

1998

Federal Judicial Selection in a Time of Divided Government,

Carl W. Tobias

University of Richmond, ctobias@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>

 Part of the [Courts Commons](#), and the [Judges Commons](#)

Recommended Citation

Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 *Emory L.J.* 547 (1998)

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

FEDERAL JUDICIAL SELECTION IN A TIME OF DIVIDED GOVERNMENT

*Carl Tobias**

Congress has authorized 179 active judges for the United States Courts of Appeals and 649 active judges for the United States District Courts. Eighty-two judgeships are now vacant,¹ although the size and complexity of federal caseloads continue to increase. More than thirty openings are considered "judicial emergencies"² because they have remained unfilled for eighteen months. The Ninth Circuit, which must resolve the largest docket of the twelve regional appellate courts, currently has nine vacancies on a circuit with twenty-eight active judges and for which the Judicial Conference has recommended the creation of nine additional judgeships. The Speedy Trial Act's requirement that criminal cases receive preferential treatment has precluded numerous district judges from conducting a single civil trial since 1995, while the district courts have a civil backlog of thousands of suits.³

Only seventeen judges secured appointment during 1996; however, this situation can be explained because it was a presidential election year. President Bill Clinton had placed a mere nine judges on the courts by early September 1997, although the concerted efforts of the Chief Executive and of Senator Orrin Hatch (R-Utah), chair of the Senate Judiciary Committee, enabled thirty-six judges ultimately to be named in 1997.⁴ Nevertheless, this figure strikingly contrasts with the eighty-five judges whom President Ronald Reagan appointed during the first year of his second Administration. Indeed, Chief Justice William H. Rehnquist recently characterized as "bleak" the prospects for appointing judges to the eighty open seats, and admonished the "President [to] nominate candidates with reasonable promptness, and the Senate [to] act within a reasonable time to confirm or reject them."⁵

* Professor of Law, University of Montana. I wish to thank Peggy Sanner and Hank Waters for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and Ann and Tom Boone and the Harris Trust for generous, continuing support. Errors that remain are mine.

¹ See *Judicial Boxscore*, THE THIRD BRANCH, Feb. 1998, at 8.

² *Id.*

³ See *infra* note 70 and accompanying text.

⁴ Carl Tobias, *I Thought I Thaw a Vacancy*, NAT'L L.J., Jan. 12, 1998, at A19.

⁵ William H. Rehnquist, *The 1997 Year-End Report of the Federal Judiciary*, THE THIRD BRANCH Jan. 1998, at 3.

The judicial vacancies difficulty will intensify over the course of President Clinton's second term as many Republican senators become more reluctant to expedite confirmation and as the number of empty judgeships and civil and criminal filings inexorably grows. Because the remote possibility of promptly confirming judges for all of the openings and the ever-increasing magnitude and complexity of dockets will erode the federal justice system and the conundrum might well be endemic to modern democracy, the dilemma warrants analysis. This Article undertakes that effort.

The first Section of this Article descriptively examines the history of federal judicial selection, emphasizing recent developments which led to the problem involving appointments. I find that a constellation of phenomena which can be ascribed to numerous institutions and people with some responsibility for choosing judges has created, left unresolved, or exacerbated the complications caused by unfilled judicial seats. Moreover, the problem actually has two facets. One is the persistent vacancies problem. Its principal sources are expanded federal court jurisdiction and exponential caseload growth that have required Congress to enlarge the bench significantly, thereby concomitantly increasing the number and frequency of openings, since the 1960s. The other component is the current impasse. The present dilemma's primary origins are political, and it derives at least in part from different political parties' control of the White House and the Senate.

This evaluation also reveals that the complication presented by vacancies is at once complex and sensitive. It comprises a plethora of matters which range from questions that involve separation of powers to issues implicating raw partisan politics. For example, those who participate in the selection process must carefully strike an appropriate balance between the need for expeditious appointment and for meticulous scrutiny of individuals who will exercise the enormous power of the state and have life tenure. I conclude that the large number of judicial vacancies and their protracted nature threaten the federal courts and that the problem must be treated promptly.

The next part of the Article, therefore, explores possible solutions for empty judgeships which many officials in the executive, legislative and judicial branches of government might employ. I assess the approaches mainly in terms of their advisability, as matters of pragmatic policy, practical politics and sound governance, ascertaining that they would have varying degrees of efficacy. For instance, some measures could address the unnecessary delay which attends the permanent difficulty, but much delay is inherent and resists felicitous reduction. Public officials, principally in the Administration and the Senate, might

concomitantly apply numerous mechanisms that would solve those political problems which contribute substantially to the existing dilemma if they had sufficient political will. Because important features of the generic complication and the recent impasse may only be amenable to amelioration, I also discuss means of addressing the effects of vacancies. The final Section affords suggestions for implementing specific alternatives that apparently would have the greatest promise.

I. ORIGINS AND DEVELOPMENT OF THE PROBLEM OF JUDICIAL VACANCIES

The origins and development of the problem of unfilled judicial openings warrant comparatively thorough examination in this Section even though several studies have rather comprehensively chronicled that background⁶ because detailed treatment improves understanding of the two-part difficulty. The focus of analysis for the generic problem is the last three decades when broadened jurisdiction and mounting dockets led Congress to expand the federal judiciary, which prompted corresponding increases in both the number of vacancies and their frequency. Evaluation of the current impasse concentrates on 1996 and 1997 when judicial selection apparently became more politicized.

A. *The Persistent Vacancies Problem*

The history of the permanent openings conundrum might seem to require relatively limited assessment for several reasons. First, this background has received comparatively extensive examination elsewhere.⁷ Second, much delay in the traditional appointments process is intrinsic and thus cannot be alleviated easily. Third, the longstanding complication is apparently less responsible than political phenomena for the existing dilemma. However, the rather thorough treatment which follows should enhance appreciation, particularly of developments that prefigured the present impasse.

⁶ See, e.g., Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319 (1994); Improving the Process of Appointing Federal Judges: A Report of the Miller Center Commission on the Selection of Federal Judges (1996) ("Miller Report"). See generally HAROLD W. CHASE, *FEDERAL JUDGES, THE APPOINTING PROCESS* (1972); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997); DAVID M. O'BRIEN, *JUDICIAL ROULETTE* (1988).

⁷ See, e.g., Bermant et al., *supra* note 6; The 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) ("N.Y. City Bar"); Victor Williams, *Solutions to Federal Judicial Gridlock*, 76 JUDICATURE 185 (1993).

The persistent vacancies difficulty is comprised of many strands, numerous of which have their origins in the republic's earliest days and in Article II of the Constitution. Nevertheless, I emphasize the problem's modern dimensions: the expansion of the jurisdiction of federal courts and their multiplying caseloads, which required Congress to authorize many additional judges, thereby increasing the number and frequency of openings.

1. *The Early History*

The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" judges.⁸ In *The Federalist*, Alexander Hamilton explained that the senatorial role envisioned "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters" while serving as an "efficacious source of stability in the Administration."⁹ The Framers thus explicitly provided and consciously contemplated that politics would be central to judicial selection.

The Senate has actively participated in naming judges since the chamber's creation because members of this body have a significant stake in affecting, or appearing to affect, appointments.¹⁰ Complicated political accommodations implicating the Senate and the Chief Executive in the early phases of the selection process have been essential to its efficient operation.¹¹ There has also been a venerable tradition of senatorial involvement in the choice of nominees, particularly for federal district court seats. The states' senators or senior elected officials who are members of the President's political party have ordinarily recommended candidates whom the Chief Executive in turn has nominated.¹²

⁸ U.S. CONST. art. II, § 2, cl. 2. See generally CHASE, *supra* note 6. The Constitution assigns the President and the Senate much more responsibility for judicial selection than the House of Representatives and the judiciary. When referring to the President, I include Executive Branch officials, such as attorneys in the Office of White House Counsel and the Department of Justice, who assist the President. When referring to the Senate, I include the Judiciary Committee, which has primary responsibility for the confirmation process, and its chair, Senator Orrin Hatch (R-Utah), the Senate Majority Leader, Senator Trent Lott (R-Miss.), and individual senators.

⁹ THE FEDERALIST No. 76, at 513 (Alexander Hamilton) (J.E. Cooke ed., 1961).

¹⁰ See CHASE, *supra* note 6, at 7.

¹¹ See Bermant et al., *supra* note 6, at 321.

¹² When Lawrence Walsh served as President Dwight Eisenhower's Deputy Attorney General, he found it virtually impossible to secure confirmation if one senator from the candidate's state was "openly or secretly opposed to the nomination." 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 6, at 4 (providing Attorney General Robert Kennedy's characterization as senatorial appointment with President's advice and consent).

Politics, therefore, pervade the judicial appointments process. When the President and powerful members of the Senate disagree, they often behave strategically to secure benefit and to control consequent nomination and confirmation.¹³ Indeed, both sides in these disputes have intentionally invoked delay for tactical purposes.¹⁴ Tension between the Chief Executive and senators may be inevitable so long as senatorial consent is a requirement for appointment.¹⁵

In short, judicial selection has been a shared responsibility of the President and the Senate and has been politicized since the country's founding. However, significant numbers of vacancies, which remained unfilled for protracted periods, only became a serious problem after the mid-twentieth century. Indeed, from the time when Congress passed the Judiciary Act of 1789 until 1950, the number of lower court judgeships only gradually grew to 277, which meant that the comparatively few openings and their relative infrequency facilitated the prompt filling of vacancies and avoided the difficulty which has ultimately arisen.¹⁶

2. History Since 1950

Congress has vastly enlarged federal court jurisdiction since 1950.¹⁷ The legislative branch created many new civil causes of actions and numerous additional crimes which fostered a 300% annual increase in district court filings during the subsequent four decades.¹⁸ Congress correspondingly expanded the number of federal judges to treat the rising dockets; there are 828 active appellate and district judgeships today.¹⁹

The Committee on Long Range Planning of the Judicial Conference of the United States, in a comprehensive 1995 study of the federal court system and its future, projected that continuing caseload increases would require 1,330 active

¹³ See Bermant et al., *supra* note 6, at 321.

¹⁴ See, e.g., CHASE, *supra* note 6, at 14, 40; Bermant et al., *supra* note 6, at 321.

¹⁵ Two routes apparently lead "out of that requirement. One requires constitutional interpretation, the other constitutional amendment." Bermant et al., *supra* note 6, at 322.

¹⁶ See Miller Report, *supra* note 6, at 3.

¹⁷ See Miller Report, *supra* note 6.

¹⁸ See, e.g., Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (1994)); 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 (1995)); see also Miller Report, *supra* note 6, at 3. See generally Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1268-70 (1996) ("Tobias, *New Certiorari*").

¹⁹ See Miller Report, *supra* note 6, at 3.

judgeships by the year 2000; 2,300 by 2010 and 4,070 by 2020.²⁰ Considerable additional growth of the federal bench seems probable, particularly given Congress's apparent reluctance to constrict federal civil or criminal jurisdiction,²¹ even though the desirability of expansion is very controversial.²²

The Judicial Conference also found that the time between a seat opening and confirmation has been lengthening.²³ During the decade and a half spanning 1980 to 1995, nominations on average consumed a year and confirmations required three months, and the time needed for each component of the process seemed to be increasing.²⁴ Furthermore, a 1994 Federal Judicial Center study of the period between 1970 and 1992 showed that "vacancy rates almost doubled in the courts of appeal and more than doubled in the district courts," while the greatest delay in appointments occurred between the date when a vacancy arose and the date someone was nominated to fill it.²⁵

Politics have always been important to judicial appointments.²⁶ However, some observers of the selection process believe that it has become increasingly politicized since the 1960s. They trace the origins of this phenomenon to the Administration of President Richard Nixon, who pledged to bring back "law and order" by naming judicial conservatives and "strict constructionists."²⁷

a. The Basic Framework of Modern Judicial Selection

At the district court level, the states' senators or the highest ranking officials of the President's political party typically begin the process of judicial selection by recommending candidates for the Chief Executive's consideration.²⁸

²⁰ See Judicial Conference of the United States, *LONG RANGE PLAN FOR THE FEDERAL COURTS 16* (1995) ("LONG RANGE PLAN").

²¹ See Miller Report, *supra* note 6, at 3. See generally William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 *CORNELL L. REV.* 273 (1996).

²² Compare Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52, with Gerald Bard Tjoflat, *More Judges, Less Justice, The Case Against Expansion of the Federal Judiciary*, A.B.A. J., July 1993, at 70.

²³ See *LONG RANGE PLAN*, *supra* note 20, at 103.

²⁴ Miller Report, *supra* note 6, at 3-4.

²⁵ See Bermant et al., *supra* note 6, at 323.

²⁶ See *supra* notes 8-16 and accompanying text.

²⁷ See O'BRIEN, *supra* note 6, at 20; Roger E. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees*, 80 *JUDICATURE* 274, 274 (1997).

²⁸ I rely substantially in this subsection on the Miller Report, *supra* note 6, at 3-6 and N.Y. City Bar, *supra* note 7, at 375. Each presidential administration varies these basic procedures somewhat. See CHASE, *supra* note 6; GOLDMAN, *supra* note 6; O'BRIEN, *supra* note 6.

Designees must complete three lengthy questionnaires for the Department of Justice, the Senate Judiciary Committee, and the American Bar Association (ABA) Standing Committee on Judiciary. Officials in the Justice Department and the White House first screen and then evaluate and interview the potential nominees, while the Federal Bureau of Investigation (FBI) conducts a background investigation and security check of the individuals.

If these reviews are satisfactory, the President formally nominates the candidates and submits their names to the Senate. The ABA Committee and some private entities which monitor judicial selection, such as the Free Congress Foundation and the Alliance for Justice, usually assess nominees at this juncture. The Senate, primarily through the Judiciary Committee, investigates and analyzes the nominees, accords the people hearings, and votes on them. The names of persons whom the Committee approves are transmitted to the full Senate, and the Senate Majority Leader schedules floor votes on nominees, who must secure a majority for confirmation. Analogous procedures apply to appellate court designees, although the White House and the Justice Department typically exercise more responsibility for the initial selection.

b. Nomination Process

The period between vacancy and nomination, the phase of the process which the Executive Branch principally controls, consumes the greatest amount of time in judicial appointments. One important reason for this is that many active judges have not traditionally given advance notice of their intention to modify active status. In 1988, the Judicial Conference “[u]rged all judges nearing retirement to notify the President and the Administrative Office as far in advance as possible of a change in status—if possible, six to twelve months before the contemplated date of change in status.”²⁹ Numerous judges who envisioned altering their circumstances have since complied with this request. However, a number of judges have failed to provide notice, apparently because they were unaware of the Conference policy or for other reasons, such as the highly personal character of retirement decisions.³⁰

An additional, significant explanation for delay at the nomination stage is that varying procedures, which reflect openings’ level in the court structure and geographic locality, the decisionmaking styles of those participating in selection,

²⁹ REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 31-32 (Mar. 15, 1988).

