notion of national patronage were exacerbated by the fact that the District of Columbia had no politically-responsive senator to protect its interest or those of the D.C. Bar.

28. These Reagan appointees were Judge Antonin Scalia and Judge Robert Bork. *See Biographies, The United States Court of Appeals for the District of Columbia, September 1986-August 1987*, 56 GEO. WASH. L. REV. 1099, 1100 (1988) (Judge Bork); *infra* notes 62-64 and accompanying text; *see also* Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 304 (recognizing the conservative ideology of Reagan's eight appointees to the D.C. Circuit).

29. Reagan appointee James Buckley had been a Republican Senator from New York. *Biographies, supra* note 8, at 1421; *see generally Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 658 (1986) (testimony of Senator Buckley) [hereinafter *Buckley Hearings*]. Judge David Sentelle was correspondingly a supporter and protege of Senator Jesse Helms. *See infra* note 36 and accompanying text; *see also Biographies, supra* note 8, at 1422; *see generally Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 160 (1988) (testimony of Judge Sentelle) [hereinafter *Sentelle Hearings*].

30. *See Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 256, 263 (1987) (statement of Paul Friedman in confirmation hearings for Judge Douglas Ginsburg) [hereinafter *Ginsburg Hearings*]. The three nominees allegedly were Judge Buckley, Judge Kenneth Starr, and Judge Stephen Williams. *See, e.g., id.* (alleging all three judges rejected); *Buckley Hearings, supra* note 29, at 691-93 (statement of Marna Tucker, D.C. Bar Immediate Past President alleging Judge Buckley rejected); David F. Pike, *The Court-Packing Plans*, NAT'L L.J., Aug. 29, 1983, at 1, 27 (alleging Judge Starr rejected).

The D.C. Bar expressed increasing concern about the appointments during the Reagan Presidency. For example, the D.C. Bar urged the Reagan Administration to nominate a member of the D.C. Bar to the seat that became vacant early in 1986.³¹ Instead, the President chose Stephen Williams, a Professor of Law at the University of Colorado.³²

In 1986, Paul L. Friedman became the President of the D.C. Bar and he commenced a campaign to assert the Bar's views. Mr. Friedman discussed the issue with Justice Department officials responsible for choosing nominees and with the Office of White House Counsel but apparently experienced limited success.³³ Moreover, the D.C. Bar discussed the possibility of creating a committee to evaluate potential nominees with local ties, to forward their names to the administration, and to advocate the lawyers' candidacies.³⁴

The Bar's concern increased when the Reagan Administration nominated to the D.C. Circuit Douglas Ginsburg, a former Professor of Law at Harvard and the head of the Antitrust Division of the Justice Department.³⁵ This concern was compounded when the President announced his intention to nominate for another opening on the D.C. Circuit District Judge David B. Sentelle of Asheville, North Carolina, who had practiced exclusively in North Carolina and was a supporter and protege of Senator Jesse Helms.³⁶

Mr. Friedman testified at the confirmation hearings on Judges Ginsburg and Sentelle and urged the Senate Judiciary Committee to support the D.C. Bar's position that the administration stop choosing nominees for the D.C. Circuit from outside the D.C. metropolitan area.³⁷ At the proceedings for Judge Sentelle, Mr. Friedman stated that the D.C. Bar was frustrated and tired of being ignored in the selection process for the

31. See Ruth Marcus, *D.C. Bar Troubled By Outsiders*, WASH. POST, Sept. 29, 1986, at D2.

32. See *Biographies*, *supra* note 8, at 1421; see generally *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 35 (1987) (testimony of Judge Williams).

33. See Marcus, *supra* note 31, at D2; see also Ruth Marcus, *Appeals Court Nomination Angers D.C. Bar*, WASH. POST, Apr. 9, 1986, at B2; accord Telephone Interview with Paul Friedman, White & Case, Washington, D.C. (Feb. 26, 1993).

34. See Marcus, *supra* note 31; accord Telephone Interview with Paul Friedman, *supra* note 33.

35. See *Ginsburg Hearings*, *supra* note 30; see generally Marcus, *supra* note 31.

36. See Marcus, *supra* note 31, at D2 (intention to nominate); cf. Carter, *supra* note 19, at 44 (Judge Sentelle political ally of Senator Helms); Ruth Marcus, *North Carolina Judge is Seen as Choice for Appellate Vacancy Here*, WASH. POST, Sept. 27, 1986, at A15 (same); see generally *Sentelle Hearings*, *supra* note 29.

37. See *Ginsburg Hearings*, *supra* note 30, at 256-58; *Sentelle Hearings*, *supra* note 29, at 173-75.

D.C. Circuit.³⁸ The D.C. Bar President criticized President Reagan for not nominating any African-Americans, women or Latinos.³⁹ He recommended that the Committee consider the gender and race of appointees to insure that the D.C. Circuit's composition reflected the nation, the community, and the legal culture in which it functions.⁴⁰

Assistant Attorney General Stephen Markman, the Attorney General's main adviser on judicial nominations, responded to Mr. Friedman by stating that the Reagan Administration did not consider gender and race in choosing judges.⁴¹ Mr. Markman stated that "[t]his administration is committed to the idea of appointing the best qualified individual to a given judicial position without regard to race, color, religion or gender, and that is our policy with respect to courts that are located inside the District of Columbia and outside the District of Columbia."⁴²

Mr. Markman subsequently testified before the Committee that the administration believed that it had no special responsibility to search for qualified female and minority lawyers.⁴³ The Assistant Attorney General added that the administration was unwilling to consider the District's parochial interests and that the D.C. Circuit is a national court whose judges must be drawn from the entire nation.⁴⁴

Mr. Friedman continued to spearhead efforts to vindicate the D.C. Bar's interests by editorializing in the *Washington Post* during and after his tenure as D.C. Bar President. In a May 1987 article, Mr. Friedman recapitulated and elaborated his arguments, imploring the Reagan Administration and "those that follow to break with the irrational and insupportable practices of the past and look first and foremost to the members of our legal community for nominees to the D.C. Circuit."⁴⁵ On February 14, 1988, Mr. Friedman capitalized on the resignation of Judge Robert Bork to reiterate his arguments for considering candidates from the D.C. Bar.⁴⁶

38. See *Sentelle Hearings*, *supra* note 29, at 174; see also *Ginsburg Hearings*, *supra* note 30, at 258 (similar testimony).

39. See *Sentelle Hearings*, *supra* note 29, at 173-75.

40. *Id.* Other bar members testified orally or submitted written testimony on this subject in both the Ginsburg and Sentelle proceedings. Indeed, Marna Tucker, a predecessor of Mr. Friedman, briefly testified on the issue at Judge Buckley's hearing. See *Buckley Hearings*, *supra* note 29, at 691.

41. *Head of D.C. Bar Assails Judicial Nominations Here*, WASH. POST, Apr. 2, 1987, at A4.

42. *Id.*

43. See *The Performance of the Reagan Administration in Nominating Women and Minorities to the Federal Bench: Hearing Before the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 24-28, 32-34 (1988).

44. *Id.* at 22-24.

