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The Federal Appellate Court Appointments Conundrum

*Carl Tobias**

I. INTRODUCTION

Selection of federal appellate court judges is now extremely controversial. Slowed nominee processing, accusations and countercharges between Democrats and Republicans, as well as “paybacks,” have characterized appointments since 1990. One tenth of the 179 active circuit judgeships authorized by the United States Congress are perennially vacant, and substantial numbers of these positions can remain open for years. Individual tribunals have encountered even more aggravated conditions. The United States Courts of Appeals for the Second, Fourth, and Ninth Circuits operated without a third of their judicial complements at different junctures throughout this period, while the United States Court of Appeals for the Sixth Circuit functioned absent half its members over eight recent months. Indeed, one new Fourth Circuit seat approved by lawmakers went unfilled more than a decade. Specific nominees often received tardy—and on occasion no—consideration from the United States Senate, which exercises advice and consent powers. For instance, the elevation of Federal District Judge Richard Paez to the Ninth Circuit required four years. Michigan Court of Appeals Judge Helene White also waited longer than anyone in national history for a hearing that she was never granted by the Senate Judiciary Committee, which has principal responsibility for confirmation. Moreover, when the 107th Congress adjourned in December 2002, the Judiciary panel had not accorded hearings to a few nominees whom President George W. Bush had submitted nineteen months earlier, while the Senate needed four years to confirm Judges Priscilla Owen and Terrence Boyle. The Committee increasingly votes along straight political party lines, and Democratic senators even relied on filibusters to deny nominees positions on the United States Courts of Appeals for the District of Columbia Circuit as well as the Fourth, Fifth, and Ninth Circuits.

The existence of numerous, protracted vacancies, therefore, has detrimentally affected the whole appointments process, appellate courts and judges, entities and individuals working on selection, and attorneys and parties who take appeals to the regional circuits. For example, lengthy openings have postponed case resolution and frustrated the goal of inexpensive and equitable appellate disposition, while vacancies forced the Sixth and Ninth Circuits to cancel oral arguments, imposing unnecessary expenditures and delay. The

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complication's persistence appears to have undermined respect for all three federal government branches, most significantly the institutions of the presidency and the Senate, but even the judiciary.

These propositions mean that federal appeals court appointments merit scrutiny, which this Article undertakes. The initial Section discusses the reasons why many circuit judgeships have lacked occupants for extensive periods and finds that several phenomena have contributed to the appellate court dilemma. An important factor is that the regional circuits are the courts of last resort for their geographic areas, in particular when treating modern policy issues such as abortion and federalism, because the Supreme Court hears so few appeals. Similarly cogent is the prevalence of divided government: until recently, during the past two decades, one political party has controlled the Executive Branch and the other the upper chamber. I find Democratic and Grand Old Party ("GOP") presidents and senators have almost identical responsibilities for the conundrum. They assumed remarkably analogous stances when each occupied the White House and possessed a Senate majority, while either could have improved the circumstances by exercising the requisite political will.

Part II evaluates appellate court selection since January 2002. This analysis reveals that phenomena—which include stalled nominee consideration, divisiveness, and partisan wrangling—that have been manifested for more than a decade continued to pervade appointments and may even have intensified. One trenchant illustration was the 2002 Judiciary Committee rejection of Judges Priscilla Owen and Charles Pickering for the Fifth Circuit, with ten Democrats voting against and nine Republicans favoring the jurists—although the full Senate might well have confirmed them. Others are the Bush Administration decisions to renominate both judges in 2003, after the GOP had won the chamber, to recess appoint Judges Pickering and William Pryor during 2004, and to renominate numerous candidates whom Democrats had previously blocked in 2005. Equally salient is Democrats' invocation of filibusters when they opposed those and additional nominees.

The concluding segment of the Article offers proposals for the future, which should rectify or ameliorate the current situation. The Article ascertains, for instance, that the Chief Executive and public officials who discharge judicial selection responsibilities could think about submitting nominees with rather moderate ideological perspectives if the administration intends to have the appeals court bench operate at full strength. Senators should concomitantly review numerous promising measures that the legislators might implement to facilitate appointments. For example, when Senate members believe that prospective candidates are unacceptable, the lawmakers should tender individuals whom they deem more palatable. Another salutary technique is consultation, whereby President Bush and those officers who help recruit appellate judges could solicit—and senators might furnish—candid, instructive assessments of designees the administration is considering prior to their formal

nomination.

II. ORIGINS AND DEVELOPMENT OF THE CONUNDRUM

A. Introduction

The background of the problems that have attended federal appeals court selection may seem to warrant comparatively limited exploration in this Article, because judicial appointments' history has received much treatment elsewhere¹ and the present circumstances appear most relevant. Nonetheless, much analysis is justified, as the evaluation should improve understanding of the regional circuits, of obstacles that presidents and senators have encountered when they attempted to nominate and confirm appellate court judges, and of the existing situation detailed in the Article's next section.