³⁰ LONG RANGE PLAN, *supra* note 20, at 104; Bermant et al., *supra* note 6, at 334 n.43.

and prevailing political realities, currently lead to the selection of numerous candidates.³¹ Therefore, unsystematic and even idiosyncratic processes to which insufficient resources may be committed have yielded nominees. For instance, some senators might not employ commissions or use panels that operate privately. Certain members of the Senate await staff findings, and others may be reluctant to select among multiple, qualified aspirants.³² Numerous senators have correspondingly insisted on recommending one individual to the Chief Executive, but several recent Presidents have requested at least three names.³³ Although the Clinton Administration has sought only one person, thereby reducing the number of people to be screened, even that approach can cause delay if the single candidate proves problematic.³⁴ These temporal restraints might be exacerbated in states which experience infrequent vacancies and thus may have to create ad hoc or reinvent selection procedures or in states whose senior elected officials have difficulty reaching consensus.

Rather recent increases in the number of officials who assist with appointments seem to be another source of delay. For example, the Miller Commission—a bi-partisan entity comprised of distinguished attorneys who studied the selection process and issued a 1996 report—was somewhat surprised to learn that the number of participants has significantly expanded, a situation which it ascribed to the practice of conducting “more extensive interviews on a range of issues [that] appears to have begun in 1981.”³⁵ Numerous Commission members seriously questioned the interviews’ efficacy because “experience has proved that it is difficult to be sure just how persons selected for the federal bench will in fact perform,” while the commissioners stated that nominees’ “experience, record for integrity, intellectual capacity,” and professional colleagues’ judgments regarding objectivity and temperament were the best indicators of future performance and that “those judgments are relatively easy to ascertain.”³⁶ The Commission correspondingly found that White House officials, Justice Department lawyers, the FBI, and the ABA, all of whom

³¹ Bemant et al., *supra* note 6, at 335. See generally ABA, Standing Committee on Federal Judiciary—What It Is and How It Works (1983) (“ABA”).

³² See Miller Report, *supra* note 6, at 5.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 2. The bi-partisan commission included present and former federal district and circuit judges, former White House counsels to Republicans and Democrats, former Justice Department officials, former senators, a prominent lawyer, and a law professor. *Id.*

³⁶ *Id.* at 8-9

investigate and evaluate candidates, serve duplicative functions, some of which may be unavoidable.³⁷

c. The ABA Standing Committee on Federal Judiciary

During the 1950s, President Eisenhower sought the ABA's assistance in analyzing nominees because his Attorney General, Herbert Brownell, was concerned that purely political appointees might lack the requisite competence to serve on the federal bench.³⁸ Since mid-century, the Standing Committee on Federal Judiciary has assessed candidates' professional qualifications and, thus, might be partly responsible for delay in judicial selection. The entity, which has included one representative from each appeals court, may have lacked sufficient resources for evaluating and rating nominees promptly enough to permit expeditious completion of the process's remaining phase.³⁹ Moreover, questionnaires and other features of Committee investigations have apparently been redundant and consumed too much time.⁴⁰ Furthermore, Democrats and Republicans as well as liberals and conservatives have criticized the ABA's participation in judicial appointments, primarily for being overly political.⁴¹ Notwithstanding the above problems, particularly the politically controversial nature of the ABA's participation, numerous observers believe that the Committee has performed a valuable service in analyzing nominees and may even have enhanced the caliber of those judges named.⁴²

d. Confirmation Process

The vetting of nominees and the scheduling of confirmation hearings by the Senate Judiciary Committee have also delayed judicial selection, although the nomination process has consumed greater time.⁴³ The Committee has apparently lacked sufficient staff counsel to perform investigations of nominees, especially when reviewing significant numbers of individuals. The Committee has occa-

³⁷ *Id.* at 5.

³⁸ See Miller Report, *supra* note 6, at 11. See generally ABA, *supra* note 31.

³⁹ See Miller Report, *supra* note 6, at 8.

⁴⁰ See *id.* at 5-6.

⁴¹ See, e.g., MARK GITENSTEIN, MATTERS OF PRINCIPLE 203-05 (1992); Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 295 (1991).

⁴² See, e.g., Miller Report, *supra* note 6, at 11; Harold R. Tyler, Jr., *Judge Selection: Keeping Politics Out; In Defense of the ABA's Role in Rating Nominees*, LEGAL TIMES, Nov. 9, 1992, at 27; see also *infra* notes 82-83 and accompanying text (affording recent history).

⁴³ Miller Report, *supra* note 6, at 5; N.Y. City Bar, *supra* note 7, at 375-76; see also *supra* text accompanying note 24.

sionally borrowed Justice Department attorneys to assist it in completing these inquiries. Moreover, the need to hold hearings when busy Committee members can attend has complicated the proceedings' prompt scheduling and has delayed confirmation. The Committee conducts hearings for all nominees, including people who are not controversial; and its sessions, which are essentially ceremonial, consume scarce resources that could be devoted to considering additional persons. Another source of delay has been the failure of the Senate leadership to schedule promptly floor debates and floor votes on nominees which the Committee has favorably reported.

e. Nomination and Confirmation

The Miller Commission recently found that the selection process has been "transformed during the last few decades and become more complicated," phenomena which are reflected in increased dependence on "larger staff operations for screening and investigating potential nominees."⁴⁴ These modifications, which the entity traced to the Reagan Administration, have continued during subsequent presidencies.⁴⁵ The Commission ascertained that practices have changed in three fundamental ways: "(1) more attorneys and resources in the White House and Department of Justice are devoted to screening potential judicial nominees; (2) extensive interviews with potential judicial nominees have become routine; and (3) White House staff have become more involved in the screening and selection process."⁴⁶ The group also characterized the three questionnaires which nominees must complete for the Justice Department, the Judiciary Committee, and the ABA as "symbolic and illustrative of how the federal judicial appointment process has become 'bureaucratized'" while discovering that "many of the questions asked are redundant or overlapping" and describing the process of answering the questionnaires as "burdensome."⁴⁷

A decade ago, the Committee on Federal Courts of the New York City Bar ("City Bar") conducted a study in which it reached somewhat similar determinations. The group observed that "[t]here has been substantial delay at the presidential level in recommending candidates" and found an "inevitable lapse of time" in the nomination process.⁴⁸ The City Bar also remarked that "[a]t both

⁴⁴ Miller Report, *supra* note 6, at 4.

⁴⁵ *Id.*

⁴⁶ *See id.* at 4-5.

⁴⁷ *See id.* at 6.

⁴⁸ *See* N.Y. City Bar, *supra* note 7, at 376.

the FBI inquiry and Senate Judiciary Committee hearing stages, judicial appointments are not top priority items” and that the investigation and hearing phases required two or three months.⁴⁹

The City Bar stated as well that the “overextended judiciary can expect little relief from the shortage of judges,” unless those who participate in the appointments process “suddenly and drastically alter their priorities,” even while recognizing that a “sense of urgency on the part of all agencies concerned could substantially speed up the selection of judges.”⁵⁰ Other observers of the appointments process have correspondingly perceived that executive and legislative branch officials evince insufficient appreciation of the vacancies problem’s critical nature to institute actions which will expedite selection.⁵¹

The City Bar and others have trenchantly admonished those who are associated with nominations and confirmations that they must carefully strike an appropriate balance between the need for efficiency and for considered evaluation of nominees. For example, the bar organization called for the elimination of unnecessary delay and for efforts to facilitate selection, even as it warned against the danger of “hurried, assembly-line appointments to lifetime positions of authority of persons ill-suited to be federal judges.”⁵² The researchers who performed a 1994 Federal Judicial Center (FJC) study for the Long Range Planning Committee of the Judicial Conference similarly cautioned that “an expedited appointments process for judges should not be achieved at the expense of thoroughness in reviewing the character and abilities of potential jurists.”⁵³ The National Commission on Judicial Discipline specifically observed that careful 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, thus, suggested that FBI investigations be thorough.⁵⁴ A related issue is the increasingly detailed scrutiny which most participants, but especially the Senate, have recently accorded nominees, although the question of precisely what level of scrutiny is appropriate has sparked ongoing, intensive debate and may be insoluble.⁵⁵

⁴⁹ *Id.*

⁵⁰ *Id.* at 375.

⁵¹ See Bermant et al., *supra* note 6, at 347.

⁵² See N.Y. City Bar, *supra* note 7, at 377.

⁵³ See Bermant et al., *supra* note 6, at 347; see also Miller Report, *supra* note 6, at 11 (suggesting that the judiciary’s quality is far more important than the time devoted to appointments).

⁵⁴ See REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 81 (1993).

⁵⁵ See Hartley & Holmes, *supra* note 27. For a flavor of the debate, compare Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989), with Albert P. Melone, *The Senate’s Con-*

It is important as well to understand that nomination and confirmation are essentially synergistic processes, so that the failure of certain participants to meet temporal deadlines can seriously affect them and exacerbate delay.⁵⁶ The activities of individuals and institutions participating alone and together can be interdependent, so that the failure by certain of the system's components to meet temporal deadlines can seriously affect others and exacerbate delay.⁵⁷ For instance, the simultaneous submission of large numbers of nominees can lead to the tardy completion of FBI background investigations or ABA qualification ratings, which could correspondingly postpone the confirmation process.⁵⁸

f. Limited Prospects for Meaningful Change

Perhaps most salient is that much of the delay which attends appointments is intrinsic and irreducible, although some temporal restraints are unnecessary and are remediable. Several studies of judicial selection have reached these conclusions. A 1961 ABA evaluation⁵⁹ found that an irreducible element of delay was inherent in the appointments process, ascertaining, for instance, that three and a half months was the shortest practicable time for concluding the nomination phase under ideal conditions and that the average period for completion of this stage had previously been almost twice as long.⁶⁰

The New York City Bar more recently expressed serious doubt that the "average time lag [from opening to confirmation] could ever be reduced substantially below" eight months, even with the best of intentions and extra effort and declared that attaining this temporal goal would not resolve the persistent vacancies difficulty.⁶¹ The strikingly insightful Bar determinations warrant comprehensive quotation:

We have found no single point of delay in the multi-faceted selection process which, if corrected, would substantially remedy the problem. Indeed, we have found quite the opposite—with respect to different candidates delay occurs at different stages. While we consider it important that unnecessary delays in the appointment system be

firmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality, 75 JUDICATURE 68 (1991).

⁵⁶ Bemant et al., *supra* note 6, at 335.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 86 Reports of the American Bar Ass'n, Report of the Standing Committee on the Federal Judiciary at 503, 507 (1961).

⁶⁰ *Id.*

⁶¹ See N.Y. City Bar, *supra* note 7, at 377.

eliminated, we see 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.⁶²

The 1994 FJC report's authors additionally observed that most of the mechanisms which might resolve the persistent vacancies difficulty by increasing efficiency and resources could expedite selection somewhat,⁶³ however, the measures only partially address certain causes of delay and may merely mitigate other sources, namely politics. Therefore, conflicts implicating powerful persons and interests could well continue delaying appointments, absent the adoption of a merit selection system that deemphasizes the role of politics, a prospect which seems quite unlikely.⁶⁴

Finally, it is important to appreciate that the persistent vacancies problem has remained essentially unchanged, even though various individuals and entities, especially members of the bench and bar, have been studying and publicizing the difficulty while urging the legislative and executive branches to treat it for several decades. For example, since 1980, the Judicial Conference has widely circulated monthly compilations of all openings and of specific vacancies that constitute judicial emergencies, the Chief Justices and numerous other judges have actively spoken out on the issue, and the organized bar has periodically addressed the question.⁶⁵ The New York City Bar aptly summarized these propositions: "[I]t is a fact that while calls for greater speed have been made by the judiciary and bar for decades, there has been only relatively modest improvement in the response time."⁶⁶

g. Effects of the Persistent Vacancies Problem

The permanent openings problem has had many deleterious effects. The New York City Bar determined that "vacancies can have a dramatic impact on the ability of courts to handle their cases," especially in light of the comparatively few judges across the nation and the tiny number in certain

⁶² See *id.* at 382. "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.

⁶³ See Bermant et al., *supra* note 6, at 344.

⁶⁴ See *id.*; see also N.Y. City Bar, *supra* note 7, at 375-77.

⁶⁵ See, e.g., Ruth Hochberger, *Three Bar Presidents Hit Delay in Filling U.S. Court Seats*, N.Y.L.J., Apr. 24, 1981, at 1; U.S. Conference of Mayors, *Bar Presidents Support Judiciary*, THE THIRD BRANCH, Aug. 1997, at 9. See generally N.Y. City Bar, *supra* note 7, at 378.

⁶⁶ See N.Y. City Bar, *supra* note 7, at 375.

specific courts.⁶⁷ The Bar correspondingly remarked that the openings and increased filings imposed unwarranted pressure on sitting judges and created unjustified difficulties for parties which must compete for scarce judicial time.⁶⁸ The FJC researchers recently ascertained that vacancies had a statistically significant impact on judges' average workloads for the period encompassing 1970 to 1992. Had the courts been operating at full judicial staffing levels, appellate and district judges would have realized workload reductions of nine and ten percent respectively.⁶⁹ Indeed, the federal courts currently experience a backlog of thousands of civil suits, while criminal dockets have effectively prevented numerous district judges from trying any civil cases during some years.⁷⁰

The Miller Commission correspondingly evinced concern that the cumbersome and prolonged selection procedures impose disadvantages on the justice process and on possible appointees, intimating that the caliber of the federal bench could suffer.⁷¹ A decade ago, the New York City Bar admonished Congress that continued "[i]naction must be weighed against the frustration of justice resulting from undue delay, and the very real price in public esteem which must be paid by a highly visible judiciary when it is unable to perform its constitutional mandate in a timely and efficient manner."⁷² Failure to treat the longstanding problem could erode the American people's respect for the political branches.

B. *The Current Impasse*

The existing difficulty may warrant somewhat less treatment than the persistent conundrum principally because closeness in time complicates efforts to appreciate what has actually happened and its ultimate effects. For example, even though political phenomena are apparently more responsible than the permanent problem for the current impasse, politics suffuse both, thereby obscuring their exact interrelationship. Nonetheless, I attempt to provide an

⁶⁷ See *id.* at 374.

⁶⁸ *Id.*

⁶⁹ Bermant et al., *supra* note 6, at 327.

⁷⁰ See Alliance for Justice Judicial Selection Project Mid-Year Report 4 (1994) (recounting backlogs); Conversation with Raymond J. Dearie, U.S. District Judge, E.D.N.Y. (May 23, 1997) (suggesting criminal dockets prevent judges from trying civil cases).