45. Paul Friedman, *No Local Lawyers Need Apply*, WASH. POST, May 25, 1987, at A19.

46. See Paul Friedman, *The Bork Vacancy*, WASH. POST, Feb. 14, 1988, at C8. President Bush eventually nominated Judge Clarence Thomas to that seat, which he assumed in 1990; see

The recruitment endeavors of the Reagan Administration were successful in achieving the President's judicial selection objectives. Nearly all of the appointees had very strong paper qualifications, and most of the judges participated in rigorous practices that should have prepared them well for service on the D.C. Circuit. Practically every appointee matriculated at fine law schools, and some were faculty members at those institutions. Nominees Antonin Scalia and Robert Bork had held high-ranking policy positions in earlier Republican administrations and taught at elite law schools before President Reagan named them to the D.C. Circuit.⁴⁷ Judge Kenneth Starr clerked for Chief Justice Burger before the President appointed him to the appeals court.⁴⁸

Several criticisms have been levelled at the Reagan Administration for its judicial selection efforts. Most important, critics allege that President Reagan did not consider gender, racial, or political diversity. He named eight white males, nearly all of whom shared the President's conservative political views.⁴⁹ Almost every judge had some experience in the federal government, but several possessed little expertise directly relevant to the D.C. Circuit's caseload.⁵⁰ Although some Reagan appointees have participated in scholarly exchange,⁵¹ the Republican judges have been less active than their Democratic counterparts.⁵²

Most of the critics' concerns are reflected in the substantive determinations of the Reagan appointees. The overall decision-making of the D.C. Circuit became more conservative. The three-judge panels increasingly split along the political party lines of the Presidents who named the jurists. This was especially true on highly controversial public pol-

generally *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 1 (1991) [hereinafter *Thomas Hearings*].

47. *Biographies*, *supra* note 28, at 1100 (Judge Bork). Judge Scalia was Assistant Attorney General for the Office of Legal Counsel, and Judge Bork was Solicitor General. Judge Scalia taught at the University of Chicago Law School, and Judge Bork taught at Yale Law School.

48. *See Biographies*, *supra* note 28, at 1100; *see generally* Kenneth W. Starr, *Assessing the Health of the Federal Courts*, THIRD BRANCH, Feb. 1993, at 10.

49. *See, e.g.*, Friedman, *supra* note 46, at C8 (eight white males); Carter, *supra* note 19, at 44 (sharing President's views); *see also supra* note 23 and accompanying text (President's views).

50. *See Biographies*, *supra* note 8, at 1421-22 (Judges Buckley, Sentelle, and Williams possessed little directly relevant expertise); *see generally supra* notes 29, 32, 36 and accompanying text.

51. *See, e.g.*, Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008 (1991); Laurence H. Silberman, *The American Bar Association and Judicial Nominations*, 59 GEO. WASH. L. REV. 1092 (1991).

52. *See supra* note 18 and accompanying text. Evidence suggests that a few Reagan appointees may lack other qualities, namely the judicial temperament necessary to serve on an appellate court. *See infra* notes 62-65, 84 and accompanying text; *see generally* Patricia M. Wald, *Random Thoughts on a Random Process: Selecting Appellate Judges*, 6 J.L. & POL. 15, 20-21 (1989).

icy issues, such as affirmative action and prison conditions.⁵³ Similar divisions arose on procedural issues, particularly threshold questions that implicated access to the federal courts.⁵⁴ For example, an analysis of two important standing cases of the 1987 term in which the en banc D.C. Circuit split evenly showed that the court had "divided on ideological grounds."⁵⁵ As Judge Mikva observed, these lawsuits "engendered some six separate opinions of great length and much sound and fury."⁵⁶

During the summer of 1987, the most controversial public revelation of sharp disagreement on the D.C. Circuit emerged over the standard for en banc review of panel decisions.⁵⁷ The new conservative majority of Republican judges granted en banc review ostensibly to reverse several determinations by the court's liberal Democratic appointees.⁵⁸ This prompted Judge Laurence Silberman, a Reagan appointee, to join the "liberal" judges in voting to vacate the earlier decisions permitting en banc review.⁵⁹ Judge Edwards, writing for the majority, criticized the minority for doing "substantial violence to the collegiality that is indispensable to judicial decisionmaking."⁶⁰ Judge Starr, the only conservative member of the court to author a written dissent, characterized the determination to vacate as "destabilizing and unseemly."⁶¹

The prominent public display in the Federal Reporter Second of these differences of opinion may have been symptomatic of the reduced collegiality on the D.C. Circuit. Such collegiality is essential to service on an appellate court and had apparently been dwindling. Judges Scalia and Wald, the consensus-builders, had previously maintained a modi-

53. See, e.g., *Hammon v. Barry*, 813 F.2d 412 (D.C. Cir. 1987) (affirmative action), *cert. denied*, 486 U.S. 1036 (1988); *Twelve John Does v. District of Columbia*, 861 F.2d 295 (D.C. Cir. 1988) (prison overcrowding).

54. These issues include standing, ripeness, mootness, and related issues, such as attorney fee awards. For sharp disagreements on ripeness, see the majority, concurring, and dissenting opinions in *Consolidated Coal Co. v. Federal Mine Safety & Health Review Commission*, 824 F.2d 1071, 1088, 1089 (D.C. Cir. 1987); see generally Patricia M. Wald, *The D.C. Circuit Here and Now*, 55 GEO. WASH. L. REV. 718, 719-24 (1987); Carter, *supra* note 19.

55. Glenn D. Grant, Comment, *Standing on Shaky Ground*, 57 GEO. WASH. L. REV. 1408, 1408 (1989); see also *Center for Auto Safety v. Thomas*, 847 F.2d 843 (D.C. Cir.) (en banc) (per curiam), *vacated*, 856 F.2d 1557 (D.C. Cir. 1988); *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 846 F.2d 1499 (D.C. Cir. 1988) (en banc).

56. Abner J. Mikva, *Strum Und Drang at the D.C. Circuit*, 57 GEO. WASH. L. REV. 1063, 1066 (1989); cf. Wald, *supra* note 54, at 719 (noting Supreme Court's reversal of several circuit standing decisions as too restrictive).

57. *Bartlett v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987); see generally Ginsburg & Falk, *supra* note 51.

58. *Bartlett*, 824 F.2d at 1242-43.

59. *Id.* at 1246-47.

60. *Id.* at 1243.

61. *Id.* at 1253 (emphasis omitted); see generally Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29 (1988).

cum of collegiality between liberals and conservatives.⁶² When Judge Scalia became a Supreme Court Justice, however, this consensus deteriorated. Moreover, little remained to moderate the forceful presence of Judge Robert Bork, who substantially contributed to the court's political polarization on controversial issues.⁶³ Judge Bork's bitter battle over confirmation to the Supreme Court and his subsequent resignation from the D.C. Circuit may have temporarily diffused some of the dissension.⁶⁴ Nonetheless, disputes have continued and occasionally erupted into public controversies and confrontations.⁶⁵

C. *Bush Administration*

Federal judicial selection under the Bush Administration merits less examination because it resembled the approach used by the Reagan Administration.⁶⁶ For example, President Bush adopted the same goal of making the federal courts more conservative⁶⁷ and relied substantially on senatorial courtesy and patronage.⁶⁸ The Bush Administration, however, changed certain features of the judicial selection procedure used by the Reagan Administration.⁶⁹ Perhaps most important, the Bush Administration instituted special efforts to nominate women and minorities, but it only initiated these efforts in 1990, and they were less comprehensive than the Carter Administration's similar efforts.⁷⁰

The Bush Administration appointed only three judges and nominated one other person to the D.C. Circuit.⁷¹ These few individuals indi-

62. See Carter, *supra* note 19, at 43.

63. *Id.*; see also ROBERT BORK, *THE TEMPTING OF AMERICA* (1990); Kenneth Karpay, *The D.C. Circuit's New Face*, LEGAL TIMES, May 4, 1987, at 1; see generally Pierce, *supra* note 28; Patricia M. Wald, *Life on the District of Columbia Circuit: Literally and Figuratively Halfway Between the Capitol and the White House*, 72 MINN. L. REV. 1 (1987).

