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# Federal Judicial Selection in the Fourth Circuit

Carl W. Tobias

*University of Richmond*, [ctobias@richmond.edu](mailto:ctobias@richmond.edu)

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# FEDERAL JUDICIAL SELECTION IN THE FOURTH CIRCUIT

CARL TOBIAS\*

*Professor Tobias assesses federal judicial selection for the United States Court of Appeals for the Fourth Circuit and for North Carolina. His Essay ascertains that four of fifteen active judgeships that Congress has authorized for the court have remained vacant over a considerable period and that a seat designated for North Carolina has been unfilled for seven years. He finds that these judicial vacancies may affect the appellate justice which the Fourth Circuit delivers and that North Carolina deserves.*

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\*Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. B.A., 1968, Duke University; LL.B., 1972, University of Virginia, School of Law. I wish to thank Peggy Sanner for valuable suggestions, Angeline Garbett and G. Schloss for processing this piece, and Jim Rogers for generous, continuing support. Errors that remain are mine.

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### INTRODUCTION

Federal judicial selection in the United States Court of Appeals for the Fourth Circuit has proven highly controversial over the last decade. The appointment of appellate judges to this court has provoked charges and countercharges among members of the United States Senate who represent states located in the Fourth Circuit. Senator Jesse Helms (R-N.C.), for example, blocked Senate consideration of two African-Americans, United States District Judge James A. Beaty, Jr., and North Carolina Court of Appeals Chief Judge James A. Wynn, Jr., whom President Bill Clinton nominated.<sup>1</sup> Senator John Edwards (D-N.C.) may prevent the Senate from processing the nomination of United States District Judge Terrence Boyle, whose name President George W. Bush submitted in May 2001 at the apparent behest of Senator Helms.<sup>2</sup> The court also has a second “North Carolina” seat that is open and for which the President has not proposed anyone. On July 20, 2001, Judge Roger Gregory became the first African-American member of the Fourth Circuit, but the Senate confirmed him only after President Clinton accorded Gregory a recess appointment and Virginia’s Republican Senators suggested President Bush nominate Gregory.<sup>3</sup> Moreover,

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1. See, e.g., David Firestone, *With New Administration, Partisan Battle Resumes Over a Federal Appeals Bench*, N.Y. TIMES, May 21, 2001, at A13; John Monk, *Hatch Raps N.C. 4th Circuit Candidate*, CHARLOTTE OBSERVER, Feb. 18, 1996, at 2B; David G. Savage, *Bush’s Judicial Nominees Go 28 for 80 in the Senate*, L.A. TIMES, Dec. 31, 2001, at A12.

2. See, e.g., Jonathan Groner, *Placing Bets on Bush Bench*, LEGAL TIMES, May 13, 2002, at 1; John Wagner, *Panel Would Suggest Nominees*, NEWS & OBSERVER (Raleigh, N.C.), June 19, 2002, at B5.

3. Senator George Allen stated that Gregory had an “inspirational story” and a “proper judicial philosophy,” while Senator John Warner characterized Gregory’s confirmation as an “historic moment.” See Alison Mitchell, *Senators Confirm 3 Judges, Including Once-Stalled Black*, N.Y. TIMES, July 21, 2001, at A16; see also Brooke A. Masters, *Battle Brewing Over 4th Circuit Nominees*, WASH. POST, May 5, 2001, at A6

Maryland's Democratic Senators stopped the nomination of Peter Keisler to the appellate court because President Bush had not consulted them and because the candidate never practiced law in Maryland.<sup>4</sup>

Although Congress has authorized fifteen active judgeships for the Fourth Circuit, the tribunal presently experiences four judicial vacancies, which means that the Sixth Circuit is the only appeals court that now has a higher percentage of empty seats.<sup>5</sup> The Fourth Circuit's Chief Judge, J. Harvie Wilkinson, Jr., has testified before the Senate Judiciary Committee that the appellate court operates efficaciously without its complete judicial complement.<sup>6</sup> The tribunal, however, affords oral arguments in thirty percent of the appeals terminated on the merits and publishes opinions in only eleven percent.<sup>7</sup> The first statistic ties for the smallest and the second is the lowest of the twelve regional circuits; these data raise significant questions about the appellate justice that the appeals court delivers. Indeed, one Fourth Circuit position authorized by Congress during 1990 was not occupied until the Senate confirmed Gregory in 2001, while a North Carolina seat on the court has remained unfilled for seven years.<sup>8</sup>

All of the above propositions suggest that federal judicial selection for the Fourth Circuit is increasingly controversial, contentious, and important, and it warrants assessment. This Essay undertakes such an effort. First, it evaluates the historical background of the problems that have accompanied appointments to the tribunal. The Essay then analyzes possible solutions to these

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(affording background of Gregory's confirmation).

4. See generally Neil A. Lewis, *Bush to Nominate 11 to Judgeships*, N.Y. TIMES, May 9, 2001, at A24 (reporting that Peter Keisler, an expected nominee, was not nominated because of a dispute with Democratic Senators); David Savage, *Bush Picks 11 for Federal Bench*, L.A. TIMES, May 10, 2001, at A1 (reporting that Keisler, the expected nominee for a Maryland seat on the United States Court of Appeals for the Fourth Circuit, was not included in President Bush's nominations).

5. VACANCIES IN THE FEDERAL JUDICIARY (July 30, 2002), at <http://www.uscourts.gov/vacancies/judgevacancy.htm> (last visited Aug. 2, 2002) (on file with the North Carolina Law Review) [hereinafter VACANCIES].

6. Most relevant to the issues that I consider in this Essay is *Conserving Judicial Resources: Considering the Appropriate Allocation of Judgeships in the U.S. Court of Appeals for the Fourth Circuit: Hearing Before the Senate Judiciary Subcomm. on Admin. Oversight and the Courts*, 105th Cong. (1997) [hereinafter *Hearing Before the Senate Judiciary*].

7. COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT, 22 tpls.2-6 to 2-7 (1998).

8. See VACANCIES, *supra* note 5; see also *supra* note 3 and accompanying text (discussing Gregory's appointment).

problems, emphasizing approaches each political branch may institute that would remedy or ameliorate the complications that will attend the future choices of Fourth Circuit judges generally and from North Carolina specifically.

## I. HISTORICAL BACKGROUND

### A. Introduction

An examination of the origins and growth of the phenomena that have made Fourth Circuit judicial selection controversial can inform comprehension of the Fourth Circuit and of the problems that have accompanied the court's appointments. Because pertinent developments in this court are inextricably intertwined with events across the country, consultation of national considerations also yields instructive perspectives on the Fourth Circuit. For example, the continuing dispute in North Carolina resembles an ongoing Michigan controversy. Two Clinton nominees from Michigan never received Senate Judiciary Committee hearings, and Democratic Senators have stymied consideration of four Bush nominees who live in that state.<sup>9</sup> Moreover, the Second, Fourth, Sixth, and Ninth Circuits have experienced similarly large numbers of openings at various times since 1995.<sup>10</sup> Republican Senators may have found that the political views of several Clinton Ninth Circuit nominees were too liberal, just as Democratic Senators might now deem certain Bush Fourth and Sixth Circuit nominees overly conservative. Thus, although the Fourth Circuit is not necessarily representative, selection efforts there have encountered obstacles that closely resemble those manifested in other courts.

### B. National Developments

Nationwide developments, which have implicated Fourth Circuit appointments, are subtle and complex, and a relatively comprehensive assessment can enhance understanding of Fourth Circuit judicial selection.<sup>11</sup> There are two principal constituents to the

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9. See, e.g., Jonathan Groner & Jonathan Ringel, *Judicial Nominee Horsetrading Heats Up As Confirmation Process Gets Weighed*, AM. LAW MEDIA, Aug. 31, 2001, available at <http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZ0136F2RC> (last visited Aug. 22, 2002) (on file with the North Carolina Law Review); Savage, *supra* note 1.

10. See, e.g., Carl Tobias, *Filling The Federal Appellate Openings on the Ninth Circuit*, 19 REV. LITIG. 233, 234 (2000); Groner, *supra* note 2.

11. For thorough examinations of national developments, see MILLER CTR. COMM'N

difficulty involving the selection of federal judges. One component is the persistent vacancies conundrum, which derived from congressional expansion of federal court jurisdiction and sharp rises in appeals over the past several decades.<sup>12</sup> This dynamic fostered the appellate judiciary's growth, thus increasing the number and frequency of vacancies and complicating attempts to fill them. The second constituent is the current political impasse that resulted in substantial measure from control of the presidency and the Senate by opposing political parties since the late 1980s.<sup>13</sup> This Essay emphasizes the second problem because it better explains the complications accompanying Fourth Circuit selection.<sup>14</sup>

### 1. The Persistent Vacancies Conundrum

The permanent vacancies problem can be traced to the nation's founding and to Article II of the United States Constitution. This Essay, however, focuses on the conundrum's modern features, attributed to enlarged federal court jurisdiction and docket growth that prompted authorization of numerous, new judgeships. These features increased the number and frequency of the vacancies and the difficulty of filling them.

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ON THE SELECTION OF FED. JUDGES, IMPROVING THE PROCESS OF APPOINTING FEDERAL JUDGES: A REPORT OF THE MILLER CENTER COMMISSION ON THE SELECTION OF FEDERAL JUDGES (1996) [hereinafter MILLER REPORT]; Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319 (1994). I rely substantially in this Essay on Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527 (1998). Much in that article remains relevant, although the political parties' circumstances are reversed.

12. See MILLER REPORT, *supra* note 11, at 3; see also Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1268-70 (1996). See generally Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11 (assessing these and related ideas).

13. See Tobias, *supra* note 11, at 528; see also Thomas O. Sargentich, *Report of the Task Force on Federal Judicial Selection of Citizens For Independent Courts*, 51 ADMIN. L. REV. 1031, 1033-34 (1999) (recognizing this phenomenon). See generally MORRIS P. FIORINA, *DIVIDED GOVERNMENT* (2d ed. 1996) (assessing the phenomenon of divided government).

14. The persistent vacancies problem deserves less analysis because much delay in selection is inherent and, thus, resists treatment, political factors contribute less to the persistent problem than the current impasse, and the vacancies problem has been assessed elsewhere. See, e.g., Bermant et al., *supra* note 11 (examining causes of, and proposing solutions to, persistent judicial vacancies); Committee on Federal Courts, *Remedying the Permanent Vacancy Problem in the Federal Judiciary—The Problem of Judicial Vacancies and Its Causes*, 42 REC. ASS'N B. CITY N.Y. 374 (1987) [hereinafter *The Problem of Judicial Vacancies*] (analyzing the constant problem of judicial vacancies and offering potential solutions); Victor Williams, *Solutions to Federal Judicial Gridlock*, 76 JUDICATURE 185 (1993) (discussing the state of judicial gridlock inherent in the federal judicial system and possible solutions).

a. The Early History

The Founders expressly provided, and consciously envisioned, that politics would play a major role in judicial selection.<sup>15</sup> The Appointments Clause in Article II states that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint” judges.<sup>16</sup> Numerous Framers contemplated that Senators would serve as a beneficial check on the President’s spirit of favoritism and would minimize selection of unfit individuals while functioning as an effective source of stability.<sup>17</sup>

Senate members have been actively involved in the process since the republic’s early days because they have an important stake in influencing, or seeming to affect, selection.<sup>18</sup> Complex political accommodations between the Senate and the President during the nascent stages have facilitated the regime’s smooth operation.<sup>19</sup> Moreover, Senators traditionally have participated in choosing nominees, especially for the federal district courts. Senators, or senior elected officials of the President’s political party, from the state in which the judge will sit, typically have suggested individuals whom the President then has nominated.<sup>20</sup>

Politics, accordingly, permeate judicial selection. If the President and Senators differ, they may behave tactically to secure advantage and to exercise control over nomination and confirmation, even using

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15. See, e.g., THE FEDERALIST NO. 76, at 513 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). For more analysis of this history, see MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS 28 (2000); Albert P. Melone, *The Senate’s Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality*, 75 JUDICATURE 68, 69–70 (1991).

16. U.S. CONST. art. II, § 2, cl. 2. The Constitution assigns the President and the Senate much larger roles than the House of Representatives and the courts. “The President” includes Executive Branch officials, such as attorneys in the White House Counsel’s Office and the Department of Justice, who help the president. “The Senate” includes the Judiciary Committee, which has primary responsibility for the confirmation process, and its chair, Senator Patrick Leahy (R-Vt.); the Majority Leader, Senator Thomas Daschle (D-S.D.); and individual Senate members.

17. See, e.g., GERHARDT, *supra* note 15, at 26–29; Tobias, *supra* note 11, at 530.

18. See HAROLD W. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS 7 (1972).

19. See Bermant et al., *supra* note 11, at 321. For historical analysis of this and related ideas, see GERHARDT, *supra* note 15, at 29–34; Melone, *supra* note 16.