The difficulty in federal appeals court selection has two primary constituents. The first component is the persistent vacancies problem that resulted from legislative expansion of federal courts' criminal and civil jurisdiction and from rising appellate and district court dockets since approximately the mid-twentieth century. These conditions promoted the bench's growth, increasing the number and frequency of open seats and complicating efforts to appoint judges who would fill them. The second constituent is the current difficulty, which is in essence political and which derives principally from control of the White House and of the Senate by different political parties over the last two decades. I emphasize the political aspect, as it best elucidates the major problems that have accompanied judicial selection for the regional circuits. However, the longstanding complication deserves some examination, and this review should foster appreciation of the historical background that underlies the present conundrum.²

¹See generally MILLER CENTER OF PUBLIC AFFAIRS, IMPROVING THE PROCESS OF APPOINTING FEDERAL JUDGES: A REPORT OF THE MILLER CENTER COMMISSION ON THE SELECTION OF FEDERAL JUDGES (1996) (addressing persistent vacancies in judicial positions) [hereinafter MILLER REPORT]; Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319 (1994) (same). I rely substantially in this Article on Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527 (1998).

²The complication warrants less examination because much delay is inherent and thus defies felicitous treatment; political factors underlie more the current problem than the persistent dilemma, which has also been assessed elsewhere. See generally Bermant et al., *supra* note 1; 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 BAR CITY N.Y. 374 (1987) [hereinafter *Vacancy Problem*]; Victor Williams, *Solutions to Federal Judicial Gridlock*, 76 JUDICATURE 185 (1993) (explaining present need to create more judgeships by promptly filling vacancies).

B. *The Persistent Vacancies Problem*

The persistent dilemma comprises multiple strands, most of which can be traced to the nation's origins and to Article II in the United States Constitution. Nevertheless, I focus on the problem's contemporary dimensions, whose primary sources have been enlarged federal court jurisdiction and burgeoning numbers of appeals, which led Congress to authorize many new appellate and district positions. This, in turn, expanded the number and frequency of vacancies and increased the difficulty of confirming judges.

1. *The Early History*

The appointments clause in Article II states that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" federal judges.³ Certain founders, most prominently Alexander Hamilton, envisioned that the upper chamber would function as a useful safeguard against Chief Executives' potential favoritism, might help restrict the approval of people who would be unfit for judicial service, and could lend considerable stability to the process.⁴ The Framers, accordingly, recognized and anticipated that politics would be important, and often critical, to selection.

Senators have actively participated in federal judicial appointments since the country was founded, because they have a large stake in affecting—or seeming to influence—the process. Complicated political accommodations which implicate the body and the president during the nascent phases of selection have facilitated the system's operation.⁵ Moreover, Senate members have conventionally helped designate and confirm nominees, in particular nominees for the federal district courts. Senators—or senior elected officials of the Chief Executive's party—from the jurisdiction where the trial judge will sit have ordinarily recommended candidates whom the president has then

³U.S. CONST. art. II, § 2, cl. 2. The Constitution assigns the House and the judiciary considerably less responsibility than the president and the Senate. The term "president" includes executive branch officials, such as lawyers in the White House Counsel Office and in the Department of Justice. The Senate includes the Judiciary Committee, which has principal responsibility for confirmation, and its chair; the Majority Leader; and individual senators.

⁴See THE FEDERALIST NOS. 76, 513 (Alexander Hamilton); MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 28 (2000); SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 11–13 (1997); Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 627–31 (2003); Dr. John C. Eastman, *The Limited Nature of the Senate's Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 646–48 (2003).

⁵See HAROLD W. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS 7 (1972); GERHARDT, *supra* note 4, at 29–34; Bermant et al., *supra* note 1, at 321. See generally Albert P. Melone, *The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality*, 75 JUDICATURE 68, 72–73 (1991) (explaining historical role and participation of senators).

nominated.⁶

Politics, therefore, has long permeated, and remains a strikingly ubiquitous constituent of, federal judicial appointments. If the Chief Executive and Senate members disagree, they can behave in a tactical manner to secure advantage and to control how judges are chosen, even using delay strategically.⁷ For instance, Senator Spencer Abraham, a Republican from Michigan, blocked upper chamber consideration over a several-year period of two individuals from Michigan whom President Bill Clinton had recommended. Democratic Senators Carl Levin and Debbie Stabenow prevented Senate Judiciary Committee hearings across 2001 and 2002 on Bush's four Michigan nominees.⁸ Senator Jesse Helms, a Republican from North Carolina, similarly precluded chamber assessment during the entire Clinton Administration of quite a few nominees whom the Democratic Chief Executive tendered for North Carolina positions on the Fourth Circuit. Senator John Edwards, Democrat from North Carolina, analogously prevented hearings throughout the Bush Administration's initial half-term for United States District Judge Terrence Boyle, whom the president had ostensibly submitted at the behest of Senator Helms.⁹ Tension between the Chief Executive and the Senate is destined to endure as long as the institution's advice and consent is required for confirmation.¹⁰