⁷¹ See Miller Report, *supra* note 6, at 6.

⁷² See N.Y. City Bar, *supra* note 7, at 383.

accurate account of recent developments by relying substantially on the actions and statements of participants.

Numerous political phenomena which attended the appointments process throughout 1997 contributed significantly to the present dilemma, although certain aspects of the generic problem did implicate selection in that year. The President and the Senate—including the Majority Leader, the Senate Judiciary Committee, its chair and committee members, and specific senators—were primarily responsible for most of the difficulties. These public officials, individually or together, could rectify or ameliorate many of the complications if they had the political will to do so.

The periods that the Clinton Administration and the Senate needed to complete nomination and confirmation continued to increase during 1997. For example, on average, nominations required more than 600 days, while confirmations consumed a record high of 183 days.⁷³ Most of the delay in the appointments process obviously kept occurring between the date of vacancy and nomination.

1. Nomination Process

The failure to appoint additional judges during the last year partially resulted from delay in submitting nominees. Moreover, the same temporal problems should be ascribed principally to the Clinton Administration and to individual senators or other political officials who were to recommend candidates for the President's consideration. However, other participants, such as Senator Hatch, Senator Lott and particular Republican senators, probably deserve some blame for delays because of their specifically-stated needs to treat political concerns such as "judicial activism."

The Chief Executive's delays in tendering nominees apparently had some, albeit comparatively minimal, responsibility for the small number of judicial appointments. In early 1997, President Clinton submitted the names of twenty-two individuals, many of whom he had nominated during the 104th Congress, several of whom had participated in confirmation hearings, and a few of whom had

⁷³ See Viveca Novak, *Empty-Bench Syndrome, Congressional Republicans Are Determined to Put Clinton's Judicial Nominees on Hold*, 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 confirmations require 91 days and nominations require 618 days); *Clearing the Bench*, DALLAS MORNING NEWS, June 17, 1997, at A16 (reciting similar statistics); *supra* note 24 and accompanying text (affording comparable data for 1980-1995).

received favorable committee votes.⁷⁴ Thereafter, the Administration rather gradually, but steadily and with somewhat increased alacrity, provided additional names. For example, the President forwarded thirteen district court nominees on July 31.⁷⁵ Virtually all of the nominees seemed to have very strong professional qualifications, while a significant percentage had prior judicial experience in the federal or state court systems.⁷⁶ Many of the nominees apparently held moderate political viewpoints, several may have been affiliated with the Republican Party, and President Bush had appointed a few of them to the district bench.⁷⁷

In fairness, the July package of judicial candidates and the aforementioned general treatment of nominations illustrate several complications. When, as here, the President tenders a substantial number of persons at one time, especially immediately before a Senate recess, the Judiciary Committee may experience considerable difficulty in smoothly processing the individuals. President Clinton had submitted the names of only eight new nominees by June, while Senator Hatch found unacceptable most of the January set of candidates for the bench, thus enabling the Chair to assert that the Committee had insufficient names to consider.⁷⁸

The Administration never tendered nominees for all 100 judicial vacancies, which would have permitted the Chief Executive to apply greater pressure on the Judiciary Committee and the Senate. However, President Clinton might have reasonably assumed that it was unnecessary to forward substantially more names than Senator Hatch had publicly pronounced on multiple occasions that the Committee would process.⁷⁹ At most relevant times throughout 1997, the Administration kept before the Committee a larger number of nominees than the Chair had promised to review. Finally, President Clinton probably had to

⁷⁴ The White House, Office of the Press Sec'y, *President Clinton Nominates Twenty-two to the Federal Bench* (Jan. 7, 1997).

⁷⁵ The White House, Office of the Press Sec'y, *President Clinton Nominates Thirteen to the Federal Bench* (July 31, 1997).

⁷⁶ See, e.g., 143 CONG. REC. S5653 (daily ed. June 16, 1997) (statement of Sen. Leahy); Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254 (1997); Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309, 315 (1996).

⁷⁷ See, e.g., Goldman & Slotnick, *supra* note 76; Sharmen P. Duffy, *Clinton Announces Nominees for Eastern District Court*, LEGAL INTELLIGENCE, Aug. 4, 1997, at 1.

⁷⁸ See Hatch, *supra* note 73; see also Neil A. Lewis, *Keeping Track; Vacant Federal Judgeships*, N.Y. TIMES, Apr. 11, 1997, at A12.

⁷⁹ The Chair said that he would follow an approach similar to that used in the 104th Congress, whereby one appeals court, and four or five district, court nominees testified at one hearing each month that the Senate was in session. See *infra* note 84 and accompanying text.

balance the need for expedition with cautious review of candidates' abilities, character, and political viability because nominees who prove to be controversial, much less incompetent or dishonest, can erode the Administration's credibility and may even slow, halt, or damage the selection process.

Individual Democratic senators or other political figures from the geographic areas in which vacancies arose who were to recommend names for the President's consideration seemingly had greater responsibility than the Chief Executive for the delays that attended the submission of nominees for a number of openings during 1997. The Republican leadership, but principally GOP senators, also contributed to delays which accompanied the tendering of names for these and other judgeships that were vacant in 1997.

Many reasons, some of which were generic and a few of which may have been specific to the locales, could have prevented particular senators or other political officials from expeditiously suggesting potential nominees to the President. For instance, in a number of states that lacked two Democratic senators, identifying those political party figures who were to forward the recommendations or treating Republican senators' demands that they be involved consumed considerable time. Illustrative are Arizona and Washington, whose GOP senators have insisted that they be permitted to participate in choosing the candidates and even that they are entitled to propose nominees.⁸⁰

The Administration may have been responsible for some delay in submitting nominees.⁸¹ Insofar as the Executive Branch could have coordinated efforts to encourage senators or other political leaders to formulate promptly their recommendations for the President, officials with this responsibility might have done too little or have been delayed by the "start-up" costs inherent in creating a second presidential Administration. For example, the White House Counsel, Jack Quinn, resigned soon after President Clinton's re-election, while ongoing Whitewater investigations and numerous additional duties may have distracted many attorneys in that office. The Administration consumed much of 1997 attempting to fill the Deputy and Associate Attorney General positions held by

⁸⁰ See, e.g., Peter Callaghan, *Senators Agree on Selecting Judges*, TACOMA NEWS TRIBUNE, Aug. 12, 1997, at B1; Neil A. Lewis, *Clinton Has a Chance to Shape the Courts*, N.Y. TIMES, Feb. 9, 1997, at 30; see also 143 CONG. REC. S2538, S2541 (daily ed. Mar. 19, 1997) (statement of Sen. Biden) (suggesting GOP senators may have so intimidated).

⁸¹ See 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; *President's Counsel Quits*, N.Y. TIMES, Dec. 12, 1996, at B22.

Jamie Gorelick and John Schmidt at the Justice Department, which meant that Attorney General Janet Reno and other Department personnel spent relatively little time on judicial selection.

To the extent that delay in tendering nominees did not result from the failure of senators or other political figures to suggest names but rather from the failure of the Administration to submit nominees, the phenomena described in the paragraph above may explain much of this delay. For instance, the time which the Justice Department committed to replacing its second and third ranking officers might have detracted from important judicial selection activities, such as identifying and interviewing candidates or consulting with the Judiciary Committee on the nominees. Some delay in submitting nominees also appears attributable to the Administration's perception that it must cooperate with, assuage, or placate the GOP leadership or specific Republican senators.

In fairness, very real practical and political restraints may limit the Chief Executive's capacity to expedite nominee submission. For instance, the President might only be able to cajole senators who make recommendations because he may need their future support or because he may wish to avoid the perception of interfering in essentially local political matters. President Clinton may have even less ability to secure help from GOP leaders or Republican senators because he may require their future assistance, the senators have few incentives for cooperating, and neither side will want to appear weak. The Chief Executive might also be unwilling to expend scarce political capital on judicial selection.

2. *ABA Committee*

Throughout the 104th Congress, the ABA Committee maintained its conventional role of rating candidates' qualifications as it had for the last four decades.⁸² Senator Hatch expressed growing concern about the ABA's participation. During 1997, the Chair abruptly terminated the Association's official responsibility in the confirmation process.⁸³ Because the ABA has traditionally played a large role in helping various Administrations ascertain the advisability of proceeding with specific candidates, the Association may continue to exercise considerable influence, although its future impact, particularly on the confirmation process, remains unclear.

⁸² See Terry Carter, *A Conservative Juggernaut*, A.B.A. J., June 1997, at 32.

⁸³ Carter, *supra* note 82; N. Lee Cooper, *Standing Up to Critical Scrutiny*, A.B.A. J., Apr. 1997, at 6.

3. Confirmation Process

The Senate Judiciary Committee bears some responsibility for delay in the appointment of judges, principally through its failure to investigate, conduct hearings for, and vote on, more nominees. The Committee Chair typically held a hearing at which one appeals court and four or five district court nominees testified each month that the 104th Congress was in session, and he promised to follow a similar approach during 1997.⁸⁴ However, the Committee did not adhere assiduously to that schedule; the Senate had confirmed only nine judges by early September 1997. Senator Joseph Biden (D-Del.), who chaired the Committee from 1987 until 1994, recently claimed that the Committee had conducted two hearings each month during his tenure.⁸⁵

This dearth of appointments appears partly attributable to the inadequate resources which the Committee committed to judicial selection and partly to political factors, some of which could be ascribed to Senator Hatch and others to his Republican colleagues. For example, Senator Hatch resolved the longstanding controversy over the ABA's participation,⁸⁶ while all of the GOP senators participated in a lengthy and sometimes acrimonious debate over the roles of the Committee, its Chair, and individual senators in judicial selection, which essentially culminated in a decision to maintain the status quo.⁸⁷ The resolution of these disputes consumed time that otherwise might have been devoted to judicial selection.

The Clinton Administration shares the responsibility for the small number of judges confirmed because, early in the congressional session, it tendered relatively few nominees—a significant percentage of whom Senator Hatch deemed unacceptable—and provided other names irregularly, possibly complicating efficacious Committee processing. Nonetheless, the Chair's claim that the Executive Branch supplied insufficient nominees lacks persuasiveness. At least as much of the delay seems attributable to the Committee's inability or reluctance to hold hearings for, and vote on, nominees, as well as specific senators' opposition to certain judicial candidates.

⁸⁴ See Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741 (1997) ("Tobias, *Choosing Federal Judges*").

⁸⁵ See 143 CONG. REC. S2538, S2539 (daily ed. Mar. 19, 1997) (statement of Sen. Biden).

⁸⁶ See *supra* note 83 and accompanying text.

⁸⁷ See Neil A. Lewis, *Move to Limit Clinton's Judicial Choices Fails*, N.Y. TIMES, Apr. 30, 1997, at D22; *Obstruction of Justice*, THE NEW REPUBLIC, May 19, 1997, at 9.

In fairness, individuals who exercise substantial state power and enjoy life tenure must receive careful investigation and analysis in an attempt to insure that they possess the requisite qualifications and character to be excellent judges. Moreover, it is difficult to strike an appropriate balance between the need for both serious scrutiny and expeditious selection. Senator Hatch has specifically asserted that he prefers to exercise care in discharging that important duty,⁸⁸ although caution seemingly contributed less than political factors to delay in the confirmation process. Furthermore, Senator Hatch may have experienced a conflict between the obligation to follow and implement Senate traditions and the responsibility to his more conservative Republican colleagues, certain of whom apparently feel less disposed to honor those conventions, particularly when concerned about appointing activist judges. After all, the Chair successfully resisted a challenge that could have significantly modified certain senatorial understandings which govern appointments.⁸⁹ Senator Hatch has processed a number of nominees, even castigating his GOP colleagues for opposing several individuals, while the 1997 confirmation record is similar to some compiled for comparable periods during prior congressional sessions.⁹⁰

The Senate Majority Leader and the Republican Party leadership seem to have great responsibility for the delay in naming judges. The Senate had confirmed only nine nominees before September 1997, although the Judiciary Committee had approved and sent significantly more names to the floor, a dynamic that resembles Republican processing of judicial candidates during the 1996 election year.⁹¹ Some delay in placing nominees who have received favorable Committee treatment on the Senate calendar and conducting floor debate and votes on them is understandable given the pressure of other important legislative business, such as budgetary matters, and the chamber's unanimous consent procedure, which enables a single senator to delay the entire body and even block its consideration of candidates.

⁸⁸ See Hatch, *supra* note 73, at A15.

⁸⁹ See *supra* note 88 and accompanying text; see also Neil A. Lewis, *Republicans Seek Greater Influence in Naming Judges*, N.Y. TIMES, Apr. 27, 1997, at 1.

⁹⁰ See, e.g., 143 CONG. 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; Novak, *supra* note 73, at 38. But see *supra* notes 84-85 and accompanying text.

⁹¹ See 143 CONG. REC. S8041, S8045 (daily ed. July 24, 1997) (statement of Sen. Leahy); Hatch, *supra* note 73, at A15.

Nevertheless, the small number of judges who secured confirmation in 1997, especially as compared with earlier sessions of Congress, suggests that considerable responsibility lies with the Senate majority's leadership and its failure to schedule floor votes promptly. At the outset of the 105th Congress, Senator Lott vowed that he would subject President Clinton's nominees to close scrutiny.⁹² In the spring, Senator Patrick Leahy (D-Vt.), the ranking minority member of the Judiciary Committee, and his Democratic colleagues, such as Senator Biden and Senator Paul Sarbanes (D-Md.), apparently attempted to cajole Senator Lott by informing the Senate that Democrats had expedited appointments during Republican Administrations and imploring the Senate to permit debate and floor votes on nominees. For example, Senator Biden stated that "everyone who is nominated is entitled to have a shot . . . to be heard on the floor and have a vote on the floor," while Senator Sarbanes claimed that Republicans would "not even let [nominees] be considered by the Senate for an up-or-down-vote."⁹³ During June, the Senate Majority Leader reportedly said that he would not act on any nominations until the President filled four vacancies on the Federal Election Commission.⁹⁴ Senator Leahy responded by reciting a litany of noncontroversial nominees for vacancies on courts in desperate straits, who had "strong bipartisan support" and "were unanimously reported to the full Senate by the Judiciary Committee," three of whom President Clinton had nominated in the spring of 1996.⁹⁵

4. *Nomination and Confirmation*

Most of the problems involving nomination and confirmation examined in the above description of the persistent vacancy difficulty⁹⁶ attended judicial selection during 1997. For instance, the Justice Department, the Judiciary Committee, and the ABA continued to employ separate questionnaires which included many similar requests. The sporadic pace of nominee submission and Judiciary Committee review evidence inadequate understanding of the vacancy dilemma's seriousness and insufficient appreciation for synergy's effects, which compounded delay.⁹⁷

⁹² See Lewis, *supra* note 80, at 30.