20. Lawrence Walsh, President Dwight Eisenhower’s Deputy Attorney General, found it difficult to confirm nominees opposed by a Senator from that nominee’s respective state. Lawrence E. Walsh, *The Federal Judiciary . . . Progress and the Road Ahead*, 43 J. AM. JUDICATURE SOC’Y 155, 156 (1960); see also MILLER REPORT, *supra* note 11, at 4 (including Attorney General Robert Kennedy’s description of Senate appointment with President’s advice and consent).

delay for strategic reasons.<sup>21</sup> Illustrative of these ideas are Senator Helms's efforts in blocking consideration of Clinton nominees from North Carolina and Senator Edwards's apparent reluctance to afford Chief Judge Boyle a Senate Judiciary Committee hearing.<sup>22</sup> Tension involving the President and Senate members will likely be a permanent fixture, as long as the chamber's advice and consent remains a prerequisite for appointment.<sup>23</sup>

In short, the President and Senators have traditionally shared considerable responsibility for choosing judges in a process that has been politicized since the nation was created. Nevertheless, large numbers of openings, which remain vacant for extended periods, only evolved into a significant difficulty during the 1970s. Indeed, between the date that Congress adopted the Judiciary Act of 1789 and the last third of the twentieth century, the total complement of appeals and district court judgeships only gradually increased to 300; thus, the rather few openings and their comparative infrequency promoted the expeditious filling of empty seats, and, therefore, minimized the problem which eventually materialized.<sup>24</sup>

#### b. History Since 1950

Federal court jurisdiction expanded dramatically in the latter half of the twentieth century.<sup>25</sup> Congress adopted numerous new civil causes of actions and federalized much criminal behavior, prompting a 300 percent yearly rise in district court cases after the 1950s.<sup>26</sup> Lawmakers responded by increasing the number of federal judges to address docket growth; thus, there are now 844 active appellate and district judgeships.<sup>27</sup>

The Committee on Long Range Planning of the United States Judicial Conference, in a thorough 1995 study of the federal courts'

21. See CHASE, *supra* note 18, at 14, 40; Bermant et al., *supra* note 11, at 321.

22. See *supra* note 2; *infra* notes 137–139 and accompanying text.

23. There are apparently two avenues "out of that requirement. One requires constitutional interpretation, the other constitutional amendment." Bermant et al., *supra* note 11, at 322.

24. See, e.g., Tobias, *supra* note 11, at 531; MILLER REPORT, *supra* note 11, at 3.

25. See *supra* note 12.

26. See MILLER REPORT, *supra* note 11, at 3; see, e.g., Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 42 U.S.C. §§ 13701–14223 (2000)) (stating purpose as "to control and prevent crime"); Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (2000)). See generally William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719 (1995) (assessing increased federalization of criminal behavior).

27. See 28 U.S.C. §§ 44, 133 (2000); see also VACANCIES, *supra* note 5.



future, prognosticated that mounting dockets would require 2,300 active judges by 2010 and 4,070 by 2020.<sup>28</sup> The judiciary will continue to expand, in part because Congress will likely not restrict civil or criminal jurisdiction,<sup>29</sup> even though enlarging the bench is quite controversial.<sup>30</sup> The Committee also determined that the period for filling vacancies had grown.<sup>31</sup> Between 1980 and 1995, nominations on average required a year and confirmations three months.<sup>32</sup> Moreover, the time period required for both aspects appeared to be lengthening.<sup>33</sup> A Federal Judicial Center (“FJC”) analysis found that vacancy rates from 1970 until 1992 nearly doubled in the federal district courts and were more than twice as high in the federal appellate courts, while most delay happened between the time when a seat became open and nomination.<sup>34</sup>

The evaluation above shows that politics has been a perennial feature of the selection process.<sup>35</sup> Nevertheless, certain observers of judicial appointments contend that the system has become increasingly politicized since the 1960s.<sup>36</sup> They assert that this development originated in the administration of President Richard Nixon, who promised to reattain “law and order” by naming judicial conservatives and “strict constructionists,”<sup>37</sup> although a more contemporary strain can be traced to the Senate’s rejection of Circuit

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28. See JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 16 (1995) [hereinafter LONG RANGE PLAN]. The Long Range Planning Committee predicted that 1,370 judgeships would be required by 2000, however Congress did not authorize those positions, partly for political reasons, as is evidenced by its failure to pass a comprehensive judgeships bill since 1990.

29. For these and related ideas see Stephen G. Breyer, *Administering Justice in the First Circuit*, 24 SUFFOLK U.L. REV. 29, 34–37 (1990); Marshall, *supra* note 26; William L. Reynolds & William M. Richman, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 297, 325–334 (1996).

30. Compare Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52 (calling for more judges) with Gerald Bard Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70 (opposing additional judges).

31. See LONG RANGE PLAN, *supra* note 28, at 102–05; see also *infra* note 75 and accompanying text.

32. MILLER REPORT, *supra* note 11, at 3–4.

33. *Id.*

34. See Bermant et al., *supra* note 11, at 323.

35. See *supra* notes 15–24 and accompanying text.

36. See, e.g., DAVID M. O'BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 20 (1988); Roger E. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees*, 80 JUDICATURE 274, 274 (1997).

37. See, e.g., O'BRIEN, *supra* note 36, at 20; Tobias, *supra* note 11, at 532.

Judge Robert Bork whom President Ronald Reagan had nominated for the Supreme Court in 1987.<sup>38</sup>

*i. The Basic Framework of Modern Judicial Selection*

State Senators or the highest-ranking officials of the President's political party may participate in choosing appeals court nominees; however, recent Presidents have limited their roles and assumed greater responsibility.<sup>39</sup> Designees must complete three lengthy questionnaires for the Department of Justice, the Senate Judiciary Committee, and the American Bar Association ("ABA") Standing Committee on the Federal Judiciary, which has assessed candidates' professional qualifications for a half-century.<sup>40</sup> Justice Department and White House officials first screen, then assess, and finally interview the potential nominees, and the Federal Bureau of Investigation ("FBI") conducts background investigations and security checks on the individuals.<sup>41</sup>

If these reviews prove satisfactory, the President formally nominates the candidates and submits their names to the Senate.<sup>42</sup> Some private entities, including the Free Congress Foundation and the Alliance for Justice, which monitor judicial selection, generally evaluate nominees at this juncture, as does the ABA Committee that participated earlier in the process.<sup>43</sup> The Senate, primarily through the Judiciary Committee, investigates and analyzes the nominees,

38. See, e.g., Carl Tobias, *The Bush Administration and Appeals Court Nominees*, 10 WM. & MARY BILL RTS. J. 103, 105 (2001); Sargentich, *supra* note 13, at 1033-34. For more analysis of Bork's rejection, see STEPHEN CARTER, *THE CONFIRMATION MESS* 132-33 (1994); MARK GITENSTEIN, *MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT* (1992).

39. The officers often begin the district court process by proposing candidates. MILLER REPORT, *supra* note 11, at 3-6; *The Problem of Judicial Vacancies*, *supra* note 14, at 375. Each specific presidential administration varies these fundamental procedures somewhat. See, e.g., CHASE, *supra* note 18, at 6-7; SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 3-14 (1997); O'BRIEN, *supra* note 36, at 49-64.

40. The ABA has received criticism for being overly political and too slow, but it has performed a valuable service in assessing nominees. See MILLER REPORT, *supra* note 11, at 5-6, 8, 11. See generally AMERICAN BAR ASSOCIATION, *STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS* (1988) (analyzing the ABA's role).

41. See MILLER REPORT, *supra* note 11, at 3-6; *The Problem of Judicial Vacancies*, *supra* note 14, at 375.

42. See MILLER REPORT, *supra* note 11, at 3-6; Tobias, *supra* note 11, at 533.

43. See, e.g., GERHARDT, *supra* note 15, at 217-29; *supra* note 40; *infra* notes 91-92 and accompanying text.

accords the individuals hearings, and votes on them.<sup>44</sup> The names of persons whom the Committee approves are transmitted to the full Senate, where the Senate Majority Leader schedules floor votes on nominees, who must secure a majority for confirmation.<sup>45</sup>

*ii. Nomination and Confirmation*

The Miller Commission, a bipartisan group of distinguished attorneys who studied the selection process and issued a 1996 report,<sup>46</sup> determined that the appointments process has changed significantly from the process in the 1970s and has become increasingly complicated, factors that are reflected in growing reliance on larger staff who screen potential nominees.<sup>47</sup> These alterations, which the group ascertained began in the Reagan Administration, have persisted during later presidencies.<sup>48</sup> The Commission found that practices have changed in three basic ways: (1) more White House and Justice Department lawyers and resources are committed to screening possible judicial nominees; (2) extensive interviews with candidates are now routine; and (3) White House officials participate more in the process.<sup>49</sup> The Commission also described the three questionnaires completed by nominees for the Justice Department, the Judiciary Committee, and the ABA as illustrative of the bureaucratization of the process, and the Commission discovered that many queries are repetitive or overlap and efforts to complete the questionnaires are “burdensome.”<sup>50</sup>

The Committee on Federal Courts of the New York City Bar (“City Bar”) performed an analysis reaching similar conclusions fifteen years ago. It detected substantial White House delay in

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44. See, e.g., GERHARDT, *supra* note 15, at 63–69; *The Problem of Judicial Vacancies*, *supra* note 14, at 375.

45. See, e.g., MILLER REPORT, *supra* note 11, at 3–6; Tobias, *supra* note 11, at 533.

46. The membership of the bi-partisan commission included present and past federal appellate and district court judges, former White House Counsels who served Republican and Democratic presidents, prior Justice Department officials, former United States Senators, a prominent attorney, and a law professor. MILLER REPORT, *supra* note 11, at 2.

47. *Id.* at 4.

48. *Id.*

49. See *id.* at 4–5.

50. See *id.* at 6. Judiciary Committee nominee vetting and hearings have also delayed selection because the Committee may lack resources for investigations and may have difficulty scheduling hearings, which the entity does even for non-controversial nominees. The Senate leadership’s inability to schedule prompt floor debates and votes on nominees whom the Committee has approved may also cause delay. See *id.* at 5; *The Problem of Judicial Vacancies*, *supra* note 14, at 375–76. For more analysis of confirmations, see Tobias, *supra* note 11, at 535–36; *infra* notes 93–106 and accompanying text.

proposing candidates and an “inevitable lapse of time” in the nomination process,<sup>51</sup> while selection did not receive high priority at the FBI inquiry and Judiciary Committee hearing phases, which required several months.<sup>52</sup> The group also stated that the over-committed judiciary could expect little relief, unless those participating in appointments dramatically changed their priorities, even as it recognized that a sense of greater urgency by all involved might significantly expedite selection.<sup>53</sup> Another important study found that executive and legislative branch officials evince insufficient appreciation of the vacancies problem’s critical nature to institute actions that will facilitate selection.<sup>54</sup>

Numerous observers have astutely suggested to those associated with nominations and confirmations that they must strike the proper balance between the need for efficiency and for careful nominee evaluation. For example, the City Bar recommended the elimination of unnecessary delay and efforts to facilitate selection, but it warned against “hurried, assembly-line appointments” of people ill-suited to be federal judges for life-tenured, important positions.<sup>55</sup> The researchers who conducted a 1994 FJC study at the Long Range Planning Committee’s request, similarly cautioned that an expedited selection process should not be instituted at the expense of a comprehensive review of the abilities and character of potential jurists.<sup>56</sup> The National Commission on Judicial Discipline observed that considered vetting of candidates to guarantee the selection of only the most well-qualified and honest judges might minimize the possibility of subsequent judicial misconduct and suggested that FBI investigations be thorough.<sup>57</sup> Most participants, especially the Senate, now accord nominees even more detailed review, although the proper amount of scrutiny is controversial and remains unclear.<sup>58</sup>

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51. *See The Problem of Judicial Vacancies*, *supra* note 14, at 376.

52. *Id.*

53. *Id.* at 375.

54. *See* Bermant et al., *supra* note 11, at 347.

55. *See The Problem of Judicial Vacancies*, *supra* note 14, at 377.

56. *See* Bermant et al., *supra* note 11, at 347; *see also* MILLER REPORT, *supra* note 11, at 11 (suggesting that the judiciary’s quality is much more important than the time which must be devoted to appointments).

57. *See* NAT’L COMM’N ON JUDICIAL DISCIPLINE AND REMOVAL, REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 81 (1993).

58. *Compare* Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 673, 687 (1989) (urging less scrutiny), *with* Melone, *supra* note 15, at 69 (urging greater scrutiny). For more discussion of the proper level of scrutiny see GERHARDT, *supra* note 15, at 135–79; Hartley & Holmes, *supra* note 36.

It is important, as well, to appreciate that nomination and confirmation are intertwined, so that the failure of certain participants to satisfy temporal deadlines can seriously affect others involved and exacerbate delay.<sup>59</sup> For instance, the simultaneous submission of numerous nominees may postpone completion of FBI background investigations or ABA qualification ratings which could correspondingly slow the confirmation process.<sup>60</sup>

*iii. Limited Prospects For Meaningful Change*

A few analyses have determined that considerable delay in selection is inherent and defies reduction, although some delay may be rectified or ameliorated. During 1961, the ABA found an irreducible element of intrinsic delay stating, for example, that three months was the shortest practicable time to complete the nomination phase under ideal circumstances and the average had previously been more than double that.<sup>61</sup> In 1987, the City Bar seriously doubted that the average period from vacancy to confirmation could ever be less than eight months, even with the best of intentions and additional effort, and proclaimed that achieving this temporal goal would not resolve the persistent conundrum.<sup>62</sup> The entity voiced little optimism about finding very efficacious solutions.<sup>63</sup> Those who prepared the 1994 FJC report remarked that numerous measures, which might remedy the permanent difficulty by enhancing efficiency and resources, could minimally improve appointments,<sup>64</sup> although these techniques only partly treat some reasons for delay and merely limit other causes, such as politics. Thus, conflicts among powerful

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59. Bermant et al., *supra* note 11, at 335 (noting the impact of delay on other elements of the selection process).