The president and senators, thus, have shared responsibility for the selection of judges in a process that has always been politicized. However, numerous openings, which could remain vacant over extended periods, only became a serious complication thirty years ago. For almost two centuries after Congress passed the 1789 Judiciary Act, the number of federal appeals and district court judges gradually increased to 277; the rather few empty seats and the comparative infrequency of vacancies meant that nominees received prompt confirmation, which avoided the dilemma that later materialized.¹¹

⁶President Dwight D. Eisenhower selected comparatively few nominees he thought would engender opposition from home-state senators. See Lawrence E. Walsh, *The Federal Judiciary . . . Progress and the Road Ahead*, 43 J. AM. JUDICATURE SOC'Y 155, 156 (1959-60); see also MILLER REPORT, *supra* note 1, at 4 (stating Attorney General Robert F. Kennedy's view of judicial selection process as Senate appointment with presidential advice and consent).

⁷See CHASE, *supra* note 5, at 14, 40; Bermant et al., *supra* note 1, at 321; see also Melone, *supra* note 5, at 72 (discussing historical politicization).

⁸See Nedra Pickler, *Bush Picks State Judge for Appeals Panel*, GRAND RAPIDS PRESS, June 27, 2002, at A15; Jonathan Ringel, *The Battle for the 6th Circuit*, LEGAL TIMES, Nov. 12, 2001, at 8.

⁹See Brooke A. Masters, *For One Nominee, Fight Ahead*, WASH. POST, May 18, 2001, at A29; David G. Savage, *Clinton Losing Fight for Black Judge*, L.A. TIMES, July 7, 2000, at A1.

¹⁰There are apparently two principal mechanisms for addressing that constitutional stricture. "One requires constitutional interpretation, the other constitutional amendment." See Bermant et al., *supra* note 1, at 322.

¹¹See MILLER REPORT, *supra* note 1, at 3; Tobias, *supra* note 1, at 531.

2. History Since 1950

Federal criminal and civil jurisdiction experienced significant growth throughout the concluding third of the twentieth century.¹² Congress federalized considerable criminal behavior and prescribed many new civil causes of action, which have correspondingly fostered a three hundred percent annual rise in district court filings since the 1950s.¹³ Senators and representatives responded to caseload expansion by enlarging the complement of Article III judges: lawmakers have now authorized 179 active appellate court positions and 667 active district court positions.¹⁴

The Judicial Conference of the United States Committee on Long Range Planning, in a thorough federal court analysis, predicted that docket growth would require 2,300 active appeals and trial court judges by 2010, and 4,070 by 2020.¹⁵ The bench's magnitude will continue to increase, partly because Congress will not shrink criminal or civil jurisdiction,¹⁶ although the size of the judiciary remains controversial.¹⁷ The Long Range Planning Committee also ascertained that the period of time that Chief Executives and Senates needed to fill openings had significantly lengthened; most delay occurred between the time that a seat became empty and the time that the president forwarded a nominee.¹⁸ From 1980 until 1995, nominations—on average—consumed a

¹²See MILLER REPORT, *supra* note 1, at 3; see also Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1268–70 (1996) (discussing effects of expanding appellate dockets and passing statutes in late twentieth century). See generally Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 23–24 (explaining “steadily expanding jurisdiction” of federal courts).

¹³MILLER REPORT, *supra* note 1, at 3; see also 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)) (federalizing criminal acts); Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (1994)) (authorizing federal civil actions). See generally William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 722–24 (1995) (noting “nearly continuous passage of statutes” expanding role of federal courts); Tobias, *supra* note 12, at 1268–70 (analyzing trend of federalization).

¹⁴See 28 U.S.C. § 44 (2000); *id.* § 133.

¹⁵JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 16 (1995) [hereinafter LONG RANGE PLAN]. The Long Range Planning Committee prognosticated that 1,330 judgeships would be necessary by 2000; however, Congress did not authorize those positions, principally for political reasons.

¹⁶See MILLER REPORT, *supra* note 1, at 3; see also William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 277 (1996) (discussing issue of increased caseloads without increased number of judges).

¹⁷Compare Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52 (suggesting increase in federal court system), with Gerald Bard Tjoelhat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70 (arguing that expansion of federal court system is not answer).