⁹³ See 143 CONG. REC. S2538, S2541 (daily ed. Mar. 19, 1997) (statement of Sen. Biden); *id.* at S2539 (statement of Sen. Sarbanes).

⁹⁴ See 143 CONG. REC. S5653, S5653 (daily ed. June 16, 1997) (statement of Sen. Leahy).

⁹⁵ *Id.* Senator Lott also remained neutral in the debate over the role of the Judiciary Committee and its chair. See *supra* note 87 and accompanying text.

⁹⁶ See *supra* notes 7-72 and accompanying text.

⁹⁷ See *supra* notes 49-51 and accompanying text.

Numerous observers of judicial selection, including some senators, have suggested or asserted that much of the current impasse is attributable to motivations that are essentially political, and even to concerns about the ideological views of nominees. For example, Senator Biden intimated that Republican senators' opposition to the perceived political perspectives of specific nominees fostered some delay and accused certain GOP senators of attempting to change the "last 200 years of tradition" which govern appointments.⁹⁸ He remarked on the Senate floor that Republican senators are "trying to keep the President of the United States from being able to appoint judges, particularly as it relates to the courts of appeals."⁹⁹ Senator Paul Sarbanes echoed Senator Biden's sentiments about the Senate's "heavy politicizing of the judicial confirmation process" and commended Biden because he had "stripped away the veneer and laid out what is going on behind the scenes, which is a complete departure from past practices."¹⁰⁰

Other experts on judicial selection have made similar remarks. Professor Sheldon Goldman, who has studied the appointments process for a quarter-century, stated that Republicans have thrown down the political gauntlet to President Clinton, adding that "[i]n all of American history there has never been a situation where a newly elected President has faced this kind of challenge to his judicial nominations."¹⁰¹ Professor Geoffrey Stone, a respected constitutional law scholar and Provost of the University of Chicago, characterized the Republicans' actions as a "scandalous and stunningly irresponsible use of the Senate's authority."¹⁰² Additional writers have commented that "Congress has insisted on playing an unprecedented role" in selection and that the "Republican Senate is demanding—and often getting—a voice in whom Clinton appoints to the district courts."¹⁰³

Another initiative which some observers consider political and which has apparently contributed to the present dilemma and caused delay is the effort of Senator Charles Grassley (R-Iowa) to analyze judicial resources in the federal courts, especially the appeals courts.¹⁰⁴ For example, in 1996, Senator Grassley circulated questionnaires to all federal judges seeking information on how the

⁹⁸ 143 CONG. REC. S2538, S2541 (daily ed. Mar. 19, 1997) (statement of Sen. Biden).

⁹⁹ *Id.* at S2538 (statement of Sen. Biden).

¹⁰⁰ *Id.* at S2539 (statement of Sen. Sarbanes).

¹⁰¹ *See Gest & Lord, supra* note 90, at 24.

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See Tobias, Filling the Federal Courts in an Election Year, supra* note 76.

officers spend their time.¹⁰⁵ He has also conducted hearings on the allocation and use of judicial resources in several appellate courts, particularly to ascertain whether those circuits need additional judges or even require the complements which they now have.¹⁰⁶ Senator Grassley and a number of his colleagues have opposed filling a currently-authorized judgeship on the influential United States Court of Appeals for the District of Columbia Circuit.¹⁰⁷ Controversy surrounding this issue substantially delayed the confirmation of Merrick Garland for another opening on that court, and the Senate made his recent approval contingent on the contested seat remaining empty.¹⁰⁸

No one disputes that the proper deployment of judicial resources in the courts is a legitimate and important Senate concern. However, Senator Grassley's initiative may have delayed judicial appointments, especially in the appellate courts which are experiencing a high percentage of vacancies and numerous judicial emergencies.¹⁰⁹ Moreover, nearly all of the regional circuits continue to confront expanding numbers of appeals. It is also important to remember that Congress has created no additional judgeships since 1990, even though the Judicial Conference has recommended that Congress authorize many more, a suggestion premised on expert, conservative judgments and systematically collected empirical data regarding dockets and workloads.¹¹⁰ Senator Biden aptly summarized these ideas on the Senate floor:

[T]he courts come back to us and say—and they do this in a very scientific way—we not only need the vacancies filled, we need more judges than we have [T]hey cite the backlog, they give the rationale that cases are being backed up [T]his is the first time in . . . 24 years . . . I have ever heard anybody come to the floor and say: You know, we should basically decommission judgeships.¹¹¹

¹⁰⁵ See, e.g., *Appellate Survey Results Released*, THE THIRD BRANCH, June 1996, at 5; Bruce Brown, *Grassley Has Judges Grousing*, AM. LAW., Mar. 1996, at 16.

¹⁰⁶ See, e.g., *Considering the Appropriate Allocation of Judgeships in the U.S. Courts of Appeals for the Fourth, Fifth, and Eleventh Circuits: Hearings Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary* (Feb. 5, 1997 & June 9, 1997).

¹⁰⁷ 143 CONG. REC. S2515-S2541 (daily ed. Mar. 19, 1997); see also Lewis, *supra* note 80, at 30; Eva M. Rodriguez, *Garland: A Centrist Choice*, LEGAL TIMES, Aug. 7, 1995, at 6.

¹⁰⁸ 143 CONG. REC. S2515-S2541 (daily ed. Mar. 19, 1997).

¹⁰⁹ Twenty-two of 179 judgeships are vacant. See *Judicial Boxscore*, THE THIRD BRANCH, Feb. 1998, at 7.

¹¹⁰ See Tobias, *Choosing Federal Judges*, *supra* note 84, at 753 (characterizing these statistics as conservative); see also S. 678, 105th Cong. (1997) (providing judgeship bill); Tobias, *New Certiorari*, *supra* note 18, at 1271 (providing Conference recommendation).

¹¹¹ 143 CONG. REC. S2538, S2540 (daily ed. Mar. 19, 1997) (statement of Sen. Biden).

Numerous actions of Republican senators described earlier support the accusation that the existing conundrum and delays are politically motivated, especially out of concern about the perceived ideological views of nominees. One illustration is the aborted attempt to modify the traditional responsibility of the Senate Judiciary Committee and its Chair in the confirmation process.¹¹² Another is the substantial percentage of vacancies on the appeals courts, which Republican senators apparently view as more important than district courts because appellate rulings govern entire regions and circuits effectively serve as courts of last resort for those areas.¹¹³

5. *Prospects for Change*

Insofar as the numerous political phenomena which accompanied judicial selection in 1997 and contributed significantly to the current impasse are inherent in the process, they may be resistant to treatment. For instance, the above examination of the persistent vacancies problem indicates that measures which increase efficiency and resources might only ameliorate the delay which is attributable to political considerations.¹¹⁴ However, the analysis of political factors which comprise the present conundrum suggests that public officials could remedy them, if they exercised the requisite political will. For example, political concerns are all which seem to prevent President Clinton from expeditiously submitting additional nominees with comparatively moderate political viewpoints and Republican senators from promptly confirming those individuals or other similar existing nominees.

6. *Effects of the Current Impasse*

The current dilemma has caused problems, most of which resemble the adverse effects that can be ascribed to the persistent vacancies problem.¹¹⁵ For instance, the present difficulty has imposed analogous pressures on judges and litigants which are reflected in judicial workload statistics. The federal system continues to have a substantial civil backlog, whereby "[c]ountless civil disputes involving business and families . . . are being held up for months,"¹¹⁶

¹¹² See *supra* notes 88-90 and accompanying text.

¹¹³ This happens because the Supreme Court reviews so few appellate decisions. See Lewis, *supra* note 87, at D22.

¹¹⁴ See *supra* notes 62-63 and accompanying text.

¹¹⁵ See *supra* notes 66-71 and accompanying text.

¹¹⁶ See Gest & Lord, *supra* note 90, at 23; see also Robert Schmidt, *The Costs of Judicial Delay*, LEGAL TIMES, Apr. 28, 1997, at 6.

while burgeoning appeals and growing vacancies in nearly one-third of the Ninth Circuit's judgeships have recently compelled the court to cancel 600 arguments.¹¹⁷ In July 1997, Senator Leahy claimed that the country has federal "courts where prosecutors have to kick cases out, that they have to plea bargain and everything else because there are not enough judges to hear them."¹¹⁸ Indeed, during mid-July, the "looming crisis in the Nation brought on by the extraordinary number of vacant federal judicial positions and the resulting problems that are associated with delayed judicial appointments" led the presidents of seven national legal groups to write an open letter to the Chief Executive and the Senate Majority Leader.¹¹⁹ They beseeched the "President and the Senate to devote the time and resources necessary to expedite [judicial] selection and confirmation" urging "all participants in the process to move quickly to resolve the issues that have resulted in these numerous and longstanding vacancies in order to preserve the integrity of our justice system."¹²⁰ The organized bar leadership warned: "The injustice of this situation for all of society cannot be overstated. Dangerously crowded dockets, suspended civil case dockets, burgeoning criminal caseloads, overburdened judges, and chronically under-manned courts undermine our democracy and respect for the supremacy of law."¹²¹ These sentiments testify to the profound effects that empty judgeships have on the lives of millions of individual citizens in the United States.

Insofar as the American people attribute the existing dilemma to partisan politics, the troubled judicial selection process may engender public disrespect for the federal government, especially the President and the Senate. The bar leadership's concerns trenchantly attest to this phenomenon,¹²² as does Senator Leahy's assertion that senatorial failure to vote on nominees "damage[s] the integrity and the independence of the federal judiciary . . . [and] the U.S. Senate."¹²³

¹¹⁷ See *Chronic Federal Judge Shortage Puts Lives, Justice on Hold*, LAS VEGAS REV. J., Aug. 13, 1997, at 9A ("Chronic Shortage"); Novak, *supra* note 73, at 37; see also *Chronic Shortage, supra* (stating that the 6th Circuit canceled sixty oral arguments); Bill Kisliuk, *Judges' Conference Slams Circuit-Splitting, Vacancies*, THE RECORDER, Aug. 19, 1997, at 1.

¹¹⁸ 143 CONG. REC. S8041, S8045 (daily ed. July 24, 1997) (statement of Sen. Leahy).

¹¹⁹ Letter to President William J. Clinton & Senate Majority Leader Trent Lott, from N. Lee Cooper, ABA President, et al. (July 14, 1997) reprinted in 143 CONG. REC. at S8046 (daily ed. July 24, 1997).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See *supra* notes 119-21 and accompanying text.

¹²³ 143 CONG. REC. S5653, S5654 (daily ed. June 16, 1997) (statement of Sen. Leahy).

The exact nature of the current conundrum and who has primary responsibility for the situation remain unclear and controversial, while efforts to resolve these issues may prove inconclusive and unnecessary, principally because it is preferable to devote energy to improving the circumstances. For example, the number and length of open judgeships which the federal court system is experiencing may not constitute a "vacancies crisis" in the sense that the quantity of open seats and the time for which they have been empty is unprecedented. Nevertheless, the conditions in specific courts, such as the Ninth Circuit, and for particular judgeships, namely those with numerous judicial emergencies, are very serious.

Assigning precise responsibility for the situation today seems similarly difficult and unproductive. For instance, the earlier evaluation revealed that each of the major participants in the appointments process could probably have instituted measures which would have expedited selection. However, at this juncture, it would be more profitable to concentrate on ending the impasse and facilitating appointments.

In sum, the above examination of the generic openings problem and the present impasse demonstrates that the two components alone, but especially together, seriously threaten the federal criminal and civil justice systems as well as warrant expeditious treatment. The next Section of this Article explores potential responses to the permanent difficulty and the recent impasse.

II. ANALYSIS OF POTENTIAL SOLUTIONS TO THE PROBLEM

This Section assesses a wide range of possible solutions to the conundrum of unfilled judicial vacancies that officials in the three branches could implement.¹²⁴ I evaluate these measures, certain of which might prove more productive in various combinations, primarily in terms of their comparative efficacy for expediting appointments. The earlier discussion demonstrated that the persistent problem is partially, and the current impasse is principally, a political problem.¹²⁵ The successful treatment of these political phenomena depends substantially on political willingness to address them conscientiously, while much of the delay implicating the longstanding complication is intrinsic and cannot be remedied easily. Therefore, I analyze the possibilities of reducing caseloads or expediting the disposition of litigants' suits. Finding the prospects minimal, I briefly

¹²⁴ See *supra* note 8.

¹²⁵ See *supra* notes 62-63, 73-82 and accompanying text.

consider mechanisms which respond to the openings' effects, rather than their causes.

A. Measures to Expedite the Filling of Vacancies

1. The Traditional Appointments Process

a. A Preliminary Word About the Need for Expedition

The prior assessment showed that every individual and entity involved in judicial selection must view the task as a critical one which demands prompt performance.¹²⁶ Indeed, the FJC study's authors stated that "[i]n the final analysis, a positive attitude and commitment from all three branches—a sense of urgency whenever a vacancy arises—will speed the process most reliably."¹²⁷ Moreover, constant reminders to executive and legislative branch officials and to the public, emanating principally from the judiciary which "has felt the urgency on a daily basis,"¹²⁸ have been helpful and should continue.

However, the above analysis also suggested that the inherent nature of much of the delay, given the need for careful nominee scrutiny and the number of participants in the selection process, may preclude elimination of the persistent vacancies problem.¹²⁹ The Chief Executive and Congress appear unlikely to modify their priorities significantly and the lay public is essentially indifferent.¹³⁰ Thus, although the Judicial Branch should do all that it can to publicize and increase public awareness of the vacancies' crucial impact on court operations and "jawboning" by others must proceed, it is important to be realistic about the limited prospects for success.

b. Expediting the Selection of Judicial Nominees

i. Insuring greater time for nominee selection through timely notice of vacancies and advance processing

Studies have shown that the most substantial temporal delays in filling vacant judgeships can be attributed to the process of identifying and assessing the fitness for judicial service of possible nominees.¹³¹ Thus, if the designation and

¹²⁶ See *supra* Part I.

¹²⁷ See Bermant et al., *supra* note 6, at 347.

¹²⁸ *Id.*; see also N.Y. City Bar, *supra* note 7, at 377-78.

¹²⁹ See *supra* notes 7-72 and accompanying text.

¹³⁰ See N.Y. City Bar, *supra* note 7, at 373; *supra* notes 48-51 and accompanying text.

¹³¹ See LONG RANGE PLAN, *supra* note 20, at 104-05; Bermant et al., *supra* note 6, at 333-35.

evaluation of potential candidates were routinely begun before openings occurred, the period during which courts are required to function without full complements of active judges might be significantly decreased.