60. *Id.* For more discussion of the FBI and ABA roles, see *supra* notes 40–41, 43 and accompanying text; *infra* notes 92–93 and accompanying text.

61. See 86 ANNUAL REPORT OF THE AMERICAN BAR ASS'N 503, 507 (1961).

62. See *The Problem of Judicial Vacancies*, *supra* note 14, at 377.

63. For example, the Committee on Federal Courts discovered no single point of delay in the multi-faceted selection process, which if corrected, would substantially remedy the problem. *Id.* at 378. Indeed, the Committee found quite the opposite with respect to different candidates, delay occurs at different stages. *Id.* at 376. Although the Committee considered it important that unnecessary delays in the appointment system be eliminated, it saw no practical way in which the average time lag of ten months or more between vacancy and candidate clearance is likely to be improved appreciably in the foreseeable future. *Id.* at 377. “But when all is said and done, the process simply cannot be streamlined to a point that the problem of persistent vacancies will be eliminated.” *Id.* at 378.

64. See Bermant et al., *supra* note 11, at 344 (observing that vacancies may well occur more rapidly than they can be filled, regardless of measures adopted to expedite the appointment process).

interests will continue to slow the process, unless some form of merit selection that reduces the importance of politics is instituted.<sup>65</sup>

The longstanding conundrum has persisted since the 1970s without change, despite concerted efforts of judges and attorneys to assess and publicize the difficulty as well as to request that the political branches address it.<sup>66</sup> Illustrative are monthly compilations of all vacancies and of specific openings that comprise judicial emergencies, which the Judicial Conference broadly distributes. Moreover, Chief Justices Warren Burger and William Rehnquist and many additional jurists have aggressively attempted to prevent delay, and the organized bar has frequently pursued the issue.<sup>67</sup>

#### *iv. Effects of the Persistent Vacancies Problem*

The permanent vacancies dilemma has imposed numerous disadvantages. One analysis ascertained that openings can significantly limit the courts' ability to resolve their filings, particularly given the relatively few judges throughout the United States and the small number in some individual courts.<sup>68</sup> The empty seats and increased cases have placed unnecessary pressure on sitting judges and posed complications for litigants and counsel who are competing for scarce court resources.<sup>69</sup> The FJC study determined that openings had a statistically significant effect on average judicial workloads for the time spanning 1970 through 1992.<sup>70</sup> If the courts had been functioning with complete staff, workloads of appeals and district judges would have declined nine and ten percent, respectively.<sup>71</sup> In fact, since the 1990s, the federal judiciary has experienced a backlog of approximately 250,000 civil suits, while criminal caseloads have essentially precluded a number of district judges from trying any civil matters in a particular year.<sup>72</sup>

65. This possibility seems unlikely. *See id.*; *see also The Problem of Judicial Vacancies*, *supra* note 14, at 375–77.

66. *See, e.g., Tobias, supra* note 11, at 539 (citing recommendations by an ABA commission to fill judicial vacancies); *The Problem of Judicial Vacancies, supra* note 14, at 378 (observing that judges have spoken out on the issue and that the Judicial Conference has published vacancies lists).

67. *See THE THIRD BRANCH*, Aug. 1997, at 6; Ruth Hochberger, *3 Bar Presidents Hit Delay In Filling U.S. Court Seats*, N.Y. L.J., Apr. 24, 1981, at 1. For decades the bench and bar have urged expedition, but the response time has only modestly improved. *The Problem of Judicial Vacancies, supra* note 14, at 375.

68. *See The Problem of Judicial Vacancies, supra* note 14, at 374.

69. *Id.*

70. Bermant et al., *supra* note 11, at 327.

71. *Id.*

72. *See Tobias, supra* note 11, at 540.

The Miller Commission expressed concern that the cumbersome, protracted process detrimentally affects the federal justice system and potential appointees, suggesting that the federal judiciary's quality could decrease.<sup>73</sup> During 1987, the City Bar warned lawmakers that the disadvantages imposed by continued inaction must be balanced with the frustration of justice produced by undue delay and the substantial price in popular respect that the highly visible bench pays when judges cannot discharge their constitutionally-assigned duties in a timely and efficient manner.<sup>74</sup> Leaving this recurrent problem unaddressed might undermine the regard that citizens have for Congress and the President.

## 2. The Current Impasse

Political considerations seem to have greater significance for the current problem than the persistent one, although politics pervade both, thus obfuscating their relationship. Political factors drive the existing dilemma and share much responsibility with the persistent problem for recent Fourth Circuit selection. Temporal proximity frustrates appreciation of how the present difficulty developed.

This subsection attempts to proffer an accurate account of the current impasse through the conduct and observations of people and entities actively involved in the process. The Essay emphasizes the second Clinton Administration, particularly its first year, as well as the initial year of the George W. Bush Administration, because selection in 1997 and 2001 was relatively similar and rather recent. The focus chosen is appropriate, even though the existing problem apparently originated earlier, perhaps with the 1987 Senate rejection of Judge Bork.

Numerous political phenomena, which attended appointments throughout the last decade and a half, contributed significantly to the present dilemma, although certain aspects of the generic difficulty did implicate selection in 1997 and 2001. Each President and the Senate were primarily responsible for most of the phenomena that constitute the current problem. These public officials could have rectified or ameliorated many of the complications, if they had the political will.

The periods that the Clinton and Bush Administrations and the respective Senates needed for completing nomination and confirmation were substantial in 1997 and 2001. For example, during 1997, nominations on average required more than 600 days, while

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73. See MILLER REPORT, *supra* note 11, at 6.

74. See *The Problem of Judicial Vacancies*, *supra* note 14, at 383.

confirmations consumed a record high 183 days.<sup>75</sup> Most of the delay in judicial selection continued to occur between the date of vacancy and nomination.

a. Nomination Process

The failure to confirm more judges in 1997 and 2001 can be ascribed partly to delay in tendering nominees and the delay of particular Senators or additional political officials who suggested individuals for the President to consider.<sup>76</sup> Nevertheless, during 1997, other participants, including Senator Orrin Hatch (R-Utah), then chair of the Judiciary Committee; Senator Trent Lott (R-Miss.), then Senate Majority Leader; and specific Republican Senators, slowed the process somewhat because of concerns about phenomena, such as “judicial activism.”<sup>77</sup> During 2001, their counterparts, Senators Leahy (D-Vt.) and Daschle (D-S.D.), may have similarly contributed to delay out of concerns regarding the political views of certain Bush nominees.<sup>78</sup>

Both Presidents apparently had some responsibility for the rather few judicial appointments that resulted from delays in submitting nominees. For example, on January 7, 1997, President Clinton provided the names of twenty-two lawyers, a number of whom he had nominated during the prior Congress and certain of whom had secured confirmation hearings or favorable committee votes, while President Bush only proffered his first group of nominees in May 2001.<sup>79</sup> Thereafter, the Clinton and Bush Administrations gradually, but steadily and rather promptly, forwarded more names. Illustrative was Clinton’s submission of thirteen individuals for district court seats immediately before the August recess on July 31,

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75. See Viveca Novak, *Empty-Bench Syndrome*, TIME, May 26, 1997, at 37; see also Orrin G. Hatch, *There’s No Vacancy Crisis in the Federal Courts*, WALL ST. J., Aug. 13, 1997, at A15 (claiming confirmation required ninety-one days and nominations required 618 days); Editorial, *Clearing the Bench: Federal Court Vacancies are Delaying Justice*, DALLAS MORNING NEWS, June 17, 1997, at 16A (reciting similar statistics); *supra* note 32 and accompanying text (affording comparable data for 1980–1995).

76. See, e.g., Tobias, *supra* note 11, at 541; Savage, *supra* note 1.

77. See, e.g., *Judicial Activism: Assessing the Impact: Hearing Before the Senate Judiciary Subcomm. on the Constitution, Federalism, and Property Rights*, 105th Cong. (1997), 143 CONG. REC. S2515 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch).

78. See, e.g., Groner, *supra* note 2; Savage, *supra* note 1.

79. See U.S. Newswire, *President Clinton Nominates 22 to the Federal Bench* (Jan. 7, 1997), 1997 WL 5710163; PRESIDENT’S REMARKS ANNOUNCING NOMINATIONS FOR THE FEDERAL JUDICIARY, WEEKLY COMP. PRES. DOC. (May 9, 2001) [hereinafter PRESIDENT’S REMARKS].



1997.<sup>80</sup> Most of the nominees of each President appeared to possess fine professional qualifications, and some had prior experience in the federal or state court judiciaries.<sup>81</sup> A number of the nominees had seemingly moderate political perspectives, a few were affiliated with the party not occupying the White House, and the predecessors of both Presidents had appointed some to the district bench.<sup>82</sup>

The Presidents' propensity to forward large batches of people on the eve of Senate recesses and their general handling of the nomination process exemplified several problems.<sup>83</sup> When the Presidents provided numerous candidates at one time, particularly as the Senate was about to recess, this complicated Judiciary Committee efforts to facilitate confirmation. Clinton had tendered a mere eight new nominees by June 1997, while Senator Hatch considered unacceptable most people included in the January set, thus permitting him to allege that there were not enough people for efficient Committee processing.<sup>84</sup>

Neither President forwarded nominees for all available vacancies, which would have enabled them to pressure the Judiciary Committee and the Senate, although each could have claimed that there was no reason to provide greater numbers of nominees than the respective committee chairs had indicated the panel would review.<sup>85</sup> In fact, in much of 1997 and some of 2001, the administrations placed

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80. See U.S. Newswire, *President Clinton Nominates Thirteen to the Federal Bench* (July 31, 1997), 1997 WL 5714533. Bush submitted similarly substantial groups before 2001 Senate recesses. See, e.g., Jonathan Ringel, *Bush Nominates 18 to Federal Bench*, AM. LAW. MEDIA, Aug. 3, 2001, <http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZG1CZBYPC> (last visited Aug. 22, 2002) (on file with the North Carolina Law Review).

81. See, e.g., PRESIDENT'S REMARKS, *supra* note 79; see also Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309, 315 (1996); Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254 (1997). See generally 143 CONG. REC. S5653 (daily ed. June 16, 1997) (statement of Sen. Leahy).

82. See, e.g., Goldman & Slotnick, *supra* note 81; Savage, *supra* note 4.

83. See Tobias, *supra* note 11, at 541-42.

84. See Hatch, *supra* note 75; see also Neil A. Lewis, *Keeping Track: Vacant Federal Judgeships*, N.Y. TIMES, Aug. 11, 1997, at A12. Analogous are President Bush's submission of relatively few new nominees by June 2001 and Senator Leahy's apparently considering unacceptable some nominees in the May package. See, e.g., Tobias, *supra* note 38, at 107; Groner, *supra* note 2.

85. In 1997, Senator Hatch held one hearing each month the Senate was in session for one appeals and four or five district court nominees. See *infra* note 93. President Bush has accused Senate Democrats of failing to hold hearings for his nominees, but Senator Leahy has stated that the confirmation pace in 2001 "exceeded the pace of confirmations in President Clinton's first year." Neil A. Lewis, *Bush and Democrats in Senate Trade Blame for Judge Shortage*, N.Y. TIMES, May 4, 2002, at A9.

before the committee more nominees than the chairs had suggested they would review.<sup>86</sup> Finally, both Clinton and Bush had to balance the necessity for speed with cautious analysis of designees' abilities and political viability because nominees who were controversial or, worse, lacked competence or honesty, could have undermined administration credibility and might have delayed, stopped, or harmed the process.

Senate members and politicians from the locales where openings occurred, who were to suggest people for the Presidents' consideration, apparently contributed to slowed submission for many vacancies in 1997 and 2001. For instance, in some states with no Senators of the President's party, identifying those political figures who were to make the recommendations was difficult. Addressing Senators' insistence on participating also delayed the process. For example, during Clinton's administration, Republican Senators from Arizona and Washington demanded that they be involved in candidate selection and even be allowed to tender suggestions.<sup>87</sup>

Insofar as the administrations might have better encouraged Senate members or additional politicians to expedite their proposals to the President, Executive Branch personnel may have done too little or been stymied by the "start-up" costs of establishing a presidency.<sup>88</sup> For instance, the second Clinton Administration spent considerable time in 1997 replacing the Deputy and Associate Attorneys General as well as the White House Counsel, while ongoing Whitewater investigations and numerous additional matters could have deflected the attention of many attorneys in both offices.<sup>89</sup> The nascent Bush Administration experienced similar difficulties, such as securing prompt confirmation of certain high-level Justice

86. See Tobias, *supra* note 11, at 542.

87. See Peter Callaghan, *Senators Agree on Selecting Judges*, NEWS TRIB. (Tacoma), Aug. 12, 1997, at B1, <http://www.tribnet.com/archives> (last visited Aug. 23, 2002) (on file with the North Carolina Law Review), available at 1997 WL 3458401; Neil A. Lewis, *Clinton Has a Chance to Shape the Courts*, N.Y. TIMES, Feb. 9, 1997, at A30; see also 143 CONG. REC. S2538, S2541 (daily ed. Mar. 19, 1997) (statement of Sen. Biden) (asserting that Republican Senators may have so intimidated).