¹⁸See LONG RANGE PLAN, *supra* note 15, at 103; see also *infra* note 33 and accompanying text (discussing timing of nominations and confirmations).

year, and confirmations required three months; the period needed for each seemed to grow with time.¹⁹ A valuable study by the Federal Judicial Center ("FJC"), which is the federal courts' research arm, determined that vacancy rates between 1970 and 1992 almost doubled in the federal districts and were more than twice as high for the appellate courts.²⁰

The persistent conundrum has created a substantial number of disadvantages. For example, the problem has slowed trial court resolution and limited the prompt, economical, and fair disposition of appeals. It has also imposed unwarranted pressures on the appellate and district court bench, as well as presented difficulties for attorneys and litigants who must compete for scarce judicial resources.²¹ Moreover, in the twenty-two years following 1970, open positions had a statistically significant impact on both appeals and trial court judges, who experienced average workload increases of nine and ten percent respectively.²²

Politics has pervaded federal judicial appointments since the United States was founded.²³ Nonetheless, some observers of the selection process contend that politicization has escalated over the last three and a half decades, beginning in the Republican Administration of President Richard Nixon, who secured election with a promise to reattain "law and order" by placing on the federal bench conservative jurists who would be "strict constructionists."²⁴ However, a rather modern strain originated when the Senate rejected District of Columbia Circuit Judge Robert Bork, whom President Ronald Reagan had nominated for the Supreme Court in 1987.

C. The Current Dilemma

Political factors seem more relevant to the present complication than to the permanent one, but politics apparently infuse each, thus obscuring their precise relationship. The existing difficulty, therefore, warrants considerable assessment, even though temporal proximity frustrates comprehension of

¹⁹See LONG RANGE PLAN, *supra* note 15, at 3-4.

²⁰See Bermant et al., *supra* note 1, at 323; see also 28 U.S.C. § 620-629 (1994) (authorizing FJC as federal courts' research arm); William W. Schwarzer, *The Federal Judicial Center and the Administration of Justice in the Federal Courts*, 28 U.C. DAVIS L. REV. 1129, 1130 (1995) (examining role of FJC); *infra* note 22 and accompanying text (evaluating additional results of FJC study).

²¹See *Vacancy Problem*, *supra* note 2, at 374; see also *infra* notes 68-71 and accompanying text (noting problems arising from judicial vacancies).

²²See Bermant et al., *supra* note 1, at 327; see also *supra* note 20 and accompanying text (discussing FJC study).

²³See *supra* Part II.B.1 (discussing presence of politics that has influenced nominations and confirmations since time of Founders); see also GERHARDT, *supra* note 4, at 28 (same); GOLDMAN, *supra* note 4, at 5-9 (same).

²⁴See DAVID M. O'BRIEN, *JUDICIAL ROULETTE* 20 (1988); Roger E. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees*, 80 JUDICATURE 274, 274 (1997).

exactly what has happened.

1. *General Survey of the Current Dilemma*

Over the last two decades, distrust, partisan infighting, and divisiveness that implicated the Democratic and Republican political parties have frequently accompanied the judicial selection process. Across nearly this entire time, selection proceeded in a context of divided government, with one major political party controlling the Executive Branch, which has nomination and appointment powers, and the other party commanding a Senate majority, which must provide advice and consent for confirmation of nominees whom the president tenders.

Several reasons explain why greater controversy has attended judicial selection for the regional circuits. First, there have been few United States Supreme Court openings in the last dozen years and those vacancies that did occur have not been sharply disputed. After the tumultuous appointment of Justice Clarence Thomas,²⁵ Chief Executives have nominated, and the upper chamber has confirmed, individuals who appeared to possess moderate political views. Second, filling district court positions has traditionally been, and essentially remains, the prerogative of Senate members who represent the areas in which openings arise. Notions related to senatorial courtesy and respect—and the idea that trial court seats are perhaps the only twenty-first century vestige of unadulterated political patronage—mean these vacancies are rarely controversial. Third, within their geographic domains, the regional circuits are increasingly perceived as the courts of last resort to resolve significant public policy questions—such as issues that involve discrimination and religious freedom—partly because the Supreme Court entertains a minuscule, and dwindling, number of appeals.²⁶

I do not mean to intimate that selection has progressively deteriorated since 1987 or to level substantial criticism at those who have been responsible for judicial appointments. There have been certain times when the appellate courts process functioned quite well. For instance, President George H. W. Bush and Democratic and GOP senators seemed to cooperate after the

²⁵See JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 6 (1994); TIMOTHY M. PHELPS & HELEN WINTERNITZ, *CAPITOL GAMES*, at xiv (1992); see also *infra* note 131 and accompanying text (discussing treatment of nominees, including Justice Thomas).