Many federal judges make decisions about changes in their active status much before the date when they are eligible to become senior judges or to retire.¹³² These comprise the most frequent reasons for judicial openings, although some judges premise these determinations on unanticipated events, such as sudden sickness, disability, or other changes in their personal circumstances. During 1988, the Judicial Conference recognized the need for judges to give advance notice of changes in status and implored them to do so; numerous judges have afforded such notice, but some have not.¹³³

Advance notice of six to twelve months before an anticipated assumption of senior status or retirement will expedite the appointment of replacements in several ways. First, it will specifically inform officers in the Executive and Legislative Branches with responsibility for judicial selection of the impending need for an appointment. Second, notice will offer bar associations, civic groups, and others that are interested in participating in the selection process opportunities to encourage and aid the President and the Senate in expeditiously naming a new judge.

A few disadvantages may attend the implementation of this approach. Advance notice of "anticipated" retirements is an incomplete solution because unpredictable developments occasion some changes in status.¹³⁴ Even for certain openings which are foreseeable, several factors may preclude the appointment of replacements before vacancies occur. For example, advance notice requires voluntary cooperation from judicial officers who might be unwilling to reveal their retirement decisions early. Of course, Congress could condition changes in status on notice; however, the unanticipated nature of many retirement decisions make this idea impractical.

The Administrative Office or court officials, such as the custodian of judicial records, might give notice when judges approach a specified time, such as six or twelve months, before they become eligible to assume senior status or retire.¹³⁵ One problem with this alternative is its potential for imposing undue pressure on

¹³² For a helpful explanation of the rules governing changes of status, see Bermant et al., *supra* note 6, at 334 & n.42; see also 28 U.S.C. § 371 (1994).

¹³³ *Supra* notes 29-30 and accompanying text.

¹³⁴ LONG RANGE PLAN, *supra* note 20, at 103-04; Bermant et al., *supra* note 6, at 334.

¹³⁵ Bermant et al., *supra* note 6, at 333-34.

judges to modify status immediately upon becoming eligible and thus contravening the traditional understanding that retirements are voluntary.¹³⁶ The independence of Article III judges correspondingly indicates that many jurists may feel free to ignore the notice, absent some regulatory predicate.

A related measure could obviate certain difficulties recounted above.¹³⁷ Congress might provide for the creation of an additional judgeship on the date when an incumbent judge becomes eligible for senior status, even if that judicial officer were not to assume senior status at that time. The number of judgeships authorized would then be decreased by one when the incumbent takes senior status, retires, or dies, if the new position has been filled by that date. This alternative enables participants, especially Executive Branch officials and senators, to facilitate the selection of nominees, many more of whom would assume office on the date that incumbents are eligible to alter their status.

ii. Establishing more formalized processes for nominee selection

If more regularized, consistent, and synchronized procedures for identifying, screening, and assessing judicial nominees are implemented and if greater fiscal and personnel resources are committed to all phases of the selection process, the individuals and entities involved in choosing judges could reach prompt, and perhaps improved, decisions, thereby decreasing the time during which judgeships remain unfilled.¹³⁸ Those who participate in designating, vetting, and evaluating judicial candidates might implement specific measures that would increase the routinization, uniformity, coordination, and efficiency of nominee selection and therefore enhance the current procedures whereby a number of candidates are chosen through diverse, unsystematic, and even idiosyncratic processes to which inadequate resources have been committed.¹³⁹

(A) Initial Selection Process

Insofar as specific members of the Senate recommend candidates to the President for nomination, senators might implement several measures that could expedite the initial phase of the selection process. Effectuation of these suggestions is particularly important in those courts which have substantial caseloads and numerous judges and, thus, rather frequent openings because

¹³⁶ *Id.*

¹³⁷ See Miller Report, *supra* note 6, at 10.

¹³⁸ See Bermant et al., *supra* note 6, at 335-36.

¹³⁹ See *supra* notes 31-34 and accompanying text.

prolonged vacancies in their judgeships can be especially detrimental to the administration of justice.

Senators should identify and promptly vet candidates within thirty days and suggest these names to the President within ninety days of a vacancy arising.¹⁴⁰ Members of the Senate also ought to recommend at least two names in order of preference to minimize delays should a candidate become unavailable or undesirable. If senators entertain doubts about specific individuals or believe that their candidacies may prove controversial, the senators could confer with Executive Branch officials or the Senate Judiciary Committee about their concerns. Senators can implement these suggestions by expanding their reliance on commissions or staffs to compile and maintain lists of highly qualified potential nominees and by committing the requisite resources to the investigation and assessment of candidates' qualifications.

Numerous members of the Senate may be reluctant to effectuate certain of these suggestions. For example, some senators may consider the recommendation of more than one candidate unnecessary or an interference with conventional senatorial understandings. Other members of the Senate, particularly those from states which experience infrequent vacancies, may correspondingly find the collection and maintenance of candidate compilations and the devotion of more resources to investigating and evaluating possible nominees unwarranted or wasteful.

(B) Subsequent Process

Executive Branch officials, alone or in conjunction with the ABA, should effectuate certain measures to expedite nominee selection. Administration officers who are responsible for choosing judges should encourage senators to forward their recommendations promptly. They should also seek input from the senators on candidates, such as those for appeals court seats, whom the President traditionally selects; and they should consult with individual senators and the Judiciary Committee to facilitate appointments.¹⁴¹

Administration officials as well should create and maintain compilations of prospective candidates for the appellate and district court benches. This would

¹⁴⁰ Miller Report, *supra* note 6, at 6-7.

¹⁴¹ For a discussion of the consultation process, see 143 CONG. REC. S2538, S2541 (daily ed. Mar. 19, 1997) (statement of Sen. Biden); Tobias, *Choosing Federal Judges*, *supra* note 84, at 744; Williams, *supra* note 7, at 193 & n.41.

enable the President to inform senators who are unresponsive to requests for multiple names of others whom the Chief Executive is considering; this should prompt the choice and nomination of very competent candidates and reduce delays if prior selections prove undesirable. The President may correspondingly consult these lists in considering his own selections when members of the Senate fail to recommend candidates within ninety days of a vacancy occurring. Numerous senators, however, may resist Administration invocation of these mechanisms because they trench too substantially on traditional senatorial prerogatives.

The White House, the Justice Department, the FBI, and the ABA should conclude their investigations of possible nominees within ninety days of the date on which senators recommend the individuals. These entities can comply with this suggestion by devoting greater financial and other resources to their efforts or by simplifying the procedures employed. All of these institutions, especially the White House and the Department of Justice, must reassess and attempt to streamline existing processes, focusing on the breadth and depth of candidate questioning, the elimination of duplicative inquiries, and the necessity of personal interviews.

Some redundancy in the efforts of White House officials, Justice Department lawyers, the FBI, and the ABA may be unavoidable; however, each participant in the judicial selection process should attempt to assume more specific, narrower responsibilities.¹⁴² For instance, the FBI could restrict its investigation to issues involving "personal and financial integrity, health and similar matters within its particular expertise."¹⁴³ The ABA might confine its inquiry to questions implicating professional competence and experience which members of its Committee are better suited to assess.¹⁴⁴ White House and Justice Department officials should consider eschewing interviews for most candidates because these officers can typically rely on interviews conducted by the FBI and the ABA and should request that the Bureau and the Bar Association provide supplemental information when necessary.¹⁴⁵

¹⁴² The Miller Commission found that both the number of participants and the scope of interviews had grown, but questioned the need and relevance of the interviews themselves. This led the commission to suggest limiting the number of participants and the scope of interviews. See Miller Report, *supra* note 6, at 3-10.

¹⁴³ See *id.* at 8.

¹⁴⁴ *Id.* at 8-9.

¹⁴⁵ I premise the above ideas substantially on the Miller Commission's observations regarding the efficacy of interviews. See *supra* notes 36-37 and accompanying text.

The ABA should consider implementing some of the Miller Commission's recommendations.¹⁴⁶ The Commission suggested that the ABA Committee furnish the Administration and the Senate Judiciary Committee with brief explanations of the reasons for its ratings of nominees' qualifications. These statements would assist Executive Branch officials, senators, and the public in understanding the Committee's perspectives and enable the ABA to deflect the allegation that it considers ideological or political factors in rating nominees.¹⁴⁷ The Miller Commission also proposed that the ABA enlarge the Committee to include more than one representative from each circuit so that the entity can conclude its investigations within thirty days.¹⁴⁸

Insofar as the current impasse can be ascribed to delay in forwarding nominees, the President must devote greater resources to the selection process. Additional people and money will expedite the submission of recommendations from senators and other political figures by resolving disputes over specific vacancies, Administration review of those candidates, and the choice and nomination of particular nominees.

The Chief Executive might consider tendering names for all current vacancies. This would enable him to deflect the frequently-leveled criticism that the dearth of nominees available for Judiciary Committee processing delayed appointments in 1997.¹⁴⁹ The President must at least insure that the Administration always supplies the Committee with more nominees than its Chair promises to process.¹⁵⁰

c. Expediting the Senate Confirmation Process for Judicial Nominees

The Senate Judiciary Committee must seriously consider means of improving the traditional confirmation process. One important action which it might institute is the devotion of additional fiscal and other resources to the investigation and assessment of nominees. For example, the Miller Commission suggested that the Committee enlarge the number of staff lawyers who investigate candidates and continue the practice of borrowing Justice

¹⁴⁶ Miller Report, *supra* note 6, at 7-8.

¹⁴⁷ *See id.*; *see also supra* notes 38-42, 83-84 and accompanying text.

¹⁴⁸ *See* Miller Report, *supra* note 6, at 8.

¹⁴⁹ *See supra* notes 73-74, 89 and accompanying text.

¹⁵⁰ The Administration could expedite nomination and confirmation by consulting in advance with the Judiciary Committee, its Chair, and individual senators. *See supra* note 141.

Department personnel when the Committee needs assistance in processing substantial numbers of pending nominees.¹⁵¹

The Judiciary Committee could also examine ways of effecting corresponding economies. For instance, the Committee might forgo confirmation hearings for noncontroversial nominees as these hearings are essentially ceremonial and scheduling them further delays the confirmation process, a problem that the increasing frequency of vacancies compounds.¹⁵²

Insofar as the present conundrum is attributable to a delayed confirmation process, some problems seemingly result from the Judiciary Committee's inability to investigate, conduct hearings for, and vote on nominees; the Senate Majority Leader's failure to schedule floor votes; and specific senators' opposition to certain nominees. In addition to implementing the above reforms, the Committee could correspondingly process greater numbers of nominees by scheduling more frequent hearings or by eliminating hearings for noncontroversial nominees. The chair, alone or in conjunction with Administration officials, might attempt to facilitate the resolution of disputes over particular candidates and over how candidates are recommended for the President's consideration in specific states, although these may be sensitive, burdensome assignments. For instance, Senator Hatch could promote efforts to seek candidates whom senators would find acceptable, such as the recent initiative in Washington state, or the compromise which facilitated filling of the long-term appellate court vacancy in Arizona.¹⁵³

The Senate Majority Leader and the Republican leadership must insure that they expeditiously schedule for floor votes nominees whom the Judiciary Committee approves, perhaps by assigning the confirmation process higher priority. Insofar as the controversial nature of some nominations has contributed to delays in scheduling, the leadership should promptly address those disputes which are amenable to resolution and, failing that, afford opportunities for full debate and votes on nominees.

¹⁵¹ See Miller Report, *supra* note 6, at 9. The Commission also suggested that the Committee be required to clear nominees within sixty days of receipt. *Id.* The Committee and its Chair might resist this idea.

¹⁵² See *supra* Part I.A.2.d.

¹⁵³ See, e.g., *Arizonan Gets 9th Circuit Seat*, THE TUCSON CITIZEN, Jan. 30, 1998, at 2C; Callaghan, *supra* note 80; D. Michael Heywood, *UPS Workers' Fight For Jobs Feels Familiar, Hatch Sniffs at Reno's Pitch for More Judges*, THE COLUMBIAN, Aug. 7, 1997, at B10.

d. *Miscellaneous Measures for Expediting the Nomination and Confirmation Process*

i. *A recapitulation on temporal prescriptions*

As mentioned above, the creation of fixed time periods within which nominations and confirmations must occur, though not legally binding, would probably yield some benefits.¹⁵⁴ Were the organized bar, national political leaders and the media to recognize time limits, this could emphasize the significance of judicial appointments and engender public expectations that openings be promptly filled. Particular guidelines or benchmarks may prompt officials in the executive and legislative branches as well as others associated with the selection process, namely the ABA, to organize their efforts in ways which would expedite appointments, although inherent restraints may limit the improvement that can be secured.

Informal guidance meant to facilitate selection, however, will be effective insofar as those involved honor it, while assigning informal guidelines legal force, whether by statute, Senate rule, or administrative regulation, may be fruitless. Deadlines for filling openings could be ignored with impunity, unless these deadlines trigger alternative appointment powers¹⁵⁵ or can be enforced in court, which seems improbable in light of current justiciability and other constitutional strictures.¹⁵⁶

ii. *Redundancies and paperwork*

It is also possible to realize economies with respect to the three written questionnaires which the White House and the Justice Department, the ABA, and the Senate Judiciary Committee now require nominees to complete.¹⁵⁷ For instance, nominees should be required to answer only one questionnaire which furnishes the material that the four entities seek. Those participants must seriously evaluate whether some questions might be deleted or changed to make the inquiry less onerous and intrusive without forfeiting pertinent information.

¹⁵⁴ See *supra* notes 132-51 and accompanying text.

¹⁵⁵ For discussion of a recent experience which illustrates the inefficacy of statutory time limits, see Bermant et al., *supra* note 6, at 337 n.51.

¹⁵⁶ See *id.* at 337.

¹⁵⁷ See *supra* note 47 and accompanying text.

e. A Word About Limitations on Measures for Treating Traditional Judicial Selection

Many of the above measures, which are principally intended to improve the judicial selection process by increasing efficiency and resources, could facilitate the filling of vacancies. However, these mechanisms only partially respond to certain problems, such as phenomena inherent in selection, that are responsible for delay. The techniques may merely ameliorate the difficulties attributable to politics, so vividly illustrated by the 1997 experience with judicial appointments. Politics pervades selection in ways that improved processes may treat only minimally.