88. Helen Dewar, *Confirmation Process Frustrates President; Clinton Wants Senate GOP to Pick Up Pace*, WASH. POST, July 25, 1997, at A21; Greg Pierce, *Clinton vs. Clinton*, WASH. TIMES, Aug. 12, 1997, at A6, <http://www.washtimes.com/archives.htm> (last visited Aug. 23, 2002) (on file with the North Carolina Law Review), available at 1997 WL 3680583; see also Savage, *supra* note 82.

89. See Tobias, *supra* note 11, at 543-44; see also *President's Counsel Quits*, N.Y. TIMES, Dec. 11, 1996, at B22.

Department officials, which may have distracted judicial recruiters from selection.<sup>90</sup>

In short, Presidents Clinton and Bush discharged their responsibilities for the nomination of judicial candidates in analogous ways during 1997 and 2001. To be sure, certain procedures that each President deployed are distinguishable, but these are differences of degree rather than kind. Both administrations might also have ameliorated some difficulties they encountered, particularly by capitalizing on lessons derived from prior efforts, although a number of complications may be inherent in the process.

#### b. ABA Committee

During the 104th Congress, the ABA Committee continued to rank candidates' qualifications as the entity had been doing since the 1950s. Senator Hatch voiced increasing concern about this involvement and, in February 1997, the chair ended formal ABA participation.<sup>91</sup> During March 2001, the Bush Administration notified the American Bar Association that it would not solicit its advice prior to submitting nominations.<sup>92</sup>

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90. See, e.g., Audrey Hudson, *Senate Panel Ends Wrangling, Approves 3 Key Justice Posts*, WASH. TIMES, May 11, 2001, at A4, <http://www.washtimes.com/archives.htm> (last visited Aug. 23, 2002) (on file with the North Carolina Law Review), available at 2001 WL 4152968; Alison Mitchell, *Senate Confirms Ashcroft as Attorney General, 58-42, Closing a Five Week Battle*, N.Y. TIMES, Feb. 2, 2001, at A1. But see 147 CONG. REC. S8552 (daily ed. Aug. 1, 2001) (statement of Sen. Leahy) (praising the Judiciary Committee's expeditious consideration of Bush nominees). See generally Jeffrey Toobin, *Ashcroft's Ascent*, NEW YORKER, Apr. 15, 2002, at 50 (assessing Attorney General Ashcroft and the Justice Department).

91. See Terry Carter, *A Conservative Juggernaut*, A.B.A. J. (June 1997), at 32; see also *supra* note 43 and accompanying text (assessing the ABA's role). But see N. Lee Cooper, *Standing Up to Critical Scrutiny*, A.B.A. J. (Apr. 1997), at 6 (identifying the important role of the committee in the nominee evaluation process).

92. See Letter from Alberto Gonzales, White House Counsel, to Martha Barnett, ABA President (Mar. 22, 2001) (on file with the North Carolina Law Review); see also Laura Little, *The ABA's Role in Prescreening Federal Judicial Candidates*, 10 WM. & MARY BILL RTS. J. 37, 37 (2002). Democrats' insistence on ABA input led to more delay. Because the ABA long played a greater role in helping Presidents ascertain whether to proceed with designees, it may have future influence, but this is unclear. See *Hearings on Judicial Nominations Before the Senate Comm. on the Judiciary*, 107th Cong. (2002) [hereinafter *Hearings on Judicial Nominations*] (statement of Sen. Leahy), at [http://www.senate.gov/~judiciary/member\\_statement.cfm?id=181&wit\\_id=50](http://www.senate.gov/~judiciary/member_statement.cfm?id=181&wit_id=50) (last visited Aug. 22, 2002) (on file with the North Carolina Law Review) (“[T]he White House last year unilaterally changed the practice of nine Republican and Democratic Presidents and will no longer allow the ABA to begin its peer reviews during the selection process . . .”).

### c. Confirmation Process

In 1997 and 2001, the Senate Judiciary Committee bore some responsibility for delay principally through its inability to investigate, hold hearings for, and vote on more nominees. For instance, Senator Hatch ordinarily conducted a hearing at which one appeals court and four or five district court nominees appeared every month of the 105th Congress's first session.<sup>93</sup> However, the committee did not meticulously do so, and the Senate had approved a mere nine judges by early September.<sup>94</sup> Moreover, the Bush Administration and other observers criticized the Senate for holding too few hearings, especially involving appellate court seats, and for confirming only twenty-eight judges in 2001, although the committee seemed to process individuals more expeditiously and had afforded every district court nominee a hearing by spring 2002.<sup>95</sup>

The dearth of 1997 appointments seemed attributable partly to deficient Judiciary Committee resources and to politics. For example, Senator Hatch resolved the perennial dispute over the ABA, while Republican Senators debated the roles of the committee, its chair, and particular members, and chose to preserve the status quo.<sup>96</sup> These controversies required resources that could have expedited confirmation.<sup>97</sup> The rather few appointments in 2001 similarly might have resulted from committee devotion of insufficient resources and partially from politics.<sup>98</sup> Nevertheless, Senator Leahy instituted

93. See Tobias, *supra* note 11, at 545. This was the practice he followed in the 104th Congress. See Al Kamen, *Window Closing on Judicial Openings*, WASH. POST, June 12, 1995, at A17 (stating that the Republican-controlled committee confirmed one appellate and three or four district court judges a month).

94. See Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 744-45 (1997). Senator Joseph Biden (D-Del.), committee chair from 1987 until 1994, claimed in March 1997 that two hearings occurred each month during his tenure. 143 CONG. REC. S2539 (daily ed. Mar. 19, 1997).

95. See, e.g., Lewis, *supra* note 85; Neil A. Lewis, *Democrats are Pushed on Judicial Nominees*, N.Y. TIMES, Oct. 21, 2001, at A22; Savage, *supra* note 1. The most controversial dispute involved Judiciary Committee rejection of Judge Charles Pickering on a 10-9 party-line vote after contentious hearings and debate. See Albert R. Hunt, *The Politics of Lifetime Appointments*, WALL ST. J., Mar. 14, 2002, at A19; Neil A. Lewis, *First Punch in the Revived Bench-Tipping Brawl*, N.Y. TIMES, Mar. 17, 2002, at A35. A similar dispute occurred over Judge Brooks Smith, but he eventually secured a 12-7 vote and confirmation on July 31, 2002. See Neil A. Lewis, *Panel Approves Bush Appeals Court Pick*, N.Y. TIMES, May 24, 2002, at A19.

96. See Neil A. Lewis, *Move to Limit Clinton's Judicial Choices Fails*, N.Y. TIMES, Apr. 30, 1997, at D22; *Obstruction of Justice*, NEW REPUBLIC, May 19, 1997, at 9; see also *supra* note 91 and accompanying text.

97. The Committee processed few nominees while resolving those disputes. See Tobias, *supra* note 11, at 545.

98. *Hearings on Judicial Nominations*, *supra* note 92 (statement of Sen. Leahy), at

special efforts to speed the process, such as conducting hearings in the August recess.<sup>99</sup> Insofar as specific Democratic Senators slowed confirmation, they might have been “paying back” Republicans for their perceived delay when considering Clinton nominees.<sup>100</sup> Moreover, the May decision of Senator James Jeffords (R-Vt.) to become an independent meant that the Senate only reached an organizational agreement in July, which significantly postponed the process’s commencement and smooth operation.<sup>101</sup>

In fairness, individuals who enjoy life tenure and exercise the state’s enormous power require careful scrutiny to guarantee that they are qualified. While striking the proper balance between close analysis and expedition is difficult, Senator Hatch argued that he preferred to fulfill that obligation with much care, and caution may have contributed less than politics to slowed confirmation.<sup>102</sup>

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[http://www.senate.gov/~judiciary/member\\_statement.cfm?id=181&wit\\_id=50](http://www.senate.gov/~judiciary/member_statement.cfm?id=181&wit_id=50) (last visited Aug. 22, 2002) (on file with the North Carolina Law Review); *id.* (statement of Sen. Hatch), at [http://www.senate.gov/~judiciary/member\\_statement.cfm?id=204&wit\\_id=51](http://www.senate.gov/~judiciary/member_statement.cfm?id=204&wit_id=51) (last visited Aug. 22, 2002) (on file with the North Carolina Law Review); Symposium, *The Judicial Appointments Process*, 10 WM. & MARY BILL RTS. J. 1, 1–176 (2001); Jonathan Ringel, *Picking Judges: The Art of the Deal*, THE RECORDER, Apr. 30, 2001, at 1, 04/30/2001 Recorder (San Francisco, CA.) 1; Ringel, *supra* note 80; William Safire, *Battle of the Blue Slips*, N.Y. TIMES, May 10, 2001, at A33.

99. See *Hearings on Judicial Nominations*, *supra* note 92 (statement of Sen. Leahy), at <http://www.senate.gov/~judiciary/oldsite/pjl082201f.htm> (last visited Aug. 22, 2002) (on file with the North Carolina Law Review); *id.* (statement of Sen. Leahy), at <http://www.senate.gov/~judiciary/oldsite/pjl082701f.htm> (last visited Aug. 22, 2002) (on file with the North Carolina Law Review); see also Neil A. Lewis, *Democrats Are Pushed on Judicial Nominees*, N.Y. TIMES, Oct. 21, 2001, at A22.

100. See, e.g., Jess Bravin, *Aid Bill is Stalled By Bid to Force Votes on Judge*, WALL ST. J., Oct. 17, 2001, at A16; Paul A. Gigot, *How Feinstein is Repaying Bush on Judges*, WALL ST. J., May 9, 2001, at A26; Hunt, *supra* note 95; Neil A. Lewis, *Party Leaders Clash in Capitol Over Pace of Filling Judgeships*, N.Y. TIMES, May 10, 2002 at A33.

101. See David Rogers, *Sen. Jeffords Defects From GOP Creating Era of ‘Tripartisanship’*, WALL ST. J., May 25, 2001, at A16; Editorial, *True Bipartisanship*, WALL ST. J., May 31, 2001, at A16. The Presidents were also responsible for the few confirmations because, in early 1997 and 2001, each tendered few names, some of whom the chair or his colleagues seemed to find unacceptable, and provided others irregularly, thus complicating processing. However, Hatch’s claim that he had too few nominees to consider lacked persuasiveness because equal delay resulted from the few hearings for, and votes on, nominees and specific Senators’ opposition. Similarly, by the conclusion of 2001, Bush had furnished enough nominees, but that date may have been too late. See *supra* notes 79, 85–90 and accompanying text.

102. Hatch faced conflicts in Senate traditions and his obligations to Republican colleagues, who were concerned about activist judges, and he did resist the challenge to Senate conventions. See *supra* note 96 and accompanying text; see also Neil A. Lewis, *Republicans Seek Greater Influence in Naming Judges*, N.Y. TIMES, Apr. 27, 1997, at 1 (describing how Senator Hatch became embroiled in the appointments controversy). He also processed some nominees, even castigating his GOP colleagues for opposing them, and the 1997 record resembled some in prior comparable periods. See, e.g., 143 CONG.

Senator Lott and the Republican leadership seemed to have greater responsibility for delay during 1997. The chamber had confirmed only nine judges by September 1997, although the Judiciary Committee had approved and sent to the floor significantly more people.<sup>103</sup> Some delay in placing nominees with favorable committee votes on the Senate calendar and according them floor debates and votes was understandable, given the press of other significant business and the chamber's unanimous consent procedure.<sup>104</sup>

However, the few judges confirmed in 1997, especially as contrasted with prior sessions, indicate that much responsibility lay with the Senate majority's leadership and its scheduling of floor votes. As the 105th Congress commenced, Lott promised to assess closely Clinton's nominees.<sup>105</sup> In spring 1997, Senator Leahy, the Judiciary Committee's ranking minority member, and other Democrats apparently responded by informing the Senate that they had expedited appointments in Republican administrations and by urging floor debate and votes on nominees.<sup>106</sup>

#### d. Nomination and Confirmation

Numerous difficulties related to nomination and confirmation evaluated in the prior discussion of the persistent dilemma accompanied selection during 1997 and 2001.<sup>107</sup> For example, some administration and Senate personnel involved with the process seemed to not comprehend the problem's severity, as witnessed in the

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REC. S2515, S2536 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch); *see also* Ted Gest & Lewis Lord, *The GOP's Judicial Freeze: A Fight to See Who Rules Over the Law*, U.S. NEWS & WORLD REP., May 26, 1997, at 23 (discussing the battle over judicial appointments during the Clinton presidency); Novak, *supra* note 75, at 38 (detailing the major reasons why appointments have been delayed).