²⁶See, e.g., Neil A. Lewis, *Move to Limit Clinton's Judicial Choices Fails*, N.Y. TIMES, Apr. 30, 1997, at D22 (noting appeals courts as courts of last resort); *Obstruction of Justice*, NEW REPUBLIC, May 19, 1997, at 9 (criticizing "partisan opposition" to appeals court nominees); Jeffrey Rosen, *Obstruction of Judges*, N.Y. TIMES, Aug. 11, 2002, § 6 (Magazine), at 38 (analyzing difficulties with appeals court nominees' approval); see also RICHARD A. POSNER, *THE FEDERAL COURTS* 80–81, 194–95 (1996) (discussing limited role of Supreme Court). See generally Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 403–04 (1996) (discussing fifty percent decline in Supreme Court's decisional output from mid-1980s to mid-1990s).

confirmation battle that involved Justice Thomas. This development fostered Justice David Souter's felicitous selection and rather effective lower court appointments during the early 1990s. Nonetheless, at the conclusion of the Bush Administration, approximately one hundred appeals and district court judgeships remained vacant. Democrats claimed that the unfilled seats resulted from the Chief Executive's sporadic nomination of highly-qualified persons whom they deemed acceptable.²⁷ Republicans attributed the unoccupied positions to slowed consideration of Bush nominees by the Senate majority, who hoped that a Democratic candidate would triumph in the 1992 presidential election.²⁸

Even the Clinton Administration experienced some atypical periods in which appellate court selection proceeded efficaciously. For example, substantial coordination between the White House and Democratic senators—who then comprised a majority—led to approval of more than one hundred nominees during 1994.²⁹ Sixty judges received appointment four years later, when the GOP captured the Senate.³⁰

From the January 1995 date on which Republicans assumed control of the upper chamber and thereby reinstated divided government, until the second Clinton Administration ended, partisan disputes—as well as accusations and recriminations—plagued judicial selection efforts. Upon President Clinton's departure from the White House, there were twenty-five openings on the regional circuits—practically the same number as existed at the time of his first inauguration.³¹ The 2000 elections left Republicans with a razor-thin majority in the Senate and permitted President George W. Bush to lead a government

²⁷See, e.g., Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 296–97 (1993) (analyzing qualifications of Bush judicial nominees); *infra* notes 34–38, 53 and accompanying text (discussing nomination process). See generally Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477 (1991) (finding improvement in Bush Administration's appointment of women judges).

²⁸Goldman, *supra* note 27, at 282–85; see also *infra* notes 31, 58 and accompanying text (finding continued vacancies due to politicization). See generally Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. REV. 1257, 1270–74 (affording brief history of Bush's judicial nominees).

²⁹Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 279 (1995); Carl Tobias, *Increasing Balance on the Federal Bench*, 32 HOUS. L. REV. 137, 145–51 (1995).

³⁰See Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 265, 267 (1999); Carl Tobias, *Choosing Judges at the Close of the Clinton Administration*, 52 RUTGERS L. REV. 827, 841–44 (2000); Carl Tobias, *Leaving a Legacy on the Federal Courts*, 53 U. MIAMI L. REV. 315, 325–27 (1999). For numerous reasons that may explain this development, see *infra* notes 70–72 and accompanying text (finding outside pressure to facilitate appointments).

³¹See VACANCIES IN THE FEDERAL JUDICIARY (2000). See generally Carl Tobias, *Dear President Bush*, 67 MO. L. REV. 1, 1 (2002) (identifying ninety lower federal court vacancies at Bush's inauguration); Nick Anderson, *Democrats Look to Battles After Ashcroft*, L.A. TIMES, Feb. 1, 2001, at A14 (citing twenty-six appellate vacancies at beginning of Bush Administration).

that was not divided. However, this opportunity proved ephemeral when Senator James Jeffords, a Republican from Vermont, chose to become an independent during May 2001,³² a phenomenon that substantially influenced the appointments process because it accorded the Democrats control of the Senate.

2. *Specific Assessment of the Current Dilemma*

I attempt below to provide an accurate descriptive rendition of the current dilemma through the actions undertaken, and the viewpoints expressed, by numerous people and institutions participating in federal judicial selection. The Subsection canvasses the second Clinton Administration and George W. Bush's Administration to date, emphasizing the first year of both. Appointments during 1997 and 2001 in each presidency are recent and comparatively analogous; they also demonstrate the telling import of divided government. That focus is appropriate, even though the existing dilemma appeared to originate earlier, perhaps with the 1987 Senate rejection of Judge Robert Bork.

Many political factors that accompanied judicial selection contributed significantly to the present situation. The Chief Executives and the senators—including the Majority Leaders, members and leaders of the Judiciary Committees, and individual senators—were mainly responsible for numerous phenomena that constitute the existing difficulty. These public officials—alone or synergistically—could have resolved or ameliorated a number of complications, if they exercised the requisite political will.

The time that the Clinton and Bush Administrations needed to conclude the nomination and confirmation processes were substantial and analogous. For example, in 1997, nominations on average consumed more than 600 days, with confirmations requiring a record high of 183 days.³³ Considerable delay continued between the date that an opening arose and someone received nomination.