2. Nontraditional Methods of Appointment

Alternative, less conventional methods for placing judges on the federal courts might be applied if prolonged unfilled vacancies can be ascribed to inordinate delays caused by the President or the Senate. Recess appointments constitute the most "traditional" of these options in the sense that the Constitution expressly authorizes the Chief Executive to invoke recess commissions when filling vacancies, while other options may require constitutional amendment or statutory authorization.

a. Recess Appointments

The Recess Appointments clause affords the most important mechanism that the President might employ to treat protracted vacancies in judgeships resulting from delays in Senate action on nominees.¹⁵⁸ Article II expressly empowers the Chief Executive, when the Senate is not in session, to name individuals to offices for which appointment otherwise requires the advice and consent of the Senate.¹⁵⁹

Recipients of recess commissions serve until the Senate confirms them or another nominee or until the conclusion of the Senate's next session, whichever happens first.¹⁶⁰ Presidents with diverse political viewpoints have relied on the Recess Appointments clause in naming judges throughout the nation's history, although no Chief Executive has employed this method to fill judicial openings

¹⁵⁸ See Bermant et al., *supra* note 6, at 337-40.

¹⁵⁹ See U.S. CONST. art. II, § 2, cl. 3.

¹⁶⁰ See *id.*

since 1980.¹⁶¹ Recess appointments are a rather convenient means for attempting to augment the judiciary's working capacity when delays in nominating candidates or in confirming nominees prolong vacancies.

Legal, political, and practical considerations, however, limit the commissions' utility. Legitimate and serious questions might be raised about the decisional independence of those granted recess commissions before Senate confirmation and about the Senate's capacity to scrutinize effectively these persons' nominations for permanent positions.¹⁶² Recess appointments could also be challenged because individuals who hold them lack life tenure and protection against salary diminution, although the Second and Ninth Circuits have sustained the commissions' validity.¹⁶³ Nonetheless, valid concerns remain regarding the effect on recess appointees' decisional independence of their limited tenure and interest in permanent appointment. Substantially increased reliance on recess commissions today, therefore, may provoke opposition from the Senate and the legal community.

Additional legal or political restraints might accompany the employment of recess judicial appointments. For example, questions respecting the meaning of "recess" could lead Chief Executives to follow the cautious approach of exercising this authority only in the period between the two sessions of each Congress, rather than during intrasessional recesses.¹⁶⁴ The limitations which Congress has imposed on the reimbursement of recess appointees further constrict the commissions' appeal.¹⁶⁵

Apart from legal and political complications, enhanced dependence on recess appointments would have circumscribed practical worth. The period after the President nominates candidates typically comprises less than twenty percent of the time required to fill openings, even though the period needed for Senate confirmation has substantially increased since 1975.¹⁶⁶ Because individuals granted recess commissions are usually people who were already chosen for nomination, the use of recess appointments will minimally decrease the time that

¹⁶¹ See Bermant et al., *supra* note 6, at 337-38; see also *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc); Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758 (1984).

¹⁶² See CHASE, *supra* note 6, at 15-16; Bermant et al., *supra* note 6, at 338.

¹⁶³ See *Woodley*, 751 F.2d at 1009-14; *United States v. Allocco*, 305 F.2d 704, 708-09 (2d Cir. 1962).

¹⁶⁴ See Bermant et al., *supra* note 6, at 339; Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2218-22 (1994).

¹⁶⁵ See 5 U.S.C. § 5503 (1994); see also Bermant et al., *supra* note 6, at 339 & n.62.

¹⁶⁶ See Bermant et al., *supra* note 6, at 339.

vacancies remain open and might only lead the Senate to delay confirming recess appointees.¹⁶⁷

These benefits and disadvantages, particularly legal, policy and practical restraints, suggest that recess commissions are not a panacea for the impasse over judicial vacancies but may afford a measure of relief, especially in carefully calibrated contexts. For example, the Chief Executive might selectively apply recess appointments in courts that have judicial emergencies and to nominees with impeccable qualifications or whom home-state senators strongly support. The President could correspondingly fill openings temporarily with persons, including bankruptcy and magistrate judges, who would not receive consideration for permanent appointments, thereby allowing a truncated review process and provoking less political opposition from Congress.¹⁶⁸ In the final analysis, dependence on recess commissions today may be as confrontational and inefficacious as the apparent reluctance of senators to confirm promptly judges appointed by Presidents of another party. Recess appointments' greatest value might be in dramatizing the risk that judicial openings pose to the federal courts and the importance of expeditiously filling those vacancies. Over the longer term, the practice's awkward position in the constitutional framework of life-tenured judges and its pragmatic policy restraints could well limit the value of recess commissions.

b. Alternative Methods for Filling Vacant Judgeships If Presidential or Senatorial Inaction Causes Inordinate Delay

Should presidential or senatorial inaction lead to inordinate delays in filling open judgeships, several less traditional alternatives could be explored.¹⁶⁹ The options' unconventional nature and the constitutional, political and practical complications that they raise probably make the measures less feasible. Indeed, the Judicial Conference, in its Long Range Plan, explored several ideas for treating the vacancies problem. It did this to emphasize how serious the difficulty is and "why it requires prompt attention and appropriate action," even though the plan did "not endorse such drastic remedies."¹⁷⁰

¹⁶⁷ See *id.* at 339-40.

¹⁶⁸ See *id.* at 340 n.65.

¹⁶⁹ LONG RANGE PLAN, *supra* note 20, at 103, 137-40; Bermant et al., *supra* note 6, at 340-14; see also N.Y. City Bar, *supra* note 7.

¹⁷⁰ LONG RANGE PLAN, *supra* note 20, at 103 (citation omitted). "If judicial vacancies cannot be filled expeditiously, disabling the judiciary and leaving no other viable remedy, the political branches may have to

The principal alternative would authorize the President and the Senate to act alone in filling judgeships which remain open because of inaction by the Chief Executive or the Senate in nominating candidates or in exercising advice and consent. For instance, the President might be permitted to appoint judges absent Senate confirmation, or judicial nominations could automatically be deemed confirmed if the Senate failed to act on nominations within a specified period after receiving them.¹⁷¹ The Senate might concomitantly be empowered to name judges should the Chief Executive neglect to tender nominations or to make recess appointments within a prescribed time after vacancies occur.¹⁷²

A related approach would be to vest in a judicial branch organ the power to fill open judgeships with permanent or interim appointments.¹⁷³ More specifically, the Chief Justice of the United States, the Judicial Conference or a specific court could be authorized to name judges when the President fails to make nominations or recess appointments within a set period after vacancies happen, when the Senate does not act on nominations within a prescribed time of their receipt, or when courts having open judgeships show that they urgently need to fill vacancies by, for example, demonstrating "judicial emergencies."¹⁷⁴

The creation of one or multiple "backup" appointment procedures would strengthen temporal restrictions that might be statutorily imposed on presidential or senatorial participation in judicial selection.¹⁷⁵ This alternative could lead to the implementation of more efficient measures while fostering the resolution of political disagreements which can delay nomination and confirmation. It seems improbable that the President or the Congress will cede complete responsibility for choosing judges to one another. However, the Chief Executive and the Congress could consider it more palatable to lodge authority for interim appointments in the less partisan judiciary,¹⁷⁶ particularly if the power is limited to either protracted openings or similarly exigent situations.¹⁷⁷ The possibility

consider alternative methods for appointing Article III judges that otherwise would be unacceptable (even if constitutional revision is required)." *Id.* at 137-38.

¹⁷¹ See LONG RANGE PLAN, *supra* note 20, at 138; Bermant et al., *supra* note 6, at 340. Recess appointments could also be continued in effect until vacancies were filled. See LONG RANGE PLAN, *supra*, at 138.

¹⁷² See LONG RANGE PLAN, *supra* note 20, at 138; Bermant et al., *supra* note 6, at 340.

¹⁷³ Bermant et al., *supra* note 6, at 340; N.Y. City Bar, *supra* note 7, at 378-79.

¹⁷⁴ See Bermant et al., *supra* note 6, at 340. A court might also show that its "annual vacancy rate or average caseload for its active judges exceeds a prescribed level." *Id.*

¹⁷⁵ LONG RANGE PLAN, *supra* note 20, at 138; Bermant et al., *supra* note 6, at 340-41; see also N.Y. City Bar, *supra* note 7, at 378-80.

¹⁷⁶ This suggestion finds support in the statutory provision for interim appointments of United States Attorneys. See 28 U.S.C. § 546 (1994).

¹⁷⁷ Numerous states so provide. See LARRY BERKSON ET AL., JUDICIAL SELECTION IN THE UNITED STATES:

of placing appointment authority in neutral third parties might well encourage politicians who have primary responsibility for judicial selection to honor prescribed temporal restrictions.¹⁷⁸

Numerous political, practical and constitutional difficulties could affect the institution of these backup appointment mechanisms. Chief Executives and members of the Senate have long seen the choice of judges as an important means of affecting the law's development and of exercising political patronage.¹⁷⁹ Therefore, measures that would erode the benefits that the President and senators derive from judicial appointments would probably provoke vigorous opposition. The process may become overpoliticized if participants cast aspersions on whether the President or the Senate caused specific delays or if astute politicians manipulate the automatic appointment aspects.¹⁸⁰

Invocation of these devices would raise several pragmatic concerns, especially regarding the advantages to be attained. The earlier examination revealed that the preliminary screening, assessment, and investigation of candidates and nominees consumes much time.¹⁸¹ Removing senators from the selection process would effect minimal temporal savings. Eliminating presidential involvement would be similarly inefficacious. For instance, were either the Senate or the judiciary to assume responsibility for designating and screening potential nominees, those tasks would consume analogous resources. The time required for complete FBI background investigations could be saved by assigning bankruptcy or magistrate judges to hear cases temporarily or by appointing special masters. However, the judicial officers' brief tenure and lack of protection from salary reduction mean that they would be exercising considerably less than full Article III jurisdiction.¹⁸² In the end, procedures that exclude the Chief Executive or the Senate from judicial selection when delay occurs might not necessarily expedite the completion of the necessary background work and could even prompt hasty, ill-conceived decisionmaking,

A COMPENDIUM OF PROVISIONS (1981); MARVIN COMISKY ET AL., THE JUDICIARY SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE 6-7 (1987).

¹⁷⁸ The District of Columbia uses an analogous provision. See D.C. CODE ANN. tit. 11 app. §§ 433-434 (1981).

¹⁷⁹ See CHASE, *supra* note 6 *passim*; Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. REV. 273, 279-80 (1989).

¹⁸⁰ See N.Y. City Bar, *supra* note 7, at 379.

¹⁸¹ See *supra* notes 22-37 and accompanying text.

¹⁸² See LONG RANGE PLAN, *supra* note 20, at 139-40; Bermant et al., *supra* note 6, at 342; see also N.Y. City Bar, *supra* note 7, at 379 (suggesting likelihood of lengthy litigation over judges).

which would be peculiarly inappropriate considering that appointments confer both the authority of the state and life tenure.¹⁸³

It may also be inadvisable as a policy matter to designate interim appointees who have not passed the qualifications inquiry intrinsic to the appointments process and who lack life tenure's protections. If these appointees were to become nominees for permanent positions, their judicial decisionmaking might appear intended to please the Senate which must ultimately confirm interim judges.

Perhaps most troubling would be questions regarding the constitutionality of legislation that reallocates the judicial appointment power.¹⁸⁴ Because judges are officers of the United States, the Appointments Clause requires the Chief Executive to "nominate, and by and with the Advice and Consent of the Senate" appoint them.¹⁸⁵ Even though Congress can vest "in the President alone, in the Courts of Law, or in the Heads of Departments" the authority to appoint those inferior officers whom Congress deems appropriate, this phrasing does not empower Congress to name the officers.¹⁸⁶ A constitutional amendment, therefore, would be necessary to authorize senatorial appointment of judges.

Notwithstanding the apparent breadth of Congress's authority to authorize the appointment of inferior officers, this term may not encompass judges.¹⁸⁷ The constitutional framers apparently intended that judges would be appointed only in the way prescribed for principal officers, by presidential nomination and Senate confirmation.¹⁸⁸ Moreover, the rank, responsibility and tenure of Article III judges suggest that they are not inferior officers as envisioned in the Appointments Clause.¹⁸⁹ If either of these constructions is correct, any approach

¹⁸³ See Bermant et al., *supra* note 6, at 341.

¹⁸⁴ LONG RANGE PLAN, *supra* note 20, at 138; Bermant et al., *supra* note 6, at 342.

¹⁸⁵ U.S. CONST. art. II, § 2, cl. 2.

¹⁸⁶ *Id.*; Buckley v. Valeo, 424 U.S. 1, 132-33 (1976).

¹⁸⁷ Bermant et al., *supra* note 6, at 342-43.

¹⁸⁸ See THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 119-21, 126-28, 224-26, 230-31 (Max Farrand ed., 3d ed. 1966); *id.* at 37-39, 41-46, 71-83, 539-40, 599-600; JEFFREY ST. JOHN, CONSTITUTIONAL JOURNAL: A CORRESPONDENT'S REPORT FROM THE CONVENTION OF 1787, at 118, 199 (1987). See generally JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE 19-24 (1953); Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1061-70 (1987).

¹⁸⁹ "[F]rom the early days of the Republic [t]he practical construction has uniformly been that [judges of the inferior courts] are not . . . inferior officers." *Weiss v. United States*, 510 U.S. 163, 191, n.7 (1994) (Souter, J., concurring) (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 456 n.1 (1833)).

which eliminates the Senate's role in the appointments process or transfers appointing power to the judiciary would require a constitutional amendment.¹⁹⁰

B. Measures to Treat Increasing Caseloads

All three branches of the federal government could also attempt to treat the dramatic expansion in the magnitude and complexity of district and appellate civil and criminal dockets which has required that Congress greatly enlarge the bench, thus promoting concomitant increases in the number and frequency of judicial openings, since the 1960s. Reductions in the quantity of litigation which parties pursue in federal court or the more expeditious resolution of those cases that are pursued would be responsive to the vacancies conundrum; however, the prospects for decreasing dockets or expediting dispositions are minuscule.

First, there is considerable consensus that the size and complexity of federal civil and criminal dockets will not shrink any time soon, principally because Congress is more likely to broaden than constrict federal court jurisdiction in the future.¹⁹¹ The federal forum will correspondingly continue to have greater appeal than state court for many individuals and entities that have the option of litigating in either system.¹⁹² Second, although courts and judges have devised and applied numerous measures for facilitating the resolution of federal court disputes, even those mechanisms which do limit delay apparently will not save enough time to make much difference, primarily because the sheer quantity of additional filings will overwhelm any savings realized.

The unprecedented nationwide experiment with procedures for decreasing delay and expense in federal civil litigation under the Civil Justice Reform Act of 1990 is illustrative.¹⁹³ The implementation of a few techniques might somewhat reduce the time to disposition; however, they would only minimally affect the present conditions created by growing dockets.¹⁹⁴ The regional circuits have

¹⁹⁰ See Bermant et al., *supra* note 6, at 345 nn.78-79.

¹⁹¹ See, e.g., Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995). See generally Honorable Stephen Breyer, *The Donative Lecture Series: "Administering Justice in the First Circuit,"* 24 SUFFOLK U. L. REV. 29, 34-37 (1990); Tobias, *New Certiorari*, *supra* note 18, at 1268-69.