64. See BORK, *supra* note 63; GITENSTEIN, *supra* note 2.

65. See *infra* note 84 and accompanying text.

66. See Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294 (1991); Lewis, *supra* note 27, at A1.

67. See, e.g., Letter from President George Bush to Senator Robert Dole (Nov. 30, 1990) (on file with author); Lewis, *supra* note 27, at A1; see also *supra* note 23 and accompanying text (Reagan Administration goal).

68. See *supra* note 27 and accompanying text.

69. For example, President Bush altered his predecessor's approach to Supreme Court nominations by submitting "stealth" candidates. See Tobias, *supra* note 2, at 1270-71. Mr. Bush also announced that he sought to name judges who would interpret the law, rather than legislate. See *The Candidates Respond*, A.B.A. J., Oct. 1988, at 52, 57; *The Election: Clinton v. Bush, The Candidates on Legal Issues*, A.B.A. J., Oct. 1992, at 57, 57; see also *supra* notes 23-27 and accompanying text (Reagan Administration approach).

70. See, e.g., Letter from President George Bush to Senator Robert Dole, *supra* note 67; Goldman, *supra* note 66, at 297; see also *supra* note 5 and accompanying text (President Carter's efforts).

71. The judges were Judges Henderson, Randolph, and Thomas. See generally *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 101st

cate that the Bush Administration chose less doctrinaire nominees for the court than President Reagan's nominees. Moreover, the Bush Administration apparently placed more emphasis on qualities important to service on the D.C. Circuit, especially significant government experience.

President Bush and his staff, in contrast to the Reagan Administration, did not rely on the idea of the D.C. Circuit as a national court to justify nominations from outside the District of Columbia.⁷² For instance, appointees A. Raymond Randolph and Clarence Thomas and nominee John Roberts were members of President Bush's or prior Republican administrations,⁷³ and Clarence Thomas and Karen LeCraft Henderson could be characterized as proteges or friends of senators who were loyal or important to President Bush.⁷⁴ Nonetheless, A. Raymond Randolph and John Roberts actively practiced for most of their legal careers in Washington, D.C.; Clarence Thomas was a government policymaker for nearly a decade and is an African-American; and Karen LeCraft Henderson is a woman.⁷⁵

In short, the Bush Administration was more attentive to the D.C. Bar's concerns which were expressed during the Reagan Administration. This more cooperative approach, the gender and racial diversity of the judges, and the local character of most of the nominees apparently explains why the D.C. Bar was less critical of the Bush Administration's selection policies. The choice of Judge Henderson, who seemed to have limited expertise relevant to the D.C. Circuit and no links with Washington, except support from a powerful Republican Senator, probably sufficed to keep the issue alive.⁷⁶

The judicial selection efforts of the Bush Administration were suc-

Cong., 2d Sess. 447 (1991) (testimony of Judge Henderson) [hereinafter *Henderson Hearings*]; *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 21 (1991) (testimony of Judge Randolph) [hereinafter *Randolph Hearings*]. The nominee was John Roberts. See Daniel Klaidman, *Bush Chooses Deputy SG for D.C. Circuit*, *LEGAL TIMES*, Dec. 16, 1991, at 1; *infra* notes 77-78 and accompanying text. Judge Thomas's relatively short tenure on the Circuit also complicates this assessment.

72. See *supra* notes 28-30 and accompanying text.

73. See *infra* notes 77-78 and accompanying text.

74. Judge Henderson was a protege of Senator Strom Thurmond, and Judge Thomas was a protege of Senator Danforth. See, e.g., *Shoo-Ins*, *NAT'L L.J.*, Apr. 23, 1990, at 7; Lewis, *supra* note 27, at A1; see generally *Henderson Hearings*, *supra* note 71; *Thomas Hearings*, *supra* note 46.

75. See *Biographies*, *supra* note 8, at 1422 (Judge Randolph); Klaidman, *supra* note 71 (Roberts). Justice Thomas, the second appointee, headed the EEOC for eight years. See Marcia Coyle, *Liberals Sound Alarm on D.C. Circuit Choice*, *NAT'L L.J.*, July 24, 1989, at 4; see generally *Thomas Hearings*, *supra* note 46.

76. See *Biographies*, *supra* note 8, at 1422 (Judge Henderson's expertise); *supra* note 74 (Judge Henderson's support from Senator Thurmond).

cessful in attaining its judicial selection goals. Practically all of the lawyers appointed or nominated had strong paper qualifications, and most had participated in challenging legal practices and graduated from excellent law schools. For instance, both Judge A. Raymond Randolph and nominee John Roberts had served as Deputy Solicitor General,⁷⁷ and Judge Clarence Thomas headed the Equal Employment Opportunity Commission.⁷⁸

Critics of the Bush Administration's appointments to the D.C. Circuit note the judges' lack of political diversity.⁷⁹ One Bush appointee apparently had limited experience directly pertinent to the appeals court's caseload.⁸⁰ Moreover, these judges have undertaken little scholarship.⁸¹

It is difficult to draw definitive conclusions about the substantive decision-making of the appointees because the President elevated Judge Thomas to the Supreme Court, John Roberts' nomination languished in the Senate Judiciary Committee, and Judges Henderson and Randolph were not appointed until 1990. Nonetheless, some conclusions can be posited by considering the court's determinations since 1990.

The D.C. Circuit's decision-making generally has continued to be conservative. For example, in cases involving important issues of substantive policy and court access the circuit panels have split along the party lines of their respective appointing Presidents.⁸² Perhaps most prominent was the decision that overturned Colonel Oliver North's conviction.⁸³ There has also been some evidence of continuing lack of collegiality. For example, in a tense private conference on an affirmative action case, Judge Silberman, angry at Judge Mikva, exclaimed: "If you

77. See *Biographies*, *supra* note 8, at 1422 (Judge Randolph); Klaidman, *supra* note 71 (Roberts); see generally *Randolph Hearings*, *supra* note 71.

78. See *supra* note 75.

79. See, e.g., Klaidman, *supra* note 71 (Judge Thomas' conservatism); *Henderson Hearings*, *supra* note 71, at 447-50 (Judge Henderson's testimony indicating conservatism); see also *infra* notes 82-83 and accompanying text (D.C. Circuit's decision-making continuing to be conservative); see generally Sandra Torrey, *Democrats Start Jockeying For Judgeships*, WASH. POST, Dec. 7, 1992, at F5.

80. See *Biographies*, *supra* note 8, at 1422 (Judge Henderson's apparently limited expertise directly pertinent to D.C. Circuit's caseload); see generally *Henderson Hearings*, *supra* note 71.

81. These judges have produced some scholarship. See, e.g., Clarence Thomas, *Transition from Policymaker to Judge—A Matter of Deference*, 26 CREIGHTON L. REV. 441 (1993); Clarence Thomas, *Commencement Address*, 42 SYRACUSE L. REV. 815 (1991).

82. See, e.g., *Shurberg Broadcasting v. FCC*, 876 F.2d 902 (D.C. Cir. 1989) (FCC minority distress policy), *rev'd sub nom. Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991) (en banc) (attorneys fees), *cert. denied*, 112 S. Ct. 3054 (1992); *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir. 1989) (court access), *vacated*, 498 U.S. 1117 (1991); but see Wald, *supra* note 19, at 1146 (only one-fourth of high profile cases rendered by split panels between 1986 and 1991).

83. *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

were 10 years younger, I'd be tempted to punch you in the nose."⁸⁴

The more moderate judicial selection policies of the Bush Administration do not mean that the D.C. Circuit is free from the problems that concerned the D.C. Bar. Nevertheless, the election of President Bill Clinton, who may be more receptive to certain of the D.C. Bar's concerns, has revived the Bar's interest in participating in the Clinton Administration's nominations to the D.C. Circuit. The concrete manifestation of this renewed interest is the D.C. Bar's development of its proposal for a nominating commission. The next section of this Essay evaluates that proposal.