103. This dynamic resembled Republican processing in the 1996 election year. *See* 143 CONG. REC. S8041, S8045 (daily ed. July 24, 1997) (statement of Sen. Leahy); Hatch, *supra* note 75; *see also* Goldman & Slotnick, *supra* note 81, at 257 (recounting 1996 treatment); Tobias, *supra* note 94, at 744-45 (same).

104. *See* Tobias, *supra* note 11, at 546.

105. *See* Lewis, *supra* note 87. *See generally* Gest & Lord, *supra* note 102; Novak, *supra* note 75.

106. For example, Senator Biden insisted that all nominees have floor votes, while Senator Sarbanes claimed the Republicans would not even afford up-or-down votes. *See* 143 CONG. REC. S2538-41 (daily ed. Mar. 19, 1997). When Lott reportedly said he would move no nominations until Clinton filled four Federal Election Commission vacancies, Leahy discussed non-controversial nominees (those who had bipartisan support and unanimous committee votes) to courts under pressure. *See* 143 CONG. REC. S5653 (daily ed. June 16, 1997) (statement of Sen. Leahy).

107. *See supra* notes 46-60 and accompanying text.

uneven pace of nominations and of Committee scrutiny. Certain observers, especially Senators, claimed that the present complication and much delay were basically animated by politics and even by concerns regarding candidates' ideology. For instance, in 1997, Senators Biden and Sarbanes suggested that their Republican colleagues were politicizing the process and altering two centuries of tradition.<sup>108</sup>

An effort which some observers found political and which seemingly implicated the existing impasse and delay was the endeavor of Senator Charles Grassley (R-Iowa) to examine the allocation of judicial resources and their employment in the regional circuits.<sup>109</sup> For example, his subcommittee conducted hearings to determine whether the courts needed more judges or even required their present complements.<sup>110</sup> Most relevant to this Essay, Chief Judge Wilkinson testified that the Fourth Circuit functions effectively with fewer than all of the positions authorized,<sup>111</sup> while Grassley issued a report that echoed Wilkinson's idea and found that virtually no court needed additional judges.<sup>112</sup>

The appropriate use of judicial resources is a valid Senate concern, but this initiative may have slowed selection for appeals courts, which have experienced high percentages of vacancies, many

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108. 143 CONG. REC. S2538, S2541 (daily ed. Mar. 19, 1997). Biden even stated on the Senate floor that the Republicans were attempting to prevent Clinton from appointing judges, especially for the appeals courts. *Id.* at S2538. Some experts offered similar ideas. Professor Sheldon Goldman said "a newly-elected president has [never] faced this kind of challenge to his judicial nominations," while Professor Geoffrey Stone found the Republican actions "a scandalous and stunningly irresponsible misuse of the Senate's authority." See Gest & Lord, *supra* note 102 (quoting Professors Goldman and Stone).

109. See U.S. SENATE JUDICIARY SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS, CHAIRMAN'S REPORT ON THE APPROPRIATE ALLOCATION OF JUDGESHIPS IN THE UNITED STATES COURTS OF APPEALS (Mar. 1999) (Sen. Grassley, Chair), available at <http://www.senate.gov/~grassley/graphics/genera-2.pdf> [hereinafter CHAIRMAN'S REPORT]; *infra* note 110.

110. *Hearing Before the Senate Judiciary*, *supra* note 6. See generally Carl Tobias, *The Federal Appeals Courts at Century's End*, 34 U.C. DAVIS L. REV. 549, 557-69 (2000) (assessing Fourth Circuit data compared to other regional circuits and judges' views on additional judgeships).

111. See *Hearing Before the Senate Judiciary*, *supra* note 6, at 12-18; see also Tobias, *supra* note 94, at 749-50 (discussing how many judges oppose expanding the size of the federal judiciary); J. Harvie Wilkinson, III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L. J. 1147 (1994).

112. See CHAIRMAN'S REPORT, *supra* note 109. For a more detailed analysis of the Fourth Circuit specifically, see *Analysis of the Fourth Circuit*, in CHAIRMAN'S REPORT, *supra* note 109, § II(d), available at <http://www.senate.gov/~grassley/graphics/fourth.pdf> [hereinafter *Analysis of the Fourth Circuit*].

judicial emergencies, and increasing caseloads.<sup>113</sup> Moreover, Congress has authorized no new appellate judgeships since 1990, although the Judicial Conference suggested that lawmakers approve numerous additional seats, a proposal based on expert conservative judgments and systematically assembled empirical data related to appeals and workloads.<sup>114</sup>

Rather similar developments attended selection in 2001. For instance, three of the eleven appeals court nominees proposed by Bush in May received Judiciary Committee hearings during that year.<sup>115</sup> In fairness, Senator Leahy and other Democrats, such as Senator Charles Schumer (D-N.Y.), stated publicly that the Senate would expedite processing of nominees whom they considered highly competent and politically moderate.<sup>116</sup> For example, the Senate did confirm Judge Gregory and Judge Barrington Parker, whom President Clinton had initially appointed.<sup>117</sup>

Numerous actions of Senators whose party did not occupy the White House supported the claims that the existing conundrum and delays were politically motivated, especially out of concern about nominees' perceived ideological views. Illustrative has been the high percentage of appeals court vacancies, which Senate members view as more important than district courts, because appellate rulings govern multiple states and the shrunken Supreme Court docket means the regional circuits increasingly serve as courts of last resort for those areas.<sup>118</sup>

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113. Twenty-five judgeships were vacant. *See Judicial Boxscore As of August 1, 1997*, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), Aug. 1997, at 8. For relevant data on docket growth, see RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 58–64 (1996); LONG RANGE PLAN, *supra* note 28, at 10.

114. *See* Tobias, *supra* note 12, at 1271 (discussing Conference proposals); Tobias, *supra* note 94, at 753 (describing the proposals as conservative); *see also* S. 678, 105th Cong. (1997) (providing judgeships); 143 CONG. REC. S2538–S2540 (daily ed. Mar. 19, 1997) (statement of Sen. Biden) (claiming that the Conference documented needs to fill vacancies and to authorize more judges but Republicans urged the decommissioning of judgeships); Letter from Leonadis Ralph Mecham, Secretary, to Sen. Patrick Leahy (May 28, 2002) (urging the creation of new judgeships) (on file with the North Carolina Law Review).

115. *See* Jonathan Groner, *Privilege Fight Looms Over Estrada*, LEGAL TIMES, June 3, 2002, at 1; *see also supra* note 79 and accompanying text. *But see infra* note 117 and accompanying text (stating that the Senate confirmed only two of the nominees).

116. *See, e.g.,* Neil A. Lewis, *First Punch in the Revived Bench-Tipping Brawl*, N.Y. TIMES, Mar. 17, 2002, at A35; Neil A. Lewis, *More Battles Loom Over Bush's Nominees for Judgeships*, N.Y. TIMES, Apr. 7, 2002, at A24.

117. *See* Mark Hamblett, *Parker Brings Experience and Intellect to Circuit*, N.Y. L.J., Oct. 25, 2001, at 1; Masters, *supra* note 3.

118. *See* Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP.



e. Prospects for Change

To the extent that many political considerations attending selection in 1997 and 2001 and fostering the present difficulty are intrinsic, they may defy treatment. For instance, the analysis of permanent openings suggested approaches that enhanced efficiency and resources will minimally limit delay resulting from politics.<sup>119</sup> Nonetheless, the evaluation of political phenomena constituting the current dilemma indicates that public officers might rectify them if the officials had sufficient political will. For instance, political factors are all that appeared to prevent Presidents Clinton and Bush from promptly tendering more nominees with comparatively moderate political perspectives and a majority of Senators from expeditiously approving them.

f. Effects of the Current Impasse

The existing complication has had numerous deleterious impacts, many of which are analogous to those that the persistent vacancies problem imposed.<sup>120</sup> For example, the present dilemma has pressured courts and parties, the effects of which are manifested in judges' workloads.<sup>121</sup> The judiciary now experiences a large civil backlog,<sup>122</sup> and docket growth and openings in a third of the Ninth Circuit's positions required it to cancel 600 oral arguments during 1997.<sup>123</sup> In July 1997, the imminent crisis produced by extraordinary numbers of judicial vacancies and the difficulties that attend delayed appointments led the presidents of seven major legal associations to author an open letter urging President Clinton and Senator Lott to commit sufficient resources to expedite confirmation.<sup>124</sup> These ideas

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CT. REV. 403, 403-404 (1997); Lewis, *supra* note 96.

119. See *supra* notes 64-65 and accompanying text.

120. See *supra* notes 68-74 and accompanying text.

121. See Tobias, *supra* note 11, at 550-51; Gest & Lord, *supra* note 102, at 24.

122. See Gest & Lord, *supra* note 102, at 23-24; see also Robert Schmidt, *The Costs of Judicial Delay*, LEGAL TIMES, Apr. 28, 1997, at 6 (discussing the District of Columbia's judicial backlog); Bill Kisliuk, *Judges' Conference Slams Circuit-Splitting, Vacancies*, THE RECORDER, Aug. 19, 1997, at 1, LEXIS, News & Business Library, News, U.S. News File (arguing that judicial vacancies created the backlog).

123. See Novak, *supra* note 75, at 37; *Chronic Federal Judge Shortage Puts Lives, Justice On Hold*, LAS VEGAS REV. J., Aug. 13, 1997, at 9A, LEXIS, News & Business Library, News, U.S. News File (stating that Sixth Circuit canceled sixty arguments). During 1997, Senator Leahy claimed that a significant number of federal prosecutors had to forgo cases or enter plea bargains because there were insufficient judges to hear cases. See 143 CONG. REC. S8041, S8045 (daily ed. July 24, 1997).

124. Letter to William J. Clinton, President of the United States, & Trent Lott, Majority Leader, U.S. Senate, from N. Lee Cooper, ABA President, et al. (July 14, 1997),

evidence how openings detrimentally affect millions of individuals. Insofar as the public ascribes the current impasse to partisan politics, the activity can undermine respect for the government, particularly the President and the Senate.

### C. Fourth Circuit Developments

The origins and growth of the considerations that have fostered controversy over Fourth Circuit judicial selection resemble in certain, and differ in other, ways from the national developments detailed above. The background related to the Fourth Circuit also has deep historical roots and is rather complicated. For instance, Senator Helms has trenchantly admonished that no Republican appointee from North Carolina has served on the appellate court since President Calvin Coolidge named Judge John J. Parker.<sup>125</sup>

Several factors suggest that the persistent vacancies conundrum had somewhat limited relevance for the Fourth Circuit until quite recently. These considerations include the comparatively few appeals which litigants and attorneys took to the court, the rather small number of active appellate judgeships that Congress authorized for the Fourth Circuit, and the relative infrequency with which openings arose on the court. For example, in the 1970s, the Fourth Circuit, like numerous appeals courts, continued to receive a manageable quantity of filings—minuscule percentages of which were complex<sup>126</sup>—to accord most cases appellate justice,<sup>127</sup> to operate with few active judges (seven),<sup>128</sup> and to experience only occasional vacancies that Presidents and the Senate could expeditiously fill.<sup>129</sup>

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reprinted in 143 CONG. REC. at S8046. The bar association presidents warned that large numbers of judicial vacancies and delays in judicial confirmation were eroding democracy.

125. See Firestone, *supra* note 1; see also David Savage, *Clinton Losing Fight for Black Judge; His Nominees to All-White 4th Circuit are Blocked by Sen. Helms*, L.A. TIMES, July 7, 2000, at A1 (discussing recent Court of Appeals nominations).

126. See Bermant et al., *supra* note 11, at 327–28; *supra* note 26 and accompanying text.

127. See, e.g., THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL—THE PROBLEMS OF THE U.S. COURTS OF APPEALS 14–30 (1994) (discussing the design and tradition of federal appellate courts as well as the concept of appellate justice); JUDITH MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 9–11 (1993) (explaining the process of the Court of Appeals and the concept of appellate justice).

128. See Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629–32 (codified as amended at 28 U.S.C. § 44 (2000)) (increasing the number of active circuit judgeships in the Fourth Circuit to seven); Bermant et al., *supra* note 11, at 323–24; *supra* notes 24 and accompanying text.

129. See Bermant et al., *supra* note 11, at 329–31; *supra* note 24 and accompanying text.

Beginning in the late 1970s, the Fourth Circuit began encountering significant docket growth and its membership increased to ten when the omnibus judgeships statute passed.<sup>130</sup> Even rising caseloads and the corresponding expansion of the court's complement seemed to have little impact on selection during much of the 1980s. For instance, Congress authorized a single new judgeship,<sup>131</sup> while President Ronald Reagan and Senators smoothly filled those few openings that occurred, so that the court had no vacancies at his administration's conclusion.<sup>132</sup> In short, the persistent vacancies problem seemed to have little historical relevance for the Fourth Circuit, although it may have affected appointments during the 1990s.