³²See, e.g., *Ashcroft: Speed up Judge Approvals*, NEWSDAY, Aug. 8, 2001, at A15 [hereinafter *Ashcroft*] (citing pressure on Bush Administration to work more quickly); Neil A. Lewis, *Road to Federal Bench Gets Bumpier in Senate*, N.Y. TIMES, June 26, 2001, at A16 (asserting Jeffords's action would affect confirmation of judges); David Rogers, *Sen. Jeffords Defects From GOP, Creating Era of 'Tripartisanship'*, WALL ST. J., May 25, 2001, at A16 (discussing Senate transfer of power); *True Bipartisanship*, WALL ST. J., May 31, 2001, at A16 (discussing Jeffords' defection).

³³See Viveca Novak, *Empty-Bench Syndrome*, TIME, May 26, 1997, at 37; see also Orrin G. Hatch, *There's No Vacancy Crisis in the Federal Courts*, WALL ST. J., Aug. 13, 1997, at A15 (asserting that confirmations required 91 days and nominations 618 days); *Clearing the Bench*, DALLAS MORNING NEWS, June 17, 1997, at 16A (reproducing similar statistics); *supra* note 19 and accompanying text (affording comparable data between 1980 and 1995).

(a) *Nomination Process*

The dearth of 1997 and 2001 confirmations resulted in part from slow nominee submission. Certain temporal difficulties should be ascribed to both presidents and to senators or additional political officers who were responsible for suggesting particular designees whom the Chief Executives might in turn nominate. During 1997, however, other participants—namely Senator Orrin Hatch, Republican from Utah, then-chair of the Judiciary Committee, Senator Trent Lott, Republican from Mississippi, then-Senate Majority Leader, and Republican senators—delayed processing out of concerns about matters such as nominees' tendency to practice "judicial activism." Similarly, in 2001, their Democratic counterparts—Senators Patrick Leahy from Vermont and Thomas Daschle from South Dakota—might have not expedited consideration because Democrats found troubling the political views of some individuals whom President Bush recommended.

The Chief Executives appeared to have certain responsibility for the few appointments that were attributable to the slow pace in tendering nominees. For instance, on January 7, 1997, President Clinton forwarded to the Senate twenty-two attorneys—a number of whom had received nomination from the previous Congress, had testified in confirmation hearings, or had secured favorable Judiciary Committee votes, but some of whom GOP senators opposed; President Bush did not announce his initial set of nominees, which omitted a few designees he had earlier considered, until May 2001.³⁴ Thereafter, each president gradually, albeit rather sporadically, provided additional names. Both leaders tended to suggest large groups of the nominees as the Senate approached a recess.³⁵ Most nominees selected by the two Chief Executives seemed well qualified, and a number had served on the federal or state bench.³⁶ Some appeared to possess moderate political views, several were affiliated with the party that did not control the White House, and the

³⁴See Remarks Announcing Nominations for the Federal Judiciary, 37 WEEKLY COMP. PRES. DOC. 724–25 (May 9, 2001) [hereinafter Remarks]; Press Release, The White House, Office of the Press Secretary, President Nominates Twenty-Two to the Federal Bench (Jan. 7, 1997), available at <http://clinton6.nara.gov/1997/01/1997-01-07-names-of-twenty-two-for-federal-bench-resubmitted.html> (last visited May 18, 2005). They were Representative Christopher Cox, Republican from California, Peter Keisler, and Judge Carolyn Kuhl. Judge Kuhl was subsequently nominated. See *infra* notes 84, 97 and accompanying text (discussing political opposition to nominees).

³⁵See Press Release, The White House, Office of the Press Secretary, President Clinton Nominates Thirteen to the Federal Bench (July 31, 1997). Bush sent similarly large nominee packages before 2001 Senate recesses. See Jonathan Ringel, *Bush Nominates 18 to Federal Bench*, AM. LAW. MEDIA, at <http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZG1CZBYPC> (Aug. 3, 2001).

³⁶See Remarks, *supra* note 34; Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309, 315 (1996); see also 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, 258 (1997) (analyzing Clinton nominees).

predecessors of Presidents Clinton and Bush had named a few as federal district judges.³⁷

In fairness, the Chief Executives' proclivity to submit many nominees a short time before the Senate recessed—and their treatment of nominations in general—illustrated particular difficulties. Forwarding numerous people at once, on the eve of a Senate recess, frustrated the Judiciary Committee's attempts to expedite candidate review. President Clinton had tendered only eight new nominations by June 1997; Senator Hatch had found unacceptable some of the January nominees, which enabled him to assert a defensible claim that the Committee lacked sufficient nominees for effective panel consideration.³⁸

Neither administration proffered names for every opening, which would have permitted them to pressure the Committee and the Senate—although there was little reason to submit more nominations than Senators Hatch and Leahy had observed they would process.³⁹ In some of 1997 and 2001, both presidents nominated a larger number of attorneys than either panel chair had said the Committee would scrutinize. Clinton and Bush also were required to balance speed against meticulous review of nominee ability and character: those who proved controversial, or were not competent or ethical, might have undermined administration credibility and could have slowed or jeopardized future appointments.