III. CRITICAL ANALYSIS OF THE PROPOSAL

A. Introduction

What is at stake must be clearly be identified in assessing the D.C. Bar's proposal to create a judicial nominating panel. It is difficult to challenge the principles that the maximum beneficial input would improve federal judicial selection and that the D.C. Bar should participate in the process of choosing judges for the D.C. Circuit. Therefore, the critical issues are the precise nature of the Bar's involvement, the appropriate weight that its input should receive, and the ramifications of those determinations.

The proposal provided that the D.C. Delegate and the Executive Branch would commit in advance to recommend someone from slates of at least three candidates submitted by the D.C. Bar.⁸⁵ Therefore, for purposes of analyzing the proposal, I assume that President Clinton and his advisers would seriously consider for appointment to the D.C. Circuit those candidates forwarded by the nominating panel and that such treatment could correspondingly limit nationwide searches for judges.⁸⁶ Accordingly, evaluation of the benefits of employing national pools in selecting nominees precedes analysis of the proposal's benefits.

B. Benefits of a National Pool

Numerous factors suggest that it is preferable to conduct nationwide searches for the best candidates to fill the vacancies on the appeals

84. Neil A. Lewis, *The 1992 Campaign: Selection of Conservative Judges Insures President's Legacy*, N.Y. TIMES, July 1, 1992, at A13. Judge Silberman later explained that his statement was not a real threat because "Judge Mikva did not immediately become ten years younger." *Id.*

85. See APPENDIX B.

86. The administration's failure to consider the candidates seriously would be politically unwise. I recognize and suggest that according serious consideration to members of the D.C. Bar can be compatible with nationwide searches. See *infra* text accompanying notes 124-28. Nevertheless, serious consideration could well reduce reliance on the national pool.

court. These considerations implicate the Circuit's peculiar caseload; issues of gender, racial, political, and geographic diversity; pragmatic questions of policy and politics; and the qualifications judges must possess to serve effectively on the court.

Many aspects of the D.C. Circuit's caseload warrant reliance on nationwide pools. The court's docket, although not unique, differs significantly from the caseloads of the remaining circuit courts. Most appeals to the D.C. Circuit are national in several respects, particularly in terms of where the suits originate and the impact of the court's decisions. Much of this is attributable to the District of Columbia's position as the seat of the federal government.

In some statutes, Congress has specifically authorized individuals, who claim that the United States has harmed them anywhere in the country, to sue the government in Washington, D.C.⁸⁷ In other statutes, principally social legislation such as environmental measures, Congress requires persons challenging certain administrative decisions to appeal directly from the agency to the D.C. Circuit.⁸⁸ In the District of Columbia, parties also institute actions involving disputes between the three branches of the federal government and between those branches and state and local governments.

This federal inter-branch litigation includes bitter fights between the Congress and the Executive over raw political power, high principle, and questions of the respective branches' authority to act, especially in areas that trench on one another's power. Additional cases implicate disagreements over the country's most cherished symbols and sacred institutions, such as the flag, religion, delicate issues of national security, the authority to dispatch troops into international combat, and even the prosecution of high-ranking public officials.⁸⁹

Nearly three-quarters of the D.C. Circuit's docket comprise exceedingly complex suits which seek review of federal administrative agency action. Many of these "cases arise under new statutory or regulatory regimes," have multiple issues or parties, present novel questions and

87. See, e.g., 42 U.S.C. § 405(g) (1988) (Social Security appeals); cf. 28 U.S.C. § 2343 (1988) (prescribing venue for review of certain agency orders in D.C. Circuit or where petitioner resides or has principal place of business); see also 28 U.S.C. § 1391 (1988 & Supp. 1992) (general venue statute); see generally *supra* notes 21-22 and accompanying text.

88. See, e.g., 30 U.S.C. § 1276 (1988) (Surface Mining Control and Reclamation Act); 42 U.S.C. § 7607(b) (1988 & Supp. 1992) (Clean Air Act); cf. 15 U.S.C. § 2060(a) (1988) (Consumer Product Safety Act provides for review of consumer product safety rules in D.C. Circuit or circuit where plaintiff resides).

89. See, e.g., *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir.) (public officials), *cert. denied*, 493 U.S. 1003 (1989); *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990) (overturning Colonel Oliver North's conviction), *cert. denied*, 500 U.S. 941 (1991); see also Wald, *supra* note 19, at 1143-46 (describing other high-profile cases implicating issues in text).

innovative arguments, and are extremely complicated.⁹⁰ A number of the actions involve cutting-edge issues of science, technology, economics, and ethics. Some of the lawsuits implicate difficult public policy choices about allocating scarce societal resources that Congress lacks either the substantive expertise or the political will to resolve.⁹¹

Thus, most of the D.C. Circuit's caseload contrasts markedly with the dockets of other appeals courts. Many of the D.C. Circuit's suits bear little relationship to the geographic area where the court is situated and certain of the cases involve constitutional issues. These lawsuits, particularly those that seek review of federal administrative agency determinations, affect millions of Americans and have national and international ramifications.

The lack of gender, racial, and political diversity on the D.C. Circuit favors employing nationwide searches for judicial candidates. These concepts are only briefly canvassed here because the propositions are obvious, both President Clinton and staunch advocates of the D.C. Bar proposal espouse the notions, and the ideas have been examined elsewhere.⁹² For example, it is easier to enhance diversity with a pool of 800,000 lawyers than one of 60,000. Five of the white males whom President Reagan appointed remain on the court, and they have reduced gender, racial, and political balance. President Clinton as a candidate stated that he would name highly-qualified women and minorities and less politically conservative attorneys to the federal judiciary.⁹³ Correspondingly, the presence on the D.C. Circuit of more women and minorities will help their colleagues better appreciate and resolve difficult issues that courts increasingly confront,⁹⁴ increase numerous citizens' confidence in the federal justice system,⁹⁵ and improve conditions for

90. Spottswood W. Robinson, III, *The D.C. Circuit: An Era of Change*, 55 GEO. WASH. L. REV. 715, 716 (1987); see generally Pierce, *supra* note 28; Wald, *supra* note 63; Colloquy, *The Contributions of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 507-59 (1988).

91. See, e.g., LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 41-48 (1965); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676-81 (1975); see generally Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745, 754-56 (1987).

92. See, e.g., Martin, *supra* note 5 (examined elsewhere); Tobias, *supra* note 2 (same and President Clinton's advocacy); Carl Tobias, *Closing the Gender Gap on the Federal Courts*, 61 U. CIN. L. REV. 1237 (1993) (same); see also *supra* notes 39-40 (staunch advocates espouse); *supra* notes 39, 49, 53-56, 79, 82-83 (lack of diversity on D.C. Circuit).

93. See *supra* notes 39, 49, 53-56 (President Reagan's appointments); *The Election: Clinton v. Bush, The Candidates on Legal Issues*, *supra* note 69 (President Clinton's statement); Bill Clinton, *Judiciary Suffers Racial, Sexual Lack of Balance*, NAT'L L.J., Nov. 2, 1992, at 15 (same).

94. Prominent examples are issues involving employment discrimination, such as affirmative action, and allocation of scarce resources. See Tobias, *supra* note 2, at 1276 nn.101-02; see also Slotnick, *supra* note 3, at 272-73. This assistance is especially important on an appellate court that renders decisions in three-judge panels.