¹⁹² See, e.g., Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

¹⁹³ See 28 U.S.C. §§ 471-82 (1994). See generally Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589 (1994).

¹⁹⁴ See JAMES S. KAKALIK ET AL., JUST, SPEEDY AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996). See generally Carl Tobias, *Civil Justice Reform Sunset*, 1988 U. ILL. L. REV. No. 3 (July).

similarly attempted to address the quarter-century crisis of volume by employing measures that will expedite appeals.¹⁹⁵ Some mechanisms have facilitated resolution, but burgeoning appellate caseloads have outstripped the temporal gains. Several widely-used procedures, namely restrictions on oral arguments and written opinions, have seemingly imposed disadvantages, such as eroding appellate justice or its appearance.¹⁹⁶

C. Measures to Treat the Effects of Judicial Vacancies

Several difficulties examined above have led to rather widespread consensus that it is at least as profitable to treat the impacts of unfilled judicial openings as it is to treat their sources.¹⁹⁷ Delays in filling many vacancies can be attributed substantially to unavoidable, and often intractable, political considerations or to unpredictable circumstances which are specific to individual nominees and which are manifested for different persons at different points in the process. Indeed, the City Bar of New York found that there was "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."¹⁹⁸ Regardless of the reasons for protracted openings, their effect is identical: courts must resolve mounting caseloads with insufficient judicial resources. Some of the remedial mechanisms previously surveyed could expedite judicial appointments; however, vacancies will certainly continue to arise more quickly than they can be filled.¹⁹⁹ Although judges have responded effectively to the difficulties which openings impose by sharing resources, employing innovative measures and working harder, the upward trend in the number and duration of vacancies might overwhelm the system unless the complications and their impacts are treated. Courts, therefore, must develop and maintain the ability to operate efficaciously at less than full capacity. The above propositions prompted the Judicial Conference to conclude that "ultimately it

¹⁹⁵ See, e.g., 1ST CIR. R. 36.1, 36.2; 4TH CIR. R. 34(a), 36; 7TH CIR. R. 34(f), 53; Arthur D. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CAL. L. REV. 937 (1980); Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 776-79 (1983).

¹⁹⁶ See, e.g., 1ST CIR. R. 36.1, 36.2; 4TH CIR. R. 34(a), 36; 7TH CIR. R. 34(f), 53. See generally THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 108-17, 119-35, 139-47 (1994); Richman & Reynolds, *supra* note 21.

¹⁹⁷ Bermant et al., *supra* note 6, at 344-45; see also LONG RANGE PLAN, *supra* note 20, at 103; N.Y. City Bar, *supra* note 7, at 381-82.

¹⁹⁸ N.Y. City Bar, *supra* note 7, at 382; see also Bermant et al., *supra* note 6, at 344; *supra* notes 59-64 and accompanying text.

¹⁹⁹ See Bermant et al., *supra* note 6, at 344-45.

may be more worthwhile to address the *effect* of the vacancy problem rather than its *causes*.”²⁰⁰

1. *Adjusting Workload Formulas So that New Judgeships Take Account of Prolonged Vacancies*

Congress could allocate judgeships in sufficient numbers to offset predicted vacancy rates.²⁰¹ It might ascertain needs for judgeships through a workload formula which considers the average number and length of openings nationwide, while specific courts could factor into new judgeship requests their vacancy rates, for instance, through increasing the positions requested by the same percentage.²⁰² Building in a cushion premised on national statistics may create discrepancies in the judicial resources available to courts. However, Congress and the judiciary can monitor the policy's impacts and eliminate unneeded positions by attrition when new openings arise.²⁰³ If resources were underutilized, they could be temporarily assigned to courts which are experiencing workload burdens that exceed the capacity of judges who are available locally.²⁰⁴

It is unclear that the advantages afforded by this approach would outweigh its detriments. Given the substantial number of existing vacancies and the apparently intractable nature of openings, authorizing additional judgeships could simply compound the difficulty by increasing the seats to be filled. The perceived expense of creating new judgeships might dampen congressional enthusiasm for this approach.

Premising requests for judgeships on such a variable consideration may also erode the credibility of the judiciary's current methodology for ascertaining needed judicial resources. Even if there were consensus in theory about the propriety of considering foreseeable openings in authorizing judgeships, reaching practical agreement on how to evaluate them may be problematic. Regardless of these difficulties, this option could further postpone the filling of vacancies, if the Administration and Congress believed that the courts' workload demands no longer required expeditious action on judicial selection.²⁰⁵

²⁰⁰ LONG RANGE PLAN, *supra* note 20, at 103 (emphasis supplied).

²⁰¹ Bermant et al., *supra* note 6, at 345-46; N.Y. City Bar, *supra* note 7, at 381-82.

²⁰² See Bermant et al., *supra* note 6, at 345.

²⁰³ *Id.*; see also N.Y. City Bar, *supra* note 7, at 381-82.

²⁰⁴ Bermant et al., *supra* note 6, at 345.

²⁰⁵ See Bermant et al., *supra* note 6, at 346.

It is important to remember that requests by the Third Branch for more judges are principally based on ratios of judicial workload to numbers of authorized positions.²⁰⁶ Because this calculation can overestimate the input of senior, visiting and adjunct judges, it could force the courts to forgo additional active judges for other potentially less certain resources in times of expanding caseloads and budgetary restraints. Several of the above factors may have caused the Judicial Conference to not recommend this approach in its Long Range Plan.

2. *Floater Judgeships*

Because openings pose system-wide difficulties, Congress could mitigate their impacts on the entire judiciary by creating a fixed number of judgeships that are not tied to specific courts.²⁰⁷ This approach would enable the judiciary to assign courts with protracted vacancies additional resources while avoiding the risks of modifying the judgeship formulae and of overstaffing particular courts in which openings have been filled.

This measure, however, raises several theoretical and practical concerns. Virtually all federal judges have come from and been identified with the geographic locales that they serve.²⁰⁸ Floater judgeships, therefore, may be a philosophically or politically unpalatable divergence from this tradition.²⁰⁹ As a practical matter, finding highly competent people to accept these types of inconvenient assignments might be problematic. Certain administrative difficulties involving support personnel and chambers as well as compensation for travel and living expenses may also arise.²¹⁰ Notwithstanding these practical complications which may fairly be characterized as significant, floater judgeships might be effective in certain unusual situations.²¹¹ For instance, when there is an acute need for additional judicial resources in a particular court and a political impasse or controversy involving a specific candidate stymies prompt appointment, floater judgeships could prove useful.

²⁰⁶ *Id.*

²⁰⁷ The judges could "ordinarily sit in districts close to their residences but . . . also . . . sit for specific periods in any district where vacancies have created a judicial manpower shortage." N.Y. City Bar, *supra* note 7, at 380; see also Bermant et al., *supra* note 6, at 346.

²⁰⁸ See Bermant et al., *supra* note 6, at 346.

²⁰⁹ See *id.* But see Williams, *supra* note 7, at 193.

²¹⁰ See Bermant et al., *supra* note 6, at 347; N.Y. City Bar, *supra* note 7, at 380-81.

²¹¹ See N.Y. City Bar, *supra* note 7, at 381.

3. *Temporary Judicial Assignments*

The temporary assignment of judicial officers to circuits or districts that are attempting to resolve burgeoning caseloads with less than their full complements of judges would afford another means of assisting these courts.²¹² For example, those appeals courts and districts might recruit senior judges and accept volunteers from courts experiencing less onerous dockets. Furthermore, the judiciary could dispatch "judicial emergency teams" comprised of available circuit, district and magistrate judges and support personnel to aid understaffed courts with burdensome caseloads.²¹³

The Third Branch has long employed inter- and intra-circuit assignments to move judicial resources from courts encountering lighter dockets to those needing help, and there will be a growing need for the type of temporary assistance which visiting judges can afford. The Judicial Conference recently recognized the value of these assignments but admonished that existing procedures for making them are "often cumbersome, potentially frustrating prompt relief of overburdened courts even where sufficient [systemic] judicial resources exist" and that the districts' present alignment requires "rethinking the rigid allocation of judges to individual courts."²¹⁴

The Conference, therefore, called for a simpler, more flexible system of temporary assignments.²¹⁵ Should the judiciary be unable to address future needs for judicial resources promptly and efficiently, the Conference recommended consideration of structural modifications which would streamline temporary assignment authority.²¹⁶ For instance, district judges might be empowered to hold court in districts located within specific distances or travel times of their permanent duty stations when so designated by chief judges.²¹⁷ Circuits and districts could also enter standing agreements for particular periods that would permit immediate cross-assignment of judicial officers upon the courts' request and concurrence.²¹⁸

²¹² LONG RANGE PLAN, *supra* note 20, at 98-100, 104-05.

²¹³ *See id.* at 100, 104.

²¹⁴ *Id.* at 98-99.

²¹⁵ *See id.*

²¹⁶ *See id.* at 99.

²¹⁷ *See id.*

²¹⁸ *See id.* "Although sound reasons may exist to retain oversight and control of judicial movements in general, there is little to recommend in a process that frustrates access by overburdened courts to nearby, underutilized judicial resources." *Id.* The Conference also analyzed measures to address disparate workloads, such as removing hurdles to interdistrict transfers of cases for reasons of judicial economy and to interdistrict

4. *Individual Court Actions*

The Judicial Conference recommended that each court actively devise measures for expediting judicial business when it must function at less than full strength.²¹⁹ Illustrative is the United States Code provision which empowers the chief judges of appeals courts to suspend the requirement that a majority of judges who serve on appellate panels be active members of their courts when emergencies exist.²²⁰ Indeed, the enormous caseload and the number and length of vacancies in the Ninth Circuit has led the court to exercise this authority and even required that it recently postpone 600 scheduled oral arguments.²²¹

D. *Summary by Way of Transition*

The above analyses of the persistent judgeships conundrum, of the present impasse and of potential remedies yield several insights. Certain of judicial selection's intrinsic necessities, including its political nature, and competing priorities, such as the need for efficient but careful investigation and evaluation of nominees' qualifications and character, lead to essentially irreducible delay and frustrate resolution of the permanent vacancies problem. Political phenomena inherent in the traditional appointments process concomitantly contribute to this longstanding dilemma and best explain the current impasse, although executive and legislative branch officials could invoke numerous mechanisms which would apparently respond to the political factors and, thus, improve the existing circumstances if they had the requisite political will. Most of the possible solutions would correspondingly have limited utility for treating much intrinsic delay, and their implementation would impose practical, political or legal disadvantages.

In short, the application of various measures could effect a modicum of temporal savings, particularly in that delay which is unnecessary. However, these techniques will not fully redress the generic vacancies difficulty or appreciably accelerate selection. Rather, they may only partially resolve those complications that result from the process's growing politicization. Therefore, attempts to attack directly and cooperatively the present problem's political

and intercircuit judicial assignments and adopting procedures for clarifying judicial authority to conduct proceedings in districts other than judges' permanent duty stations. *See id.* at 99-100.

²¹⁹ *See id.* at 104-05.

²²⁰ *See* 28 U.S.C. § 46(b) (1994); *see also* LONG RANGE PLAN, *supra* note 20, at 104-05.

²²¹ *See supra* note 117 and accompanying text.

dimensions and to address the effects of those features and of the long-term openings conundrum should prove more productive.

I am not advocating retention of the status quo, much less abandonment of any efforts to solve the persistent vacancies dilemma or the existing impasse. However, entities and individuals responsible for judicial selection must strike and maintain an appropriate balance between the need for expedition and care in judicial selection and must obviously attempt to eliminate unnecessary delay. I principally mean to emphasize that considerable delay is inherent and impervious to remediation or is attributable to the inexorable pressures of politics and resists felicitous treatment as well as the importance of being realistic about the prospects for success. Despite the elusive character of numerous difficulties and the illusory nature of some potential remedies, officials in the executive, legislative and judicial branches must become more sensitive to the harm engendered by unfilled openings and must rededicate themselves to improving the current situation.

III. PREFERABLE SOLUTIONS

A. The Persistent Vacancies Problem

The most effective solution for perennial judicial vacancies would apparently be the creation of enough additional judgeships, especially by approving more judges for those courts which have chronic openings, to accord the existing judiciary the full complement of judicial officers now authorized.²²² This option would avoid certain theoretical, legal and pragmatic complications presented by the alternatives that I have surveyed. Although officials in the Administration, Congress, and the courts might attempt to solve the permanent vacancies problem with measures other than new judgeships, particularly techniques which cure unnecessary delay, they should appreciate that the mechanisms may only minimally decrease those temporal restraints which are essentially irreducible.

B. The Persistent Problem and the Current Impasse

1. The Executive Branch and the Senate

When confronting the generic difficulty, but primarily present conditions, the President and senators must do everything possible to improve the discharge of

²²² See *supra* notes 201-04 and accompanying text.

their judicial selection duties. For instance, the Chief Executive and the Senate might undertake efforts to streamline those facets of the process for which each has responsibility as well as to calibrate meticulously the importance of searching investigation and review of candidates' character and competence with the need to expedite appointments. Officials in the executive and legislative branches should address increasing politicization's contributions to the persistent complication and the existing impasse, even as they recognize that attempts to treat this phenomenon will probably prove controversial and perhaps be unsuccessful. The officers must also exert the political will to work cooperatively, to reach reasonable accommodations, and to resolve efficaciously for the good of the courts and the country those disputes that arise. The officials as well should cease participating in activities, such as recriminations over who is most responsible for delay in selection, which appear to be motivated principally by efforts to secure momentary political victories and by gamesmanship. Insofar as mounting politicization slows judicial appointments and caseload resolution, thus eroding civil and criminal justice, and fosters the perception that public officials are sacrificing the best interests of the courts and the nation for short-term partisan advantage, this phenomenon could undermine the American people's respect for Congress, both political parties, and perhaps the judiciary.

2. *The Executive Branch*

The above examination showed that President Clinton has some responsibility for the large number of judgeships which are currently open. For example, at the commencement of the 105th Congress, he submitted twenty-two nominees, few of them new. During 1997 he steadily, albeit irregularly, tendered additional names. Although many of these people had excellent qualifications and comparatively moderate political views, Senator Hatch claimed that some did not.²²³ The Chief Executive has now apparently supplied the Judiciary Committee with sufficient numbers of very capable nominees who hold political perspectives which should be palatable to Republicans for it to process, and he must continue forwarding the names of additional individuals at a pace that will facilitate the Committee's work. In fairness, President Clinton and his aides have probably proceeded cautiously in scrutinizing candidates' capabilities, character, and political acceptability because errors in judgment at

²²³ See *supra* notes 74-76, 78-79 and accompanying text.

this stage can undermine Administration credibility, delay appointments and even jeopardize the selection process.