In contrast, the present impasse apparently has much salience. A 1990 Act enlarged the court to fifteen judges.<sup>133</sup> A number of circuit seats opened in the George Bush Administration, which realized considerable success in appointing judges before 1992 but experienced some difficulty filling the positions during that election year.<sup>134</sup> Democrats, who controlled the Senate, attributed the complications to delayed nomination of candidates they found acceptable, while the Republican Party claimed that the majority slowed the processing of well-qualified candidates because they hoped a Democrat would capture the White House in 1992.<sup>135</sup> In any event, when Bush left office, the Fourth Circuit had several vacancies, for one of which he had nominated Judge Boyle.<sup>136</sup>

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130. See Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629-32 (codified as amended at 28 U.S.C. § 44 (2000)). See generally WILLIAM MCLAUGHLAN, *FEDERAL COURT CASELOADS* (1984) (analyzing docket growth).

131. See Act of July 10, 1984, Pub. L. No. 98-353, 98 Stat. 333, 346 (codified as amended at 28 U.S.C. § 44 (2000)).

132. See GOLDMAN, *supra* note 39, at 285-345 (assessing Reagan's judicial selection).

133. See Federal Judgeship Act of 1990, Pub. L. No. 101-650, § 202, 104 Stat. 5089, 5098-99 (1990) (codified as amended at 28 U.S.C. § 44 (2000)) (adding four judgeships to the United States Court of Appeals for the Fourth Circuit). See generally Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282 (1993) [hereinafter Goldman, *Final*] (assessing the Judgeship Act and Bush's judicial selection legacy); Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294 (1991) [hereinafter Goldman, *Imprint*] (assessing Bush's judicial selection).

134. Bush nominated, and the Senate confirmed, three judges in 1990 and 1991. For an analysis of Bush's judicial selection, see Goldman, *Final*, *supra* note 133; Goldman, *Imprint*, *supra* note 133.

135. See, e.g., 143 CONG. REC. S2538 (daily ed. Mar. 19, 1997) (statement of Sen. Biden); Goldman, *Final*, *supra* note 133; see also Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. REV. 1257, 1270-74 (assessing Bush's judicial selection).

136. See, e.g., Firestone, *supra* note 1; Brooke A. Masters, *For One Nominee Fight Ahead*, WASH. POST, May 18, 2001, at A29; Monk, *supra* note 1.

President Clinton enjoyed marginally greater success. During 1995, the President first attempted to elevate James A. Beaty, Jr., whom he had named a United States District Judge for the Middle District of North Carolina two years earlier, but Senator Helms and Senator Hatch blocked Beaty's consideration.<sup>137</sup> In 1999, Clinton nominated James Wynn, who serves as a judge on the North Carolina Court of Appeals, and the jurist received similar Senate treatment.<sup>138</sup> Helms premised his actions on the claim that the Fourth Circuit was operating well without its full judicial complement.<sup>139</sup> During October 2000, the President nominated Professor Elizabeth Gibson of the University of North Carolina School of Law<sup>140</sup> and Andre Davis, a United States District Judge for the District of Maryland;<sup>141</sup> however, the chamber processed neither person.

Clinton did appoint Fourth Circuit Judges Blane Michael and Robert King from West Virginia, whose rather smooth confirmations may reflect their non-controversial candidacies or the political acumen of longtime Democratic Senator Robert Byrd.<sup>142</sup> The President also named Diana Gribbon Motz, who had served on the Maryland Court of Appeals, as the first Fourth Circuit female judge from Maryland, while he elevated William B. Traxler, Jr., whom Bush placed on the United States District Court for the District of South Carolina.<sup>143</sup> Finally, Clinton's Article II recess appointment of Roger

137. See, e.g., GERHARDT, *supra* note 15, at 187–88; Monk, *supra* note 136; Charles Ogletree, *Why Has the G.O.P. Kept Blacks Off Federal Courts?*, N.Y. TIMES, Aug. 18, 2000, at A25; Savage, *supra* note 125; see also Editorial, *Confirm Judge Beaty*, CHARLOTTE OBSERVER, Mar. 8, 1996, at 14A.

138. See, e.g., Firestone, *supra* note 1; Masters, *supra* note 136; see also Editorial, *Filling Out the Court*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 14, 1999, at A28.

139. See Ogletree, *supra* note 137; James Rosen, *Edwards Backs Wynn for 4th Circuit Judgeship*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 5, 1999, at A3; Savage, *supra* note 125; see also *Hearing Before the Senate Judiciary*, *supra* note 6 (providing the testimony of Fourth Circuit Chief Judge J. Harvie Wilkinson who proffered a similar assertion).

140. See U.S. Newswire, *President Clinton Nominates S. Elizabeth Gibson to the Federal Bench* (Oct. 26, 2000), 2000 WL 26850371; Anne Blythe, *Appeals Court Nominee Realistic*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 28, 2000, at 1B (Orange Co. Ed.).

141. See, e.g., Sheldon Goldman et al., *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 248 (2001); Lyle Denniston, *Politics, Race Cloud Naming of Judges to U.S. 4th Circuit*, BALTIMORE SUN, Jan. 8, 2001, at 1A; Maria Glod, *New U.S. Judge's Future Uncertain*, WASH. POST, Jan 19, 2001, at B8.

142. See, e.g., Naftali Bendavid, *Adding Diversity to the Bench*, LEGAL TIMES, Dec. 27, 1993, at 7; Francis X. Clines, *How Do West Virginians Spell Pork? It's B-Y-R-D*, N.Y. TIMES, May 4, 2002, at A1; Lawrence Messina, *"Tenacious" Judge Takes Seat Today*, CHARLESTON GAZETTE (W.Va.), Oct. 23, 1998, at 1A, 1998 WL 5977846.

143. See, e.g., Marcia Myers, *Diana Motz Joins Federal Bench Today*, BALTIMORE SUN, July 22, 1994, at 1B; see also *Clinton Picks Motz for U.S. Appeals Court*, BALTIMORE SUN, Jan. 28, 1994, at 2B; *Traxler Nominated to 4th Circuit Court*, CHARLESTON POST &

Gregory partly led President George W. Bush to nominate, and the Senate to confirm, Gregory in July 2001.<sup>144</sup> Despite these efforts, when Clinton completed his second term, the fifteen-member court technically had five empty seats, one of which Gregory ultimately filled.

The significant number of vacancies now experienced by the Fourth Circuit, and the considerable time that they have remained open, has apparently limited its delivery of appellate justice in several ways. For example, the Commission on Structural Alternatives for the Federal Courts of Appeals, which recently conducted a one-year study at the behest of Congress, ascertained that the Fourth Circuit affords the smallest percentage of published opinions in the country and its percentage of oral arguments ties for the lowest.<sup>145</sup> The court's eleven percent figure for published determinations is twelve points under the system-wide average.<sup>146</sup> Its thirty percent statistic for oral arguments is ten points below the national average and less than one-half the percentage granted in the First and Second Circuits.<sup>147</sup> The relatively few published dispositions and oral arguments are useful measures of appellate justice and effective performance, which involve significant process values, such as open court access. Opinion publication and oral argument can enhance judicial accountability, visibility, and fairness to litigants.<sup>148</sup>

The Fourth Circuit operates efficaciously in other ways. For instance, the Commission found that the court attains the systemic average for most resolution time indicators and for merits terminations per judgeship.<sup>149</sup> Chief Judge Wilkinson testified

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COURIER (Charleston, S.C.), July 11, 1998, at B6, [http://www.charleston.net/PSUser/psrecord.htm?NS\\_doc\\_offset=0&NS\\_doc\\_returned=1&NS\\_adv\\_search=0&NS\\_search\\_set=dkg0xCuyv65af0e80a8530d&NS\\_template\\_dir=/docs/templates/archives&NS\\_initial\\_frm=1](http://www.charleston.net/PSUser/psrecord.htm?NS_doc_offset=0&NS_doc_returned=1&NS_adv_search=0&NS_search_set=dkg0xCuyv65af0e80a8530d&NS_template_dir=/docs/templates/archives&NS_initial_frm=1) (last visited Aug. 22, 2002) (on file with the North Carolina Law Review).

144. See *Masters*, *supra* note 3; *Mitchell*, *supra* note 3.

145. FINAL REPORT, *supra* note 7, at 22 tbls.2-6 & 2-7.

146. See *id.* at 22 tbl.2-7 (providing the data on published opinions and oral arguments). But see *Analysis of the Fourth Circuit*, *supra* note 112, at 1 (finding that the court operates well).

147. See FINAL REPORT, *supra* note 7, at 22 tbl.2-6. But see *Hearing Before the Senate Judiciary*, *supra* note 6 at 12-18 (testimony of Chief Judge Wilkinson) (asserting that the court operates well).

148. See *BAKER*, *supra* note 127, at 14-30; *MCKENNA*, *supra* note 127, at 9-11. See generally Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463 (1987) (assessing process values).

149. See COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, WORKING PAPERS, 93 tbl.1; 95 tbl.7. The Senate report found its disposition rate the "fastest" and "by this important measure, [the court is] in excellent shape." *Analysis of the Fourth Circuit*, *supra* note 112, at 2. *Accord Hearing Before the*

correspondingly that the tribunal functions well without its full complement of authorized judges.<sup>150</sup> Moreover, the 1999 report compiled by the Senate Judiciary Subcommittee on Administrative Oversight and the Courts found that the tribunal works effectively and needs no additional positions. It also asserted that new judgeships might threaten efficiency and circuit law's clarity and stability, in part by fostering inconsistent resolution and invocation of the en banc process.<sup>151</sup> The Senate study further claimed that the tribunal performs well because it judiciously employs staff attorneys, screens through telephone conferences, restricts argument in "more significant cases" and allows no argument in "routine" appeals, permits informal briefs and summary dispositions, and uses prepublication opinion circulation to promote uniform decision-making.<sup>152</sup> Most of these measures conserve resources, but other approaches, such as leaving publication and counsel appointment for indigent pro se litigants in essence to one judge's discretion, can limit court access.<sup>153</sup> Thus, although the Commission's raw data suggest the Fourth Circuit may operate less efficaciously than it could, this material is inconclusive and additional sources indicate the court functions rather well.

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*Senate Judiciary*, supra note 6, at 12–18 (testimony of Chief Judge Wilkinson). Recent statistics agree. See U.S. Courts of Appeals, *Median Time Intervals in Cases Terminated After Hearing or Submission*, by Circuit During the 12-Month Period Ending Sept. 30, 2001, at <http://www.uscourts.gov/judbus2001/appendices/b04sep01.pdf> (last visited Aug. 22, 2002) (on file with the North Carolina Law Review). This may reflect the few published opinions and oral arguments afforded.

150. See *Hearing Before the Senate Judiciary*, supra note 6, at 14 (testimony of Chief Judge Wilkinson); see also Brooke Masters, *Virginian May End the Impasse Over Integrating Court*, WASH. POST, July 30, 2000, at C1; supra note 139 and accompanying text.

151. *Analysis of the Fourth Circuit*, supra note 112, at 1, 3. *Accord Hearing Before the Senate Judiciary*, supra note 6, at 13 (testimony of Chief Judge Wilkinson). See generally Tobias, supra note 110, at 565 (assessing views regarding additional judgeships' effects on courts).

152. See *Analysis of the Fourth Circuit*, supra note 112, at 1–2; *Hearing Before the Senate Judiciary*, supra note 6, at 13 (testimony of Chief Judge Wilkinson) (agreeing with the findings in the subcommittee report); 4TH CIR. R. 33, 34, 36, I.O.P. 36.3. The court resolves cases rather promptly, while any delay that might result from pre-publication opinion circulation may be offset by increased intra-circuit consistency. See *Analysis of the Fourth Circuit*, supra note 112, at 1; *Hearing Before the Senate Judiciary*, supra note 6 (testimony of Chief Judge Wilkinson); 4TH CIR. R. 36(a); supra note 149 and accompanying text.

153. See 4TH CIR. R. 34(b), 36(a). The recent study's scope, relative lack of empirical data, and political nature are controversial. However, the subcommittee clearly has authority to monitor the courts and their resources, and the subcommittee did attempt to gather some data and seek judges' perspectives that are informed by experience.

#### D. *A Word About North Carolina Developments*

The significant number of Fourth Circuit vacancies and the protracted time they have remained open directly implicate North Carolina. The most salient development relating to North Carolina is that no judge from the state now serves on the Fourth Circuit.<sup>154</sup> Senator Helms often mentions this, but he is partly responsible for it. In the 1970s, Helms may have prevented the nomination of Julius Chambers, a renowned civil rights lawyer and former NAACP General Counsel, and Professor William Van Alstyne, a preeminent constitutional scholar at the Duke University School of Law, while during the Clinton Administration, Helms blocked consideration of Judge Beaty and Judge Wynn.<sup>155</sup> On May 9, 2001, President Bush nominated Chief Judge Boyle of the Eastern District of North Carolina at Helms's apparent instigation, but he has not received a hearing.<sup>156</sup>

Each state located within the purview of a specific appeals court should have a judge on the tribunal who is stationed in the jurisdiction, even though the judiciary is not a representative branch of the federal government. An appellate judge whose chambers are situated in a particular state generally will be more familiar with its substantive law, which may help resolve appeals that implicate diversity of citizenship,<sup>157</sup> and with the jurisdiction's customs and mores, which can facilitate efforts to reconcile federal policies and more localized concerns.<sup>158</sup> The residents of a state may also have greater confidence in, and find more acceptable, the decisions of an

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154. See Firestone, *supra* note 1; Wagner, *supra* note 2.