95. See, e.g., Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 64 JUDICATURE 246,

women and minorities in the legal profession and society as a whole.⁹⁶

Another aspect of the D.C. Circuit's current composition warrants reliance on a national pool. This is the lack of geographic diversity. For instance, a majority of the judges now on the D.C. Circuit served as federal government lawyers in Washington, D.C. before appointment.⁹⁷ There is considerable value to selecting judges who have practiced law or lived outside the peculiar environment of the nation's capital, associated as it is with such phenomena as politics, power, money, and patronage and all of their negative connotations.⁹⁸ Therefore, choosing judges from other locales considers pragmatic political realities, especially popular distrust of the federal government. These sentiments have contributed to the election of every recent President. In other words, there could be some virtue in geographic distance from the country's capital. Moreover, judges on the D.C. Circuit should appreciate the profound effect of its decisions on Americans living and working outside of Washington, D.C.⁹⁹

Drawing on a national pool recognizes and capitalizes on the incredible wealth of legal talent that exists throughout the United States. A pool that includes 750,000 additional attorneys will facilitate the selection of candidates who best satisfy the qualifications crucial to membership on the D.C. Circuit. Many lawyers possess the qualities that are important to such service. Practitioners in every jurisdiction certainly have the intelligence, industry, independence, integrity, and temperament necessary to discharge judicial duties on any federal appellate court. Gender, racial, and political diversity are available throughout the United States.

Numerous attorneys in various locales even possess those attributes more peculiar to discharging the duties of D.C. Circuit judges. For instance, many law school faculty are experts in administrative law.¹⁰⁰

253 (1978); cf. *The Election: Clinton v. Bush, The Candidates on Legal Issues*, *supra* note 69, at 57-58 (similar suggestion by President Clinton).

96. See, e.g., Tobias, *supra* note 25, at 176; Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477, 484 (1991); see generally Martin, *supra* note 25.

97. Judges Edwards, Ginsburg, Henderson, Sentelle, and Williams had not served as government attorneys, although Judges Sentelle and Williams had been Assistant United States Attorneys. See *Biographies*, *supra* note 8, at 1420-22.

98. I understand that most of these phenomena also have positive connotations and that they do not adequately capture work or life in Washington, D.C. or other metropolitan areas.

99. I certainly do not intend to overstate these ideas, although the comparisons may seem somewhat overdrawn. I do not mean to create false dichotomies that everything in Washington is evil and everything outside Washington is good. Citizens in the remainder of the country, however, increasingly believe that they are entitled to greater representation in all segments, including the courts, of the federal government.

100. Examples include Professor Christopher Edley of Harvard Law School, now serving in the Office of Management and Budget, and Professor Cass Sunstein of the University of Chicago

Competent attorneys across the country can master enormous records, understand complex scientific and technological issues, and competently review difficult public policy choices regarding allocation of scarce resources. When President Clinton nominated Janet Reno for the position of Attorney General, the Chief Executive implicitly acknowledged many of the ideas discussed above by stating that he was honoring a campaign commitment to name the best from both the statehouses and the courthouses.¹⁰¹

C. *Benefits of the Proposal*

Perhaps the foremost benefit of the D.C. Bar's proposal is the special consideration that it accords members of the D.C. Bar in selecting judges for the D.C. Circuit. The D.C. Bar comprises thousands of capable lawyers who are well-equipped to serve on the appeals court, and the Bar should be treated as an important constituent of the national pool.¹⁰²

The D.C. Bar is undoubtedly one of the most sophisticated bars in the United States. It includes exceptionally competent attorneys who have expertise in the types of disputes important to the D.C. Circuit's caseload. For instance, numerous members of the D.C. Bar have devoted their careers to practice before and with federal administrative agencies; others have actively participated in litigation involving the branches of the federal government, the country's most significant symbols and institutions, and national security and international law.¹⁰³

The D.C. Bar's proposal affords the possibility of increasing gender, racial, and political diversity on the D.C. Circuit. The D.C. Bar includes the most substantial group of highly-qualified female and minority attorneys in the nation. At least 13,000 women, 3,000 African-Americans, and 750 Latinos practice law in Washington.¹⁰⁴ Moreover, the District has the most female and minority attorneys who have earned partnerships in large law firms and the most women and minorities who

Law School. See generally CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990).

101. "I pledged when I ran to reach beyond Washington, to bring the best from America's state-houses and courthouses to our government . . ." Announcement by President Bill Clinton of Janet Reno as Attorney General Nominee (Federal Information Systems Corp., Federal News Service, Feb. 11, 1993).

102. These lawyers possess the general qualities relating to merit and diversity and those qualities peculiar to service on the D.C. Circuit, such as expertise in administrative law and practice.

103. See *supra* notes 89-91 and accompanying text.

104. Telephone Interview with Steve Ramirez, Office of Court Administration, D.C. Court System (Mar. 15, 1993); Telephone Interview with Wilbur Smallwood, Membership Director, D.C. Bar (Mar. 15, 1993).

practice in the government.¹⁰⁵ There are more than twenty African-American male, ten white female, and five African-American female judges on the local appellate and trial courts.¹⁰⁶

Insofar as the D.C. Circuit should be considered a national court, the "D.C. Bar is, more than that of any other jurisdiction, the most truly national bar, in terms of geographic representation, size, subject matter and impact."¹⁰⁷ Many members of this bar consciously choose to become lawyers in the country's capital precisely because they want to engage in national practice and work on issues that affect all of the United States and even the world.¹⁰⁸

The D.C. Circuit's docket does not consist exclusively of appeals from federal agency decisions and other cases that only have consequences outside of Washington, D.C. The D.C. Circuit hears numerous civil and criminal appeals from the United States District Court for the District of Columbia that have essentially local import.¹⁰⁹ The resolution of these lawsuits requires more appreciation for the practice of law in Washington, D.C. and for the local legal culture, concomitant knowledge of the rules of evidence and of civil and criminal procedure as applied within the jurisdiction, and an understanding of work and life in the District of Columbia.¹¹⁰ Local attorneys and judges will have greater comprehension of these phenomena than those from other places.¹¹¹

105. See Friedman, *supra* note 46, at C8; see also Torrey, *supra* note 79, at F5 (D.C. Delegate stated "[o]ur cup runneth over with qualified lawyers, especially women and minorities.").

106. See Telephone Interview with Steve Ramirez, *supra* note 104.

107. Friedman, *supra* note 45, at A19; see also Friedman, *supra* note 46, at C8. I am obviously assuming that the D.C. Circuit should be considered a national court for the purposes of argument.

108. See Friedman, *supra* note 46.

109. Sixteen percent of the appeals were criminal cases in 1992. Telephone Interview with Ann Pomeroy, Office of the D.C. Circuit Executive (Mar. 15, 1993). The United States Attorney has discretion to prosecute many criminal cases in the United States District Court or the local courts and typically exercises that discretion to file in District Court in high-profile cases. See, e.g., *supra* note 89 and accompanying text; see also Wald, *supra* note 19, at 1142 (observing that administrative appeals continue to dominate the court's docket but have dropped measurably since mid-1980s); cf. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 11-301, 84 Stat. 473, 476 (1970) (abrogating D.C. Circuit's jurisdiction over local, nonfederal cases).

110. Of course, the evidentiary and procedural rules are supposed to be similar in all ninety-four federal trial courts. The local rules, however, have severely eroded that concept for the civil rules. See, e.g., Stephen N. Subrin, *Federal Rules, Local Rules and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 999 (1989); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992).

111. These experiences range from trying exceedingly complex antitrust cases, to viewing the art in the National Gallery, to riding the Metro in the city that has had the highest murder rate in the nation. But see *supra* notes 97-99 and accompanying text.

These ideas regarding knowledge of Washington, D.C. are related to notions of representation on that court for individuals who work or live in Washington, D.C. Lawyers, parties, judges, and persons who work or live in the District of Columbia are arguably entitled to some representation on the federal appellate court situated in the country's capital and in the national legislature.¹¹²

As the above factors indicate, attorneys who practice in the District of Columbia will possess the qualifications important for effective service on the D.C. Circuit. Many of these lawyers will also have the intelligence, industry, independence, and integrity as well as the judicial temperament necessary to be excellent federal appellate court judges.