The President may want to supplement these efforts by setting certain priorities with a finely-calibrated analysis which includes: all of the judicial vacancies and their locations; how long the seats have remained open; present and projected caseload responsibilities and backlogs of the judgeships and the courts; and the relative difficulty of filling the vacancies. For instance, fears about overwhelming dockets or backlogs and considerations of efficiency might suggest that the Chief Executive immediately attempt to appoint persons who consultation reveals are acceptable to Republican senators in courts having multiple openings which constitute judicial emergencies.²²⁴ By comparison, concerns regarding the bench's quality could lead the President to reject compromise and publicly insist on Senate confirmation of nominees with superior qualifications whom he strongly favors for courts that have less exigent circumstances.

At the outset, the Chief Executive should also explore and implement numerous rather conciliatory measures which are available. These techniques will probably be more effective and he can rely on their prior invocation when resorting to less cooperative mechanisms, if that becomes necessary. The President might consider and apply means which would enhance the discharge of Administration responsibilities for judicial appointments. For example, President Clinton and his assistants could expedite the submission of nominations by compiling their own lists of possible nominees for appellate court openings and by encouraging senators to forward district court recommendations more promptly, perhaps through greater reliance on staff or selection commissions. Moreover, the Chief Executive might streamline Administration investigation and analysis of candidates by limiting the number of interviews, questionnaires and participants employed.

To improve the confirmation process, the President and his aides could work with entities, namely the Senate Judiciary Committee and the ABA, which investigate and evaluate nominees, and propose that they undertake efforts similar to those above and even consolidate or eliminate redundant activities. The Administration might enhance nomination and confirmation through consultation with individual senators and the Judiciary Committee, soliciting their advice and help as to candidates before formally tendering names.

²²⁴ See *infra* notes 226-28 and accompanying text.

Additional conciliatory approaches could more specifically treat the present impasse. For instance, the Chief Executive may want to consider submitting fewer nominees who will prompt Republican Party opposition. Illustrative was the June nomination for a Second Circuit vacancy of Judge Sonia Sotomayor, a district judge whom President Bush had appointed.²²⁵ She should rather easily secure confirmation because she was already approved once, will probably have Republican senators' support, and will bring valuable experience derived from federal district court service, which can correspondingly inform assessment of the her qualifications and character. These types of benefits have generally made the elevation of current federal district judges to the appellate bench a time-honored technique for facilitating selection that many Chief Executives, including Presidents Reagan and Bush, successfully used²²⁶ and that the Clinton Administration occasionally employed during its first term.²²⁷

The Chief Executive should at least think about nominating additional, highly-qualified individuals who have affiliations with the opposing party.²²⁸ This approach could be particularly effective in certain contexts. Illustrative are courts which have protracted vacancies and substantial caseloads or backlogs while being situated in, or encompassing, states that have two Republican senators or that traditionally vote Republican. The Ninth Circuit, which has nine openings among its twenty-eight active judgeships and the nation's largest appellate docket, affords a general example.²²⁹ One of the court's "Arizona seats" remained unfilled for nearly two years, principally because the state's Republican senators and its Democratic officials were deadlocked.²³⁰

For courts with numerous longterm vacancies and enormous caseloads or backlogs which are located in states where the politicians who propose or might block candidates simply cannot agree, the Administration could even consider trade-offs, such as allowing Republicans to recommend half the nominees whom Democrats suggest.²³¹ President Clinton might concomitantly offer the

²²⁵ See The White House, Office of the Press Sec'y, *President Clinton Nominates Sotomayor to the Appellate Bench* (June 25, 1997); see also *supra* note 77 and accompanying text.

²²⁶ See, e.g., 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 A1; see also Tobias, *Filling the Federal Courts in an Election Year*, *supra* note 76, at 752.

²²⁷ Examples are Second Circuit Judges Jose Cabranes and Pierre Leval.

²²⁸ See *supra* note 77 and accompanying text.

²²⁹ See also *supra* note 153 and accompanying text.

²³⁰ Telephone conversation with Nan Aron, Alliance for Justice, Washington, D.C. (Aug. 19, 1997); see also Lewis, *supra* note 80; *supra* note 153.

²³¹ Senator Biden suggested that Republican senators were contemplating a similar "informal agreement,"

Republicans the opportunity to propose some percentage of candidates in exchange for legislation that would authorize new judgeships,²³² thereby effectively inaugurating a bipartisan judiciary, an idea which may find substantial support in the current political climate.²³³ The Chief Executive could also strike a separate compromise with Senator Hatch on a prearranged number of nominees whom the Senate would confirm annually.

If efforts to improve judicial selection and treat the current conundrum by invoking cooperative measures fail, the President may want to entertain and apply less conciliatory approaches. For example, the Chief Executive could use the presidency as a bully pulpit to blame delay on Republican senators or to cajole or shame them into expediting appointments or even for forcing the issue of tardy selection by taking it to the American people. Related means for breaking the impasse might be the submission of nominees for every existing vacancy or selective reliance on recess appointments, each of which could pressure the Senate to process nominees by publicizing or dramatizing how protracted openings threaten justice and the importance of promptly naming more judges.

3. *The Senate*

Republican members of the Senate may want and need to evaluate and institute numerous cooperative actions because the above examination shows that they apparently had at least as much responsibility as the Chief Executive for the present dilemma. These senators might remember that the upper chamber did confirm a greater number of judges, regardless of how politicized the process actually was, when Republicans were presidents and Democrats had a Senate majority.²³⁴ Republican senators should correspondingly keep in mind that the Grand Old Party may not control the Senate forever and that the roles could again be reversed. Moreover, the American public might blame Republicans for the delays in the federal criminal and civil justice systems which unfilled open-

but he characterized this as "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 80.

²³² See Goldman & Slotnick, *supra* note 76, at 271. President Eisenhower made a similar offer in 1960. See *id.*; see also Tobias, *Filling the Federal Courts in an Election Year*, *supra* note 76, at 753.

²³³ I am not suggesting that the President implement the ideas in the last two sentences; but he should be realistic and pragmatic, if not mercenary, about filling judicial vacancies. The President might want to calculate how critical the openings are generally and in specific courts. The Administration may reach a point at which it concludes that filling the bench is less important than certain principles, such as appointing the type of judges whom the President prefers.

²³⁴ See *supra* note 85 and accompanying text; see also *supra* note 80 and accompanying text; Hartley & Holmes, *supra* note 27.

ings can foster. The people may also find inappropriate and unfair any unjustifiable delay in naming judges that is attributable to the GOP because it undermines the preference for divided government and checks and balances which voters expressed by electing a Democratic President who has appointment power and a Republican Senate with the power of advice and consent.

Republican senators, therefore, should seriously analyze and implement conciliatory approaches. Some measures are comparatively general. Illustrative is the need for the GOP leadership and specific Republican members of the Senate to work with the Administration in several areas involving selection. For instance, they could search for and effectuate ways to reduce unnecessary delay through streamlining various procedures and eliminating unjustifiable redundancies. Senator Hatch might help the President establish priorities by identifying courts with particularly pressing circumstances and vacancies that may be filled most easily and by developing additional options and seeking reasonable compromises when agreement cannot be forged. The GOP leaders and individual senators should also be responsive to Executive Branch requests for advice through consultation. They could afford frank assessments of candidates under consideration, furnish justifications for considering unpalatable those so found and perhaps recommend feasible alternatives. The Republican leadership and other GOP senators should be receptive to Administration overtures. For example, Republicans must promptly confirm the Bush district court appointee whom President Clinton nominated for an appeals court opening.

There are numerous, more specific possibilities for cooperation. Insofar as the delayed submission of nominees has resulted from particular GOP senators' dissatisfaction with individuals whom Democrats have suggested to the Chief Executive, Republicans should facilitate nomination by clearly articulating reasons for their opposition or by proposing compromise candidates who are more acceptable. Illustrative are efforts to reach consensus that Senator Slade Gorton (R-Wash.) and Senator Patty Murray (D-Wash.) have recently consummated.²³⁵ GOP senators who represent states in which senior politicians of the President's party have traditionally recommended persons for nomination should correspondingly honor this understanding or at least seek accord by closely conferring with, or suggesting other approaches to, the Democratic officials.

Senator Hatch might also encourage all senators, but especially his Republican colleagues, to expedite nominations by, for instance, attempting to reconcile

²³⁵ See *supra* note 153 and accompanying text.

disagreements over the processes employed or candidates' suitability. The Chair could even assume the unenviable, onerous task of attempting to mediate disputes which seem intractable and perhaps solicit the assistance of Senator Leahy or the Senate Majority Leader.

Insofar as the growing number of unfilled vacancies during 1997 can be ascribed to delay in the confirmation process, the GOP leaders and specific Republican senators should examine and implement measures which will expedite the approval of more judges. Senator Hatch and the Senate Judiciary Committee must hold hearings and permit votes on additional nominees with truncated review procedures and enhanced resources for investigation and evaluation, perhaps borrowing Justice Department personnel, if necessary. The Judiciary Committee might also consider eliminating the essentially ceremonial hearings for non-controversial candidates. To the extent that Senator Hatch has delayed the processing of specific nominees in his capacity as Chair because he or other senators have found the individual unacceptable, particularly for his or her perceived political views, longstanding tradition and recent practice suggest that Senator Hatch should afford the judicial candidates opportunities for hearings and Committee votes.²³⁶ Now that President Clinton has tendered sufficient, acceptable names to facilitate smooth Committee processing, even if the number of individuals he provided and the pace of their nominations in early 1997 arguably postponed appointments somewhat, the chair should limit his criticism of the Chief Executive.

The Senate Majority Leader, for his part, must institute actions which will improve the confirmation process by expediting full Senate consideration of nominees. For example, Senator Lott ought to permit votes on more nominees by promptly scheduling floor votes after receiving notification of Judiciary Committee approval. Insofar as delay has resulted from controversy over particular candidates, especially dissatisfaction on the part of the Majority Leader or specific senators, Senator Lott could provide for increased floor debate and final votes on these individuals. For example, the discussion that preceded Merrick Garland's confirmation apparently engendered lively, candid, and healthy exchange regarding selection on the Senate floor.²³⁷ To the extent that the Majority Leader has premised floor votes for judicial nominees on other contingencies, such as President Clinton's submission of names for the Federal Election

²³⁶ See *supra* notes 78, 90-95 and accompanying text; see also *supra* notes 73-76, 224 and accompanying text.

²³⁷ See *supra* note 108 and accompanying text.

Commission openings, the importance of filling court vacancies requires that Senator Lott cease this practice.

All senators should precisely balance the need for careful evaluation of nominees with that for expeditious appointment and must approve those individuals who possess the abilities and character to be fine judges, while the solons should abandon the elusive, and even quixotic, quest to predict whether and which nominees will be so-called "activist judges."²³⁸ Article III's provisions for advice and consent probably contemplate that Senate members will scrutinize nominees' professional attributes and character in attempting to ascertain whether they would be skillful and honest judges as well as arguably envision some inquiry into judicial candidates' appreciation and respect for separation of powers in the tripartite system of American government. However, senators should not delay the nominees' consideration in an effort to discern how they might decide specific cases once confirmed, as this could threaten judicial independence.

Republican Senate members also should vote for nominees who exhibit the capabilities and character to render excellent judicial service because Democratic Party senators generally followed that practice when they comprised a Senate majority and Republicans controlled the presidency.²³⁹ In fairness, some GOP senators apparently resent the Senate's decade-old rejection of Judge Robert Bork for the Supreme Court and the acrimonious battle involving Justice Clarence Thomas, which the Republicans ascribe primarily to Democratic senators' concerns about the nominees' future substantive decisionmaking.²⁴⁰ Finally, senators should not consider Republican control of the Senate or their disagreement with the perceived political perspectives of judicial candidates sufficient reasons to reject or delay nominees.

²³⁸ See, e.g., Hearings on Judicial Activism: Assessing the Impact Before the Senate Judiciary Constitution Subcomm., July 15, 1997; 143 CONG. REC. S2515 (daily ed. Mar. 19, 1997) (statement Sen. Hatch).

²³⁹ See *supra* notes 77, 89-94 and accompanying text; see also *supra* notes 73-76, 224 and accompanying text.

²⁴⁰ See, e.g., Gest & Lord, *supra* note 90; Goldman & Slotnick, *supra* note 76, at 256; Melone, *supra* note 55, at 68. See generally GITENSTEIN, *supra* note 41 (Bork); PAUL SIMON, ADVICE AND CONSENT (1992) (Thomas). The Democrats' behavior perhaps can be distinguished because of the Supreme Court's enormous significance and because Democrats rarely so scrutinized lower court nominees. See 143 CONG. REC. S2538-S2541 (daily ed. Mar. 19, 1997) (statements of Sen. Biden & Sen. Sarbanes).

4. *The Judicial Branch*

Federal judges are considerably less able than the President and the Senate to effect constructive change in judicial selection because the Constitution assigns principal responsibility to the political branches. Nonetheless, the courts can undertake certain actions. The federal judiciary must implement mechanisms that will encourage more judges to provide advance notice of intent to change their active status because notification would afford substantial temporal savings in the nomination process. The courts should also redouble ongoing, concerted efforts to publicize the existence of unfilled seats and the serious complications which those openings impose. This could increase public awareness of, and might galvanize support for ameliorating, the vacancies problem and perhaps heighten executive and legislative branch officials' sensitivity to the urgent need for expediting appointments. The Third Branch should also recommend promising methods to facilitate judicial selection that the Chief Executive and the Senate could effectuate, while courts and judges must institute measures, such as enhanced reliance on visiting judges, which will efficaciously address openings' impacts.

CONCLUSION

Empty judgeships significantly threaten the federal civil and criminal justice process. These are two parts to the dilemma. One is a persistent vacancies problem. Much delay that attends this complication is intrinsic and resistant to treatment, although unnecessary delay can be rectified. The other is a current dilemma which is primarily political and which public officials could remedy if they had the requisite political will to do so. President Clinton and the Senate alone and together must eliminate the maximum unwarranted delay. They should also attempt to depoliticize judicial selection, cease criticizing one another, reconcile their partisan differences and break the present impasse for the good of the courts and the country. All who participate in the appointments process should heed President Reagan's conciliatory, telling observation after the failed Supreme court nominations of Judge Bork and Judge Douglas Ginsburg:

The experience of the last several months has made all of us a bit wiser. I believe the mood and the time is now right for all Americans in this bicentennial year of the Constitution to join

together in a bipartisan effort to fulfill our constitutional obligation of restoring the Supreme Court to full strength.²⁴¹

²⁴¹ See GITENSTIEN, *supra* note 41, at 316.