The political figures who proposed individuals to the Chief Executives may have delayed judicial nominations during 1997 and 2001. For example, in jurisdictions without senators from the president's political party, designating the public officials from the states who were to recommend lawyers, or addressing requests that they participate, consumed time. At various junctures of the Clinton Administration, some Republican Senate members insisted on being involved and even wanted to suggest nominees.⁴⁰ When Bush compiled

³⁷See, e.g., Goldman & Slotnick, *supra* note 36, at 258–68 (analyzing Clinton nominees); Shannon P. Duffy, *Clinton Announces Nominees for Eastern District Court*, LEGAL INTELLIGENCER, Aug. 4, 1997, at 1 (calling nominees “obvious compromise” with Republicans); David G. Savage, *Bush Picks 11 for Federal Bench*, L.A. TIMES, May 10, 2001, at A1 (identifying Bush nominees and their qualifications). See generally *infra* notes 65, 106–09, 112–15, 132–37 and accompanying text (discussing techniques to secure bipartisan approval).

³⁸See Hatch, *supra* note 33; see also Neil A. Lewis, *Keeping Track: Vacant Federal Judgeships*, N.Y. TIMES, Aug. 11, 1997, at A12 (citing slow nominations by Clinton). Analogous are President Bush's submission of rather few new nominees by June 2001 and Senator Leahy's finding that some nominees submitted in the May 2001 nominee package were unacceptable.

³⁹In 1997, Senator Hatch typically conducted a single hearing every month that the 105th Senate was in session; these hearings typically evaluated one of Clinton's appellate court nominees and four or five district court nominees. See *infra* note 47 and accompanying text (discussing Clinton's nomination process). Senator Leahy followed a comparatively similar approach throughout much of 2001. See Ringel, *supra* note 35.

⁴⁰Peter Callaghan, *Senators Agree on Selecting Judges*, TACOMA NEWS TRIB., Aug. 12, 1997, at B1; Neil A. Lewis, *Clinton Has a Chance to Shape the Courts*, N.Y. TIMES, Feb. 9, 1997, § 1, at 30; see also 143 CONG. REC. S2538, S2541 (daily ed. Mar. 19, 1997) (statement of Sen. Biden) (suggesting on floor of Senate that Republican senators appeared to have so

his first appeals court slate, limited consultation with the California and Maryland Democratic senators apparently terminated the candidacies of one designee in each jurisdiction,⁴¹ while the lack of hearings that Republicans accorded Clinton nominees seemed to foster paybacks by Democrats in Michigan, North Carolina, and Ohio.⁴²

The Clinton and Bush Administrations might well deserve considerable responsibility for slow transmittal.⁴³ Insofar as both could have encouraged senators and other political officers to speed their recommendations for the respective presidents, executive branch staff might have undertaken additional efforts. Perhaps each new administration was frustrated by the “start-up” expense of creating an administration. Helpful illustrations are the time each president consumed when assembling a Justice Department.

Clinton and Bush thus discharged their nomination obligations rather similarly in 1997 and 2001. Of course, the administrations did not rely on identical practices, but the distinctions were matters of degree. The two Chief Executives could also have foreseen or preemptively addressed certain problems by gleaning lessons from previous selection endeavors, although some difficulties might well inhere in the process.

(b) *ABA Committee*

Over the first and second sessions of the 104th Congress, the American Bar Association (“ABA”) Standing Committee on Federal Judiciary, which has rated candidates’ qualifications—vis-à-vis intelligence, temperament, integrity, diligence, collegiality, and independence—since the mid-twentieth century, continued to provide a service considered helpful by numerous observers of judicial appointments.⁴⁴ Nonetheless, Senator Hatch evinced growing concern

intimated). See generally *infra* notes 58, 122 and accompanying text (referring to role of opposing political party in nominations).

⁴¹For California, see Jean O. Pasco & Henry Weinstein, *Cox Gives up Shot at Judgeship*, L.A. TIMES, May 26, 2001, at A13; Savage, *supra* note 37; Henry Weinstein & Faye Fiore, *Rep. Cox Called Likely Judicial Nominee*, L.A. TIMES, Apr. 5, 2001, at A1. For Maryland, see David L. Greene & Thomas Healy, *Bush Sends Judge List to Senate*, BALT. SUN, May 10, 2001, at 1A; Lewis, *supra* note 32. See generally *infra* notes 96, 110, 133–36 and accompanying text (discussing major role of senators in judicial nominations and confirmations effecting their state).