In sum, the major benefit of conducting nationwide searches for nominations to the D.C. Circuit is the opportunity to select the very finest judges from the 800,000 attorneys throughout the country. The principal benefit of the D.C. Bar proposal would be the heightened consideration that it could afford the D.C. Bar, which clearly comprises a valuable source of lawyers who are well-suited for service on the D.C. Circuit. The Bar's membership, therefore, should receive serious consideration for every vacancy on the D.C. Circuit. The question that remains is precisely what weight the Clinton Administration should place on the D.C. Bar's recommendation and its proposal. The next section suggests how the Clinton Administration should resolve those issues and how it should appoint new judges to the D.C. Circuit.

IV. SUGGESTIONS FOR THE FUTURE

A. Introduction

The Clinton Administration has not finalized its judicial selection procedures. The delayed appointment of Janet Reno as Attorney General slowed institution of an appointment procedure. Moreover, President Clinton has made few public pronouncements about the goals or procedures that he intends to implement.¹¹³ Nonetheless, administration

112. A number of these propositions lead to the question of statehood for the District of Columbia, which would partially respond to the concerns of the D.C. Bar that engendered development of its proposal. *See supra* notes 28-46. Statehood would enable residents of the District to elect a senator who would have the ability to protect the interests of both the D.C. Bar and the people who live and work in the district when attorneys are nominated to the D.C. Circuit. The issue of Washington, D.C. statehood is beyond the scope of this paper. *See generally* Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U. L. REV. 311 (1990); Philip G. Schrag, *By the People: The Political Dynamics of a Constitutional Convention*, 72 GEO. L.J. 819 (1984); Louis M. Seidman, *The Preconditions For Home Rule*, 39 CATH. U. L. REV. 373 (1990).

113. *See supra* note 93 and accompanying text (President Clinton's pledges); *see also* Michael York, *Clout Sought in Choosing U.S. Judges*, WASH. POST, Feb. 5, 1993, at D3 (Clinton

officials in the Office of White House Counsel and at the Justice Department have undertaken some planning for judicial selection, and Janet Reno may be receptive to the idea of nominating panels because Florida employs similar commissions.¹¹⁴

It appears that the Clinton Administration will retain primary responsibility for choosing appointees to all of the appellate courts, including the D.C. Circuit. For each opening, the administration probably will compile a small group of potential nominees; it may request input on these attorneys, and perhaps consider the submission of additional candidates, from several sources. The most important sources are likely to be Democratic senators and other elected officials who represent the relevant geographic areas and state and local bar associations.¹¹⁵ The Clinton Administration has not yet indicated whether it will revitalize the circuit nominating commission that President Carter instituted and his Republican successors dismantled.¹¹⁶ In choosing district judges, by comparison, the new administration plans to defer to senators from those regions where the judges will sit.¹¹⁷

B. *Judicial Selection for the D.C. Circuit*

When proposing nominees for vacancies on the D.C. Circuit, President Clinton and his advisers should apply the criteria relating to merit and diversity that they are employing for other appellate court vacancies. The Clinton Administration should also consider qualifications that meet the peculiar needs of the D.C. Circuit.

In considering merit, President Clinton should name those lawyers whose records of achievement promise that they will be excellent judges. For example, the attorneys should be very intelligent, highly industrious, possess great integrity and significant independence, and

Administration signaling that it intends to give deference to Democratic senators in district court judicial selection).

114. Ronald Klain of the White House Counsel's Office has major responsibility for judicial selection, and that office has assumed greater responsibility than the Justice Department to date. This situation may change if Janet Reno wishes the Department to assume greater responsibility. Telephone Interview with Mark H. Tuohey, III, Reed, Smith, Shaw & McClay, Washington, D.C., and D.C. Bar President-Elect (Feb. 27, 1993) (Janet Reno's possible receptivity to commissions).

115. See York, *supra* note 113, at D3 (Democratic senators, or representatives if no senators); cf. Torrey, *supra* note 79, at F5 (D.C. Delegate hoping to have analogous input).

116. The administration has simply made no affirmative decision favoring or rejecting revitalization. Of course, the D.C. Bar's proposal could serve as a valuable experiment in revitalization, and the panel created is now doing so for the district court. See *supra* note 24 and accompanying text (dismantling by Reagan Administration of Carter panel); Tobias, *supra* note 2, at 1270-74 (Bush Administration failure to revive panel).

117. Telephone Interview with George Kassouf, Alliance for Justice, Washington, D.C. (Feb. 25, 1993); see also York, *supra* note 113, at D3.

evince balanced dispositions.¹¹⁸ When considering gender, racial, and political diversity, the President should analyze the present composition of the D.C. Circuit to determine whether the court might be differently constituted.

The administration should honor President Clinton's campaign promise to increase balance on the judiciary. For instance, the diverse perspectives, especially from life experiences, that female and minority judges will bring to the appellate court may improve substantive determinations.¹¹⁹ The appointment of more women and minorities would also increase public confidence in the federal courts.¹²⁰ Enhanced political balance may correspondingly lead to judicial decisions that are more responsive to individuals' constitutional rights and to congressional intent—for example, that judges facilitate court access for resource-poor litigants.¹²¹

President Clinton and his advisers should be sensitive to the court's unusual docket and the expertise required to resolve that caseload. When treating the Circuit's current composition, the Clinton Administration should address the lack of gender, racial, and political diversity on the appeals court. The administration should also consider the apparent decline in collegiality among the judges on the D.C. Circuit.¹²² Although this consideration would ordinarily be less important than others, collegiality has seemingly decreased enough to warrant emphasizing characteristics, such as judicial temperament, consensus-building, and conciliation.¹²³

All of the above factors indicate that the administration must seek nominees from the broadest available pool, the 800,000 lawyers throughout the nation. President Clinton and his advisers should con-

118. See Tobias, *supra* note 2, at 1274-75 (more discussion of merit).

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

120. See *supra* note 95 and accompanying text.

121. See Tobias, *supra* note 2, at 1277-78, 1278 n.108 (political diversity and decisions responsive to rights and to congressional intent); see also Carl Tobias, *Civil Rights Procedural Problems*, 70 WASH. U. L.Q. 801 (1992) (congressional intent expressed in substantive, procedural, and fee-shifting statutes); see generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (discussing current debate over statutory interpretation); Wald, *supra* note 54, at 724-28 (statutory interpretation of the D.C. Circuit).

122. See *supra* notes 62-65, 84 and accompanying text.

123. Although increased diversity, especially politically, may ameliorate the decreased collegiality, some of the decreased collegiality may be the inevitable by-product of the very different judicial selection practices that Democratic and Republican administrations implemented. Indeed, one of the most difficult questions that President Clinton must confront is how to address political diversity on the courts. See, e.g., Stephen Carter, *Judge Selection: Keeping Politics Out; Let's Fess Up to What's Been Going On*, LEGAL TIMES, Nov. 9, 1992, at 27. For helpful analysis of this issue, see GITENSTEIN, *supra* note 2; Wald, *supra* note 52; Jeff Rosen, *Court Test: Clinton's Opportunity*, NEW REPUBLIC, Sept. 28, 1992, at 15.

duct national searches for outstanding attorneys whose abilities are best-suited to the D.C. Circuit's needs and reject the notions of nationwide patronage and senatorial courtesy.¹²⁴

This approach is intended to be compatible with the D.C. Bar proposal because attorneys who practice in the District should be considered as valuable constituents of the national pool. Nationwide searches may lead to the D.C. Bar because it includes lawyers who satisfy all of the applicable indicia of merit and possess expertise that is particularly relevant to the D.C. Circuit's caseload. Many D.C. Bar attorneys are women and minorities with a broad range of political perspectives. Thus, just as it would have been a mistake for the country and the District to lose the remarkable abilities of Harold Leventhal or Patricia Wald because they practiced locally, so too would it have been unfortunate to lose the gifts of David Bazelon, Warren Burger, or Harry Edwards because they were not practicing in Washington, D.C.¹²⁵

President Clinton and the D.C. Bar could implement the suggested approach in numerous ways. The administration officials responsible for judicial selection should seek input from the D.C. Bar and the D.C. Delegate.¹²⁶ The officials should encourage the bar association and the delegate to search for, find, and foster the candidacies of the ablest lawyers who possess the attributes delineated above.¹²⁷ The bar and the D.C. Delegate should institute mechanisms that will efficiently yield the finest attorneys. For instance, the bar and the delegate should submit lists of candidates that are sufficiently short to be manageable yet long enough, in terms of satisfying the requisite criteria of merit and diversity, to afford the administration adequate flexibility in choosing nominees.