155. J. Dickson Phillips, Jr., a former Dean of the University of North Carolina School of Law, ultimately assumed the North Carolina seat. For events in the 1970s, see GOLDMAN, *supra* note 39, at 273–74; Peter G. Fish, *Merit Selection and Politics: Choosing a Judge of the United States Court of Appeals for the Fourth Circuit*, 15 WAKE FOREST L. REV. 635 (1979). For developments in the Clinton Administration, see *supra* notes 137–41 and accompanying text.

156. See PRESIDENT'S REMARKS, *supra* note 79, at 725; Firestone, *supra* note 1; see also Savage, *supra* note 4. See generally *supra* note 136 and accompanying text (discussing Boyle's nomination).

157. See 135 CONG. REC. S5027 (daily ed. May 9, 1989) (statement of Sen. Hatfield). "Mastery of State Law" may be overvalued, especially given the rather few appeals from diversity cases. See, e.g., BAKER, *supra* note 127, at 98; Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L. J. 1357, 1373 (1995) (reporting that of the 225 diversity cases appealed to the Ninth Circuit, the court affirmed three-fourths).

158. This is the regional circuits' federalizing function. See CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 10–13 (5th ed. 1994) (discussing generally the role of the courts of appeals and federalization specifically); see also John Minor Wisdom, *Requiem for a Great Court*, 26 LOY. L. REV. 787, 788 (1980) (discussing directly the federalizing role of the circuit courts).

appellate court that includes a member who lives in their home state. Indeed, when a regional circuit has no judge from a specific jurisdiction for an extended period, its residents could develop an unhealthy sense of estrangement from, and even distrust of, the appeals court system that propounds an expanding corpus of federal law that governs them.<sup>159</sup> These phenomena will be accentuated as appellate caseload growth and a shrunken Supreme Court docket increasingly convert the regional circuits into the courts of last resort for their respective geographic areas.<sup>160</sup> The Senate has traditionally honored the convention of having a member from every state in a regional circuit serve on the court, while Congress appears to have considered the notion so compelling that lawmakers recently codified it.<sup>161</sup> However, Senator Helms's actions during the Clinton Administration and in the past necessitated departure from the practice for the Fourth Circuit.

In sum, the earlier assessment of the generic vacancies problem and of the present difficulty suggests these components may have compromised the criminal and civil justice that the federal judiciary affords. This situation deserves prompt, effective treatment. The Essay's next segment explores a variety of approaches that officials in the three branches could institute to address the circumstances.

## II. ANALYSIS OF PREFERABLE SOLUTIONS

This part surveys numerous remedies for unfilled appeals court vacancies, although several factors complicate the provision of definitive suggestions. First, it is impossible to predict which political party will capture disputed Senate seats, especially in North Carolina, and a chamber majority this November, although Senate control will be more critical than who wins the North Carolina race. Closely related is timing. Before the elections, Senators will confirm few

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159. See *Ninth Circuit Court of Appeals Reorganization Act of 1989: Hearing on S.948 Before Senate Judiciary Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong. 247 (1990) (statement of Sen. Simpson). For an analysis of these and related issues, see BAKER, *supra* note 127, at 95-98; see also *Ninth Circuit Split: Hearing on S.853 and S.956 Before Senate Comm. on the Judiciary*, 104th Cong. 5 (1995) (statement of Sen. Simpson).

160. See POSNER, *supra* note 113, at 58-64, 80-81, 194-95 (discussing appeals growth and the Supreme Court's shrunken docket). See generally Hellman, *supra* note 118 (examining the Supreme Court's shrunken docket).

161. See Act of Nov. 26, 1997, Pub. L. No. 105-119, § 307, 111 Stat. 2440, 2493 (1997) (amending 28 U.S.C. § 44(c) (1994) by requiring each appellate court except the United States Court of Appeals for the Federal Circuit to have "at least one circuit judge in regular active service appointed from the residents of each [state] in that circuit").



nominees already submitted, much less process new ones. Pragmatic, political realities may mean that both parties must await the November returns. Nonetheless, some ideas can be offered by positing plausible scenarios. Thus, this section emphasizes the best measures that the President, the Senate, and the Judiciary could implement to rectify or ameliorate the political difficulties that have attended Fourth Circuit selection.<sup>162</sup>

#### A. *The Executive Branch and the Senate*

The President and Senators must do everything possible to improve the discharge of their judicial appointments duties. For instance, the Bush Administration and the Senate might undertake efforts to streamline those responsibilities for the process that each fulfills, while meticulously balancing analysis of nominees' character and competence with the need to expedite selection.

Executive and legislative officers should treat increasing politicization and recognize that attempts to address it may be controversial and perhaps unsuccessful. The officials must work together, reach reasonable accommodations, and efficaciously resolve disputes when they occur. The officers should also cease participating in activities, such as recriminations over who is most responsible for delay, which are apparently animated by efforts to secure transitory political victories and by gamesmanship.<sup>163</sup> Insofar as growing politicization slows the process and fosters the perception that government officials are sacrificing the best interests of the courts and the country for short-term partisan advantage, the phenomena could erode public respect.

These ideas apply specifically to Fourth Circuit and North Carolina appointments. For example, the President might redouble his efforts to cooperate with Senators across the region by consulting them before he formally nominates designees. Proposal of a nominee for the second North Carolina opening provides an excellent opportunity to seek this advice. All Senate members from states

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162. See *supra* note 16. The persistent dilemma's best solution seems to be creation of enough new positions to accord the judiciary every judge now authorized because this would avoid certain theoretical, pragmatic, and legal problems. See Tobias, *supra* note 11, at 569–70 (suggesting solutions such as creating enough positions to compensate for the vacancies and creating floater judgeships). Other measures may only slightly decrease essentially irreducible temporal restraints. For exposition of many solutions, few of which apply to the Fourth Circuit, see *id.* at 552–72.

163. See, e.g., Sargentich, *supra* note 13, at 1033–35; Editorial, *Eliminating Unnecessary Delays in Filling Federal Judicial Vacancies*, 83 JUDICATURE 100 (1999); Lloyd Cutler & Mickey Edwards, *End the Judicial Blame Game*, WASH. POST, Mar. 13, 2002, at A29.

located in the court should closely communicate about important issues, namely whether they will continue approving judges who are from the same jurisdictions in which vacancies arise. The two Senators representing each state in the Fourth Circuit must work together and find a suitable candidate when a vacancy occurs in a particular jurisdiction. They may even consider establishing an intrastate merit-selection group, which could resemble the Circuit Judge Nominating Commission employed by President Jimmy Carter or the district panel that Bush as well as California Democratic Senators Dianne Feinstein and Barbara Boxer recently created.<sup>164</sup> That concept might resonate in North Carolina, particularly if Democrats retain the Senate and the new Senator wants to pursue a cooperative relationship. Indeed, the leadership of the North Carolina Bar Association recently proposed the creation of a “bipartisan commission . . . to recommend federal judicial nominees” in an attempt “to break a bitter stalemate between North Carolina’s two Senators.”<sup>165</sup>

### B. *The Executive Branch*

Presidents Clinton and George W. Bush had some responsibility for the current openings.<sup>166</sup> Bush may not have supplied enough capable nominees with moderate political views for the Judiciary Committee to process, and he must forward more names at a pace that will facilitate its work. In fairness, Bush might have proceeded cautiously because errors by a nascent administration can erode credibility, promote delay, and threaten selection.

The President must assess and institute numerous conciliatory measures because that approach could prove to be more effective and he could rely on their prior invocation, should resort to less cooperative mechanisms be warranted. The President must apply practices that will enhance discharge of administration duties. For

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164. For the Carter Commission, see LARRY C. BERKSON & SUSAN B. CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES* (1980); Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 *JUDICATURE* 136, 140 (1987). For the California panel, see Carla Marinucci, *Feinstein, Boxer Given A Say Over Judges*, *SAN FRAN. CHRON.*, Apr. 27, 2001, at A3; Henry Weinstein, *Judge Selection Process Set Up Courts*, *L.A. TIMES*, May 30, 2001, at B1.

165. Wagner, *supra* note 2; Editorial, *Better Way: Plan Would Make Obstructionism Costly*, *FAYETTEVILLE OBSERVER*, June 26, 2002, at 8A.

166. In early 1997 and 2001, each tendered few nominees, most of whom were well qualified and rather moderate, but Hatch and Leahy claimed some were not. See *supra* notes 79–85 and accompanying text.

instance, Bush could expedite nominations by compiling lists of possible appellate court designees and expedite confirmation by urging that the Judiciary Committee and the FBI eliminate redundant investigation and evaluation.<sup>167</sup> Bush should also examine the ABA's exclusion from advance candidate review, as this decision has increased delay due to Democratic insistence on informal ABA peer review.<sup>168</sup> Other conciliatory ideas include submitting fewer nominees Democrats will oppose. Illustrative was the 2001 selection of Judge Barrington Parker, whom Clinton had named to the district bench and the Senate promptly approved.<sup>169</sup> Because most district judges can easily secure appointment to appeals courts, elevation remains a venerable technique.<sup>170</sup>

The President should at least consider nominating more well-qualified attorneys who have Democratic affiliations.<sup>171</sup> This approach could be salutary in courts with protracted vacancies and large caseloads and which are located in states that traditionally vote for Democrats or have two Democratic Senators. The Sixth Circuit, which has seven of its sixteen seats open and the fourth largest docket, is a general instance, while Maryland, whose Senators blocked a Bush candidate's nomination, affords a Fourth Circuit example.<sup>172</sup> The "Michigan seats" remain unfilled because the two

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167. Bush could enhance nomination and confirmation through consultation with the Judiciary Committee and with Senators and by implementing a merit-selection commission. See *supra* notes 164–65 and accompanying text.

168. See *supra* notes 91–92 and accompanying text; *Hearings on Judicial Nominations*, *supra* note 92 (statement of Sen. Leahy) (urging the current Bush Administration to reconsider its decision to discontinue soliciting ABA advice before beginning the confirmation process).

169. This occurred because Parker had been approved once, had Democrats' support, and had experience derived from prior service, which informed analysis of his abilities and character. The action resembled Clinton's elevation of Judge Sonia Sotomayor, whom former President George Bush had named. See Neil A. Lewis, *After Delay, Senate Approves Judge for Court in New York*, N.Y. TIMES, Oct. 3, 1998, at B2; see also *supra* note 117 and accompanying text (discussing the confirmations of Judge Gregory and Judge Parker).

170. Bush's three predecessors relied upon the elevation of district judges. See Tobias, *supra* note 94, at 752; Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. TIMES, Apr. 10, 1990, at A1; Ruth Marcus, *Bush Quietly Fosters Conservative Trend in Courts*, WASH. POST, Feb. 18, 1991, at A6. Clinton Administration examples include Second Circuit Judge Sonia Sotomayor and Fourth Circuit Judge William Traxler. See *supra* notes 143, 169 and accompanying text.

171. See *supra* note 82 and accompanying text.

172. Candidates have been nominated to fill all of the vacancies on the Sixth Circuit Court of Appeals. VACANCIES, *supra* note 5. For analysis of Maryland, see Tobias, *supra* note 38, at 110, 114; Neil Lewis, *Washington Talk: Road to Federal Bench Gets Bumpier in Senate*, N.Y. TIMES, June 26, 2001, at A16.

parties' officials there cannot agree.<sup>173</sup> For courts with numerous long-term vacancies and enormous caseloads, which are situated in states where those who proffer or can block designees are deadlocked, Bush could consider trade-offs, such as allowing Democratic proposals of half as many nominees as the Republicans.<sup>174</sup> He might even permit Democrats to suggest some candidates in exchange for a judgeships bill, thereby inaugurating a bipartisan judiciary, an idea that may generate much support in today's political climate.<sup>175</sup> Bush could also agree with Senator Leahy on a prearranged number of nominees to be confirmed annually.<sup>176</sup>

If attempts at improving selection through cooperation fail, the President might entertain and apply less conciliatory methods. For example, Bush could use his office as a bully pulpit to blame Democratic Senators or to cajole or shame them into greater action, while he might force the issue by taking it to the people. Related approaches are submission of nominees for all openings or selective reliance on recess appointments, each of which could pressure the Senate by publicizing or dramatizing how protracted vacancies threaten justice. A recess appointment probably led to Judge Gregory's confirmation, but real legal, political, and practical restraints limit the tool's utility.<sup>177</sup> Bush has employed, or threatened

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173. See Groner & Ringel, *supra* note 9; Editorial, *Senate Nomination Process Needs Repair*, DETROIT NEWS, Mar. 4, 2002, at 08, <http://detnews.com/2002/editorial/0203/04/a08-431361.htm> (last visited Aug. 23, 2002) (on file with the North Carolina Law Review), available at 2002 WL 14869836; Editorial, *The Federal Court Blockade*, GRAND RAPIDS PRESS, May 12, 2002, at G2, 2002 WL 18293981.