The Clinton Administration, through the White House and the Justice Department, should also recruit the best candidates nationally by applying the same criteria. The administration should then seriously consider the names that the D.C. Bar and the D.C. Delegate tender,

124. See *supra* notes 28-46 and accompanying text; see also *supra* text accompanying notes 98-101. Whatever judicial selection criteria the Clinton Administration applies, 750,000 additional lawyers will invariably enhance the quality of the pool.

125. See, e.g., *In Memory of Judge Harold Leventhal*, 80 COLUM. L. REV. 879-893 (1980); Marilyn Berger, *David Bazelon Dies at 83; Jurist Had Wide Influence*, N.Y. TIMES, Feb. 21, 1993, at A38 (obituary).

126. The bar and the delegate are the only official participants envisioned under the bar proposal in APPENDIX B. It may be advisable to consult other local sources, such as African-American political organizations or women's groups, although the D.C. Delegate probably maintains excellent communications with such entities. The procedures actually adopted require such consultation. See APPENDIX A at art. IV.

127. See *supra* notes 118-123 and accompanying text.

solicit their input on national candidates, and select the ablest attorneys for nomination to the D.C. Circuit.

This manner of proceeding contemplates that the Clinton Administration will carefully safeguard its own prerogatives to search nationally while seriously considering the lawyers forwarded by the D.C. Bar and the D.C. Delegate. It should not treat those names as binding or even give them presumptive weight. The administration should take this course of action, even though the proposal envisioned that the Executive Branch and the D.C. Delegate would commit in advance to draw their nominees from the D.C. Bar's list.¹²⁸ Some observers have argued that the administration should accord those recommendations persuasive effect.¹²⁹ The administration, however, should resist pressure to limit its appointments to local lawyers and defend its choices when there are multiple, highly qualified candidates. In short, the Clinton Administration, the D.C. Bar, and the D.C. Delegate must work closely together to nominate the finest judges.

V. CONCLUSION

The D.C. Bar's development of a proposal for treating appointments to the D.C. Circuit affords a valuable opportunity to reevaluate the selection process. This analysis indicates that President Clinton should conduct nationwide searches for vacancies on the D.C. Circuit and seriously consider members of the D.C. Bar. If the new administration implements these suggestions, it will name the best judges to the second most important court in the country.

128. See APPENDIX B.

129. See York, *supra* note 113 (statement of D.C. Bar President Jamie Gorelick); Telephone Interview with Mark H. Tuohey, III, *supra* note 114 (similar statement of D.C. Bar President-Elect).

APPENDIX A

**BY-LAWS AND PROCEDURES FOR THE DISTRICT OF
COLUMBIA FEDERAL JUDICIAL NOMINATING
COMMISSION****ARTICLE I. DEFINITIONS**

Unless it shall appear otherwise from the context, terms shall have the following meaning:

Commission. The District of Columbia Federal Judicial Nominating Commission.

Chair. The Chair of the Commission.

Commissioner. Any member of the Commission.

Applicant. Any person whose name has been submitted to the Commission as a possible nominee to fill a U.S. Attorney, U.S. Marshal or U.S. District Court vacancy.

Congresswoman. The Congresswoman from the District of Columbia.

ARTICLE II. PURPOSES

The purposes of the Commission are to assist in the selection of candidates for federal judicial and law enforcement appointments, including U.S. District Court Judge, U.S. Attorney and U.S. Marshal; to review, investigate and evaluate Applicants; and to recommend to the Congresswoman names to fill each vacancy.

ARTICLE III. MEMBERSHIP

Section 1. Number and Appointment. The Commission shall consist of seventeen (17) members including the Chair, who shall be appointed by the Congresswoman.

Section 2. Term of Office. Commissioners shall serve staggered terms. In order to create staggered terms which will ensure continuity yet allow an orderly turnover and broad community representation, initially eight Commissioners shall serve for one year and nine shall serve for two years. Commissioners may be reappointed. Vacancies shall be filled by the Congresswoman. Commissioners whose terms have expired shall continue to serve until a successor is appointed.

ARTICLE IV. NOTICE OF VACANCIES

Section 1. Notices. Whenever a vacancy occurs for U.S. District Court Judge, U.S. Attorney or U.S. Marshal, the Commission shall announce the vacancy by public notice sent to daily and other local legal

publications, other print and broadcast media, bar associations including women's, ethnic, gay and lesbian bar groups, law schools and other interested parties within the District of Columbia. The notice shall specify the time within which interested Applicants may apply in writing to the Commission.

Section 2. Encouraging Applications. Commissioners may encourage individuals to submit applications, provided that it is made clear that such encouragement in no way constitutes endorsement.

ARTICLE V. APPLICATION PROCESS

Section 1. Questionnaires. A written Applicant questionnaire must be completed by all Applicants for each position.

Section 2. Submittal. Applicants shall complete and submit questionnaires to the Congresswoman's office. The application shall be forwarded to the Commission Chair. The Congresswoman's office will send questionnaires to all interested Applicants, including those who have expressed in writing an interest in applying to fill a vacancy before such vacancy existed or the Commission was established.

ARTICLE VI. SELECTION CRITERIA AND SCREENING PROCESS

Section 1. Selection Criteria. There shall be written criteria adopted by the Commission for the evaluation of candidates. These shall include, but not be limited to the following personal and professional qualities: integrity, legal or law enforcement knowledge and ability, judicial temperament or other professional qualities, diligence, good health, appropriate management skills, decision making ability, and social responsibility.

Section 2. Screening Process. Commissioners shall attempt to elicit from Applicants information pertaining to the adopted selection criteria. Such screening may include, but not be limited to, review of written materials submitted by the Applicant or by others about the Applicant, interview of the Applicant and others familiar with the Applicant, consultation with government agencies, results of investigations and review of relevant information gathered from whatever source.

ARTICLE VII. VOTING FOR NOMINEES

Section 1. General Procedure. Following interviews of Applicants for a vacancy and subsequent discussion by the Commission, the Commission shall vote on individuals for each vacancy to recommend to the Congresswoman. The Commission shall not recommend to the Con-

gresswoman the name of any individual who did not have the support of a majority of the Commission. Generally, the Commission shall recommend three or more persons and more if requested by the Congresswoman for each vacancy, and may recommend more or fewer depending on the number of highly qualified Applicants who receive the support of a majority of the Commission. The Chair shall be entitled to vote. A quorum consisting of a majority of the Commissioners is required for any vote to be taken.

Section 2. Proxy Voting. Proxy voting shall be permitted for Commissioners unable to attend. Proxies must be in writing and received by the Chair prior to the vote and must designate the specific candidates for whom a favorable or unfavorable vote is to be cast. No general delegation of proxy is permitted. Proxies will remain valid as long as the candidate for whom the proxy vote is cast remains under consideration.

Section 3. Further Investigation. The Congresswoman may submit to the United States Department of Justice for executive branch investigation any or all of the names for any vacancy submitted by the Commission and may consider the results of any such investigation prior to making a final recommendation to the President. The final recommendation shall be announced by the Congresswoman.

ARTICLE VIII. ACTION AND COMMISSION RECOMMENDATIONS

Following selection of the most qualified nominees for a vacancy by the Commission, the Chair shall submit those names in alphabetical order to the Congresswoman. All documents and nominee information also shall be forwarded to the Congresswoman. If none of the names is acceptable to the Congresswoman, she shall return the list to the Commission and request additional names.

If an appointment is not accepted by the President or not confirmed by the Senate, the Congresswoman may make another selection for that vacancy from among the Commission's recommendations or may reopen the application process for that vacancy.

ARTICLE IX. COMMISSIONER ETHICS AND CONFIDENTIALITY

Section 1. Confidentiality. The Commission will not be able to get the confidence of the President, the Congresswoman and the public unless it operates with strict confidentiality. Commission proceedings are not public hearings, but are confidential personnel deliberations ancillary to Congressional offices and therefore not subject to the Freedom of Information Act. Only Commissioners, the Congresswoman and

her staff shall be entitled to know the names of all Applicants or finalists. Communications regarding Applicants shall not be made available to the public by the Commission. Confidentiality is essential to the integrity and thoroughness of the Commission's work, such that revealing internal discussions of the Commission's work may be cause for a Commissioner to be relieved of further participation.

Section 2. Recusals. In instances where Commissioners are related (professionally or personally) to Applicants, this fact shall be disclosed to the Chair and, if the Commissioner and the Chair conclude that the Commissioner should not be recused from all votes and interviews for the vacancy for which the Commissioner's conflict arises, the existence of the potential conflict shall be disclosed to the entire Commission. The decision of the Chair not to recuse may be overruled by a majority vote of the remaining Commissioners.

Section 3. Other Ethical Considerations. In the performance of their duties, Commissioners shall be mindful that they hold positions of public trust. No Commissioner should conduct herself or himself in a manner which reflects discredit upon the selection process or discloses partisanship or partiality in the consideration of nominees. Consideration of nominees should be made impartially, discreetly and objectively.

Section 4. Disclosure of Communications with Respect to Applicants. Each Commissioner shall disclose to every other Commissioner any written or oral communication she or he has with any non-Commissioner if such communication related to an Applicant's qualifications or fitness to fill a vacancy.

Section 5. Removal. A Commissioner who violates the confidentiality requirement, fails to disclose to the Commissioners communications with respect to an Applicant, or conducts himself or herself in a manner which violates the public trust or is "at odds" with the By-laws may be relieved from further duty by the Congresswoman.

Section 6. Former Commissioner as Applicant. No Commissioner may be considered as an Applicant for any position unless at least two years have elapsed since the last day of service of such Commissioner on the Commission.

ARTICLE X. COMMUNICATIONS AND OUTREACH

Section 1. Commission Comment to Media. Only the Chair may comment on behalf of the Commission to the media and others, and solicitations for comment should be referred to the Chair. Comment about individual Applicants may be made only by the Congresswoman.

Section 2. Commission Meeting with Congresswoman. The Commission shall meet at least once annually with the Congresswoman to

review procedures and suggestions for possible reforms in the selection process. For other purposes, the Commission shall meet on the call of the Congresswoman or the Chair.

Section 3. Bar Association Investigations. The Commission may call upon bar and other sources as needed to assist in its investigation. If such sources wish to interview the Applicant, the Commission Chair will so inform the Applicant. Engaging in such interviews will be solely at the Applicant's discretion.

ARTICLE XI. EVALUATIVE CRITERIA

In evaluating candidates, the Commission shall consider, but not be limited by, the criteria stated below.

Section 1. Judges. Judges shall be evaluated primarily on these qualities:

- a. Integrity—intellectual honesty, moral vigor and professional uprightness.
- b. Professional skills and experience—broad knowledge of the law and substantive legal and legally relevant experience.
- c. Impartiality—the ability to treat cases objectively regardless of the identity of the parties or subject matter in controversy.
- d. Industry—a diligent and energetic worker.
- e. Good health.
- f. High respect in the legal and local community.
- g. Respect for the Bill of Rights and for the rights of all litigants, entities and parties before the court.
- h. Judicial temperament—dignity, sensitivity and understanding.
- i. Ability to communicate effectively orally and in writing.
- j. Demonstrated commitment to equal justice.
- k. Decisiveness—the ability to make difficult decisions quickly and with firmness.

Section 2. United States Attorneys. U.S. Attorneys shall be evaluated primarily on these factors:

- a. Integrity—intellectual honesty, moral vigor and professional uprightness.
- b. Professional skills and experience—broad knowledge of the law and substantive legal and legally relevant experience.
- c. A background and experience indicating the ability to make official decisions independent of extraneous factors and within the general guidelines established by the U.S. Department of Justice.
- d. Demonstrated administrative and management ability.

- e. Willingness to support and carry out the policies of the President and to accept direction from the Attorney General.
- f. High respect in the legal and local community.
- g. Ability to communicate effectively orally and in writing.
- h. Demonstrated commitment to equal justice.

Section 3. United States Marshals. U.S. Marshals shall be evaluated primarily on these factors:

- a. Integrity—intellectual honesty, moral vigor and professional uprightness.
- b. Knowledge and experience in applying effective preventative and corrective security.
- c. Demonstrated administrative and budgetary ability.
- d. Ability to work effectively and tactfully with individuals and groups representing widely diverse background, interests and points of view.
- e. High respect in the community and among members of the law enforcement profession.
- f. Ability to communicate effectively orally and in writing.
- g. Respect for the rights of all individuals, entities and parties who may come in contact with the office or judicial system.

APPENDIX B

**REPORT OF THE BOARD OF GOVERNORS OF THE D.C.
BAR RECOMMENDATION FOR NOMINATING
COMMISSION FOR FEDERAL JUDGES
FOR THE DISTRICT OF
COLUMBIA**

February 1993

LIST OF RECOMMENDATIONS

RECOMMENDATION NO. 1: The practice of selecting federal judicial candidates for both the Circuit Court and the District Court in the District of Columbia by use of a nomination commission should be reinstated.

RECOMMENDATION NO. 2: The Commission should recommend a slate of candidates either to the executive branch or to the elected delegate from the District of Columbia to Congress, who should commit in advance to make a recommendation for the judicial vacancy from the list.

RECOMMENDATION NO. 3: The composition and method of selection of the Commission should be as follows:

(a) The Commission should have 11 members.

(b) Seven lawyers members should be designated by the Board of Governors of the D.C. Bar.

(c) The remaining four members, at least three of whom should be lay persons, should be designated by the elected Delegate from the District of Columbia to Congress, after receiving recommendations from the Citizen's Advisory Committee of the D.C. Bar and other appropriate groups.

(d) The Chair of the Commission should be designated from among the 11 members by the Elected Delegate from the District of Columbia to Congress.

(e) Members should be appointed for five-year terms, with staggered terms at the outset to provide continuity.

RECOMMENDATION NO. 4: Adequate representation for women and minority groups must be assured in the Commission's composition, both for lawyer and lay members.

RECOMMENDATION NO. 5: The members of the Commission should be chosen without regard to political party affiliation.

RECOMMENDATION NO. 6: The Commission should recommend at least three candidates for each judicial vacancy.

RECOMMENDATION NO. 7: The lawyer members of the Commission should be active members of the D.C. Bar and either reside in the District of Columbia or have substantial professional ties to the District of Columbia.