174. Senator Biden suggested that Republicans contemplated a similar informal agreement, but he claimed this was not in line with the last 200 years of tradition. 143 CONG. REC. S2538, S2541 (daily ed. Mar. 19, 1997); see also Lewis, *supra* note 87, (discussing Clinton's selection of federal judges and the conflict between a Republican Senate and a Democratic executive branch). Some object to "horsetrading" over judgeships. See Groner & Ringel, *supra* note 9.

175. See Goldman & Slotnick, *supra* note 81, at 271. President Eisenhower made a similar offer in 1960. See *id.*; see also *supra* note 114 and accompanying text (discussing judgeships bill and Judicial Conference proposals).

176. Bush might consider these ideas and should be realistic and pragmatic about filling vacancies. Bush should calculate how critical the openings are and may conclude that filling the bench is less important than certain principles, such as appointing the type of judges he prefers.

177. For example, had Gregory not been confirmed, his opinions might arguably have lacked effect. The Second and Ninth Circuits have upheld the validity of recess appointments. See *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985); *United States v. Allocco*, 305 F.2d 704, 715 (2d Cir. 1962); Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758 (1984).

to employ, these measures as leverage over the Democratic Senate.<sup>178</sup> Nonetheless, he has invoked the techniques in a gingerly manner and has expressed concern about maintaining a dignified process.<sup>179</sup>

Some of these measures apply to the Fourth Circuit as a general matter and to North Carolina specifically. For instance, consultation is a cost-free device that Bush should deploy. Insofar as the failure to do so prevented nomination of a lawyer for the "Maryland seat," he might broach future designees with the state's Senators.<sup>180</sup> The President should similarly consult with the Senators from North Carolina when considering the second vacancy there. However, the political reality that none of the nominees, who are currently proposed will be confirmed in 2002, suggests awaiting the outcomes of the November elections.<sup>181</sup> To the extent that Bush nominated Chief Judge Boyle at Senator Helms's request, the Senator's retirement may alleviate some pressure to force the confirmation issue.<sup>182</sup>

### C. *The Senate*

All Senators should assess and institute cooperative actions because they may be as responsible as Presidents Clinton and Bush for the current situation. Republican Senators might remember that the Democratic Senate did confirm more judges, regardless of how politicized the process was, when Republicans were Presidents.<sup>183</sup> Democrats should keep in mind that the party may lose the Senate, the roles could again be reversed, and the public might blame them for delayed federal justice created by unfilled openings.<sup>184</sup>

Therefore, Democratic Senators should also employ conciliatory approaches. They should generally be receptive to administration overtures, through responsive consultation, which affords frank candidate evaluations and prompt approval of any district judges

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178. See, e.g., *supra* note 95.

179. See PRESIDENT'S REMARKS, *supra* note 79; Neil A. Lewis, *Bush Appeals for His Picks for the Bench*, N.Y. TIMES, May 10, 2001, at A29; see also *supra* note 95 (sharing Bush's tone in treating judicial confirmations).

180. See *supra* note 172.

181. Bush could be criticized because he nominated no one for the second vacancy. In fairness, Bush might have been waiting for the Senate to process other appellate nominees or Judge Boyle before proceeding.

182. See *supra* note 156 and accompanying text. Bush may press for approval apart from Helms so as not to appear weak.

183. See *supra* note 94 and accompanying text; see also Hartley & Holmes, *supra* note 36.

184. See *supra* note 95.

named by Clinton whom Bush might nominate for appeals courts. Specific cooperative possibilities abound. For example, when Democratic Senators are dissatisfied with Republican designees, they might propose more acceptable compromise candidates.<sup>185</sup>

Insofar as the number of unfilled vacancies derived from slowed confirmation, Democratic leaders and Senators should apply measures that will facilitate the approval of more judges. For example, the Judiciary Committee could hold hearings and permit votes on additional nominees with truncated review and even abrogate ceremonial hearings for non-controversial candidates. To the extent that Senator Leahy has delayed specific designees' processing because their perceived political views are deemed unpalatable, venerable traditions and recent practice may suggest that nominees should receive hearings and Judiciary Committee votes.<sup>186</sup> The Senate Majority Leader should institute actions that will expedite full Senate consideration. Senator Daschle may want to permit votes on additional nominees by scheduling floor votes more promptly after notification of Judiciary Committee approval and by providing for increased floor debate and final votes.<sup>187</sup>

All Senators should precisely balance the need for scrutiny with that for speed and approve nominees with the abilities and character to be fine judges. Democrats might carefully evaluate whether they assign ideology too much import, just as Republicans should abandon the quixotic quest to predict whether nominees would be "activist judges."<sup>188</sup> The Article II provision for advice and consent envisions that Senators will assess professional attributes and character to

185. Illustrative are 1997 efforts at consensus of Washington Senators Slade Gorton (R) and Patty Murray (D). *See* Callaghan, *supra* note 87; *see also supra* notes 164-65 and accompanying text. Leahy should reconcile discord over processes and candidates and mediate intractable disputes, perhaps with the aid of Senators Hatch or Lott.

186. *See supra* notes 94, 108 and accompanying text; *see also supra* notes 79-84 and accompanying text. The party-line committee vote against Judge Pickering may be a "payback" for similar Republican actions. *See supra* note 95. Now that Leahy has sufficient, acceptable names to facilitate processing, Democrats might limit criticism of Bush.

187. The debate preceding approval of Circuit Judges Merrick Garland, Marsha Berzon, and William Fletcher arguably engendered some candid, healthy exchange. *See* 143 CONG. REC. S2515-41 (daily ed. Mar. 19, 1997) (Garland); 144 CONG. REC. S11872 (daily ed. Oct. 8, 1998) (Berzon and Fletcher); *see also* Neil A. Lewis, *After Long Delays, Senate Confirms 2 Judicial Nominees*, N.Y. TIMES, Mar. 10, 2000, at A16 (discussing the Ninth Circuit confirmation of Richard A. Paez and Marsha L. Berzon, including the difficulties involved in the confirmation process).

188. *See, e.g.*, Hearing Before the Senate Committee on the Judiciary Subcomm. on Admin. Oversight and the Courts on Should Ideology Matter?: Judicial Nominations 2001, 50 DRAKE L. REV. 431 (2002); *supra* note 77.

ascertain nominee skill, honesty, and appreciation and respect for separated powers. However, Senators should not delay processing to discern how a lawyer, once confirmed, might decide specific cases as this could threaten judicial independence.<sup>189</sup>

Democratic Senators should consider voting for nominees who exhibit the capacity and character to render excellent service, as Republican Senators often did when they had a Senate majority and Democrats controlled the presidency.<sup>190</sup> In fairness, certain Democratic Senators seemingly resent Republican efforts to stall Clinton nominees, just as some Republican members apparently continue to resent the 1987 Senate rejection of Judge Bork and the acrimonious confirmation battle involving Justice Clarence Thomas, which are primarily ascribed to concerns about their future substantive decision making.<sup>191</sup>

A few of these concepts pertain to the Fourth Circuit, in general, and North Carolina, specifically. Senator Helms's retirement should enable Senator Edwards to forge new links with whoever secures the North Carolina Senate seat in November.<sup>192</sup> It may even be possible to address the situation that has prevented Republican Presidents from appointing a Fourth Circuit judge from North Carolina for eight decades and which thwarted Senate consideration of three Clinton

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189. See, e.g., Thomas O. Sargentich et al., UNCERTAIN JUSTICE POLITICS AND AMERICA'S COURTS: THE REPORTS OF THE TASK FORCES OF CITIZENS FOR INDEPENDENT COURTS, 1-75, 121-71, 205-42 (2000) (discussing judicial selection, the distinction between intimidation and legitimate criticism of judges, and the role of the legislature in establishing the power and jurisdiction of the courts); *Judicial Independence and Accountability Symposium*, 72 S. CAL. L. REV. 315-810 (1999) (exploring the distinction between independence of judges and accountability of the judiciary in general).

190. See *supra* note 99.

191. See, e.g., Goldman & Slotnick, *supra* note 81, at 256 (discussing the controversy surrounding the Bork and Thomas hearings); Melone, *supra* note 17, at 68 (detailing the arguments of Senators opposed to the manner in which the Bork hearings were conducted); Gest & Lord, *supra* note 102 (exploring the power struggle between Democrats and Republicans over judicial appointments). See generally GITENSTEIN, *supra* note 38 (discussing the rejection of Judge Bork); SENATOR PAUL SIMON, ADVISE & CONSENT 73-135 (1992) (discussing the Thomas confirmation battle). The Democratic opposition to President Bush's nominees can, perhaps, be distinguished by the enormous significance of Supreme Court appointments and the relatively limited Democratic scrutiny of, and resistance to, previous Republican lower court nominees. See 143 CONG. REC. S2538-41 (daily ed. Mar. 19, 1997) (statements of Sen. Biden & Sen. Sarbanes).

192. See generally Richard L. Berke, *Echoes Aside, Dole Insists She Is No Clinton*, N.Y. TIMES, Apr. 8, 2002, at A17 (discussing Senator Helms's plan to retire); Kevin Sack, *The Jockeying Starts As Helms Yields to Time*, N.Y. TIMES, Aug. 23, 2001, at A16 (same); Richard Simon & Greg Miller, *Helms Expected to Retire At End of Term*, L.A. TIMES, Aug. 22, 2001, at A1 (same).

nominees.<sup>193</sup> For instance, Senator Edwards might consider permitting the Senate to process Chief Judge Boyle's nomination, if President Bush proposes one of the individuals suggested by President Clinton.<sup>194</sup>

#### D. *The Judicial Branch*

Federal judges are considerably less able than the President and the Senate to effect constructive change because the Constitution delegates principal responsibility to the political branches.<sup>195</sup> Nevertheless, the judiciary might enhance attempts to publicize vacancies and the serious problems that they impose<sup>196</sup> and suggest promising methods to facilitate selection that President Bush and the Senate could effectuate.

Some ideas above apply to the Fourth Circuit. For example, Chief Judge Wilkinson has asserted that the court operates effectively absent a full judicial complement and does not need additional judgeships.<sup>197</sup> A majority of active tribunal members recently asked Congress to approve no new Fourth Circuit positions,<sup>198</sup> even as the court's judges affirmatively responded in the highest percentages to the Commission survey question whether expanding the tribunal would help it "correct prejudicial errors, minimize appellate litigation costs, avoid creating intercircuit [and intracircuit conflicts and] hear oral arguments."<sup>199</sup> With all due respect, the percentages of written opinions and arguments that the Fourth Circuit affords suggest that the court might dispense more appellate justice or at least function

193. See *supra* notes 125, 137–140 and accompanying text.

194. Edwards reportedly opposed, but delayed blocking, Boyle's appointment until he could discuss Judge Wynn's possible nomination with President Bush. See Matthew Cooper & Douglas Waller, *Bush's Judicial Picks Could Be a Battle Boyle*, TIME, May 21, 2001, at 22; see also *supra* note 173 and accompanying text (assessing a similar situation in Michigan). But see *supra* note 174 (proposing a similar tradeoff but admonishing that some object to "horsetrading").

195. See *supra* note 16 and accompanying text.

196. This would increase public awareness of the problem of judicial vacancies and perhaps heighten executive and legislative branch officials' sensitivity to the need for expedition.

197. See *supra* notes 110–112 and accompanying text.

198. See *Analysis of the Fourth Circuit*, *supra* note 112, at 1; Tobias, *supra* note 94, at 749.

199. See WORKING PAPERS, *supra* note 149, at 18–19. The conservative estimates of dockets, workloads and resources on which the Judicial Conference bases judgeship proposals for Congress may also suggest the court needs new seats. See Tobias, *supra* note 94, at 753. But see CHAIRMAN'S REPORT, *supra* note 109, at 2–7 (discussing the formula used to calculate judgeship needs); Wilkinson, *supra* note 111, at 1161–63 (suggesting that increasing the number of judges will not benefit the judiciary).



better were every authorized position occupied.<sup>200</sup> Therefore, the Chief Judge and his colleagues may want to reconsider whether the Fourth Circuit would function more effectively with a full contingent or even additional judges.<sup>201</sup>

### CONCLUSION

Judicial vacancies significantly threaten the federal justice system. The problem consists of two major components. The first, the vacancies conundrum, is a persistent difficulty. Much delay that accompanies it is inherent and resists change, although some unwarranted delay can be remedied or ameliorated. The second is a current dilemma that is essentially political and which public officials could rectify if they muster the requisite political will. President Bush and the Senate must eliminate unnecessary delay. They should also attempt to depoliticize selection, stop criticizing one another, reconcile their partisan differences, and break the present impasse for the good of the judiciary and the nation. Senators Daschle, Leahy, Lott, and Hatch, as well as Attorney General John Ashcroft and White House Counsel Alberto Gonzales, may want to lead this effort.

Senators who represent states located in the Fourth Circuit should cooperate as closely as possible within particular jurisdictions, among themselves, and with the White House. The November election of a new Senate member from North Carolina should provide the opportunity for a fresh start and possibly greater cooperation between the state's Senators. If the North Carolina members consult the suggestions above, they should be able to improve federal judicial selection in their jurisdiction, the Fourth Circuit, and perhaps the nation.

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200. See *supra* notes 145–148 and accompanying text.

201. These are disputed, unresolved issues. See *supra* notes 139, 145–53 and accompanying text.