⁴²For Michigan and North Carolina, see sources cited *supra* notes 8–9. For Ohio, see Tom Brune, *Roadblocks to Justice—Judgeships Unfilled as Congress Wrangles over Appointees*, NEWSDAY, May 9, 2002, at A46; Jack Torry, *Court Nominations: Sitting in Limbo*, COLUMBUS DISPATCH, Dec. 30, 2001, at 8A; sources cited *infra* notes 97, 108.

⁴³I rely substantially in this paragraph on 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; Savage, *supra* note 37.

⁴⁴For this proposition, as well as the notion that the American Bar Association is overly political and consumes too much time when it rates nominees, see MILLER REPORT, *supra* note 1, at 5–6, 8, 11. See generally AMERICAN BAR ASSOCIATION, STANDING COMM. ON FEDERAL

about the organization's participation. During February 1997, he terminated formal ABA involvement in Judiciary Committee deliberations, although President Clinton used ABA rankings for his entire second term.⁴⁵ On March 22, 2001, the Bush Administration informed the ABA that President Bush would not seek ABA input before he submitted nominations.⁴⁶

(c) *Confirmation Process*

During 1997 and 2001, the Senate Judiciary Committee also bore some responsibility for delayed appointments in part by failing to investigate, hold hearings for, and vote on more nominees. Each month of the 105th Congress's first session and across much of the second Clinton Administration, the panel ordinarily conducted a hearing in which one appellate nominee and four or five individuals proposed for district courts testified; however, the Committee did not invariably follow that schedule, and the Senate had confirmed a mere nine judges by September 1997.⁴⁷ President Bush and additional observers similarly criticized the small number of hearings—in particular hearings related to the appeals courts—and the few appellate judges confirmed in 2001.⁴⁸ Later, the Judiciary Committee apparently operated better: by spring of 2002, it had accorded hearings to all nominees for the district courts.

The dearth of judges approved in 1997 might have resulted from deficient temporal and fiscal resources and from politics. Illustrative were Senator Hatch's resolution of the ongoing dispute about the extent of ABA

JUDICIARY—WHAT IT IS AND HOW IT WORKS (1988) (describing ABA committee's evaluation process).

⁴⁵See Terry Carter, *A Conservative Juggernaut*, 83 A.B.A. J. 32, 32 (1997); N. Lee Cooper, *Standing up to Critical Scrutiny*, 83 A.B.A. J. 6, 6 (1997); see also Ashcroft, *supra* note 32 (assessing Ashcroft's intent to "curtail" ABA involvement); *infra* notes 76–77 and accompanying text (discussing ABA's role in judicial selection).

⁴⁶See Letter from Alberto R. Gonzales, White House Counsel, to Martha Barnett, President, American Bar Association (Mar. 22, 2001) (on file with Utah Law Review). See generally Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to Give Up on the Lawyers?*, 10 WM. & MARY BILL RTS. J. 37, 37 (2001). Democrats' insistence on ABA input led to more delay, but the future influence that the ABA will have is unclear. See *Confirmation Hearings on Federal Appointments Before the Senate Judiciary Comm.*, 107th Cong. 1304–06 (2002) [hereinafter *Confirmation Hearings*] (opening statement of Sen. Leahy); Jonathan Groner, *ABA Adjusts to Role on Judges*, LEGAL TIMES, Aug. 5, 2002, at 10.

⁴⁷See Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 742 (1997). Senator Joseph Biden (D-Del.), who served as the Judiciary Committee chair from 1987 until 1994, asserted that he conducted two hearings each month in his tenure. See 143 CONG. REC. S2538 (daily ed. Mar. 19, 1997).

⁴⁸See, e.g., Neil A. Lewis, *Bush and Democrats in Senate Trade Blame for Judge Shortage*, N.Y. TIMES, May 4, 2002, at A9 (discussing fault in debate about vacancies); Editorial, *Judicial Nominations Scorecard*, WASH. POST, Aug. 9, 2002, at A22 (analyzing Leahy's chairmanship of Senate Judiciary Committee).

involvement,⁴⁹ as well as debate among Republican Senate members over the confirmation duties of the Judiciary panel, its chair, and individual members—which ultimately prompted the GOP to maintain the status quo. These matters consumed time and energy that could have been spent processing judicial nominees. The relatively few 2001 appointments might also be ascribed to the commitment of inadequate resources and to politics,⁵⁰ even though Senator Leahy implemented certain special measures which fostered review, namely extraordinary hearings over the Senate's August recess.⁵¹ Insofar as specific Democrats delayed the process, their actions could have represented payback for Clinton nominees whom the legislators believed Republicans had stalled.⁵² Moreover, the late May decision of Senator James Jeffords to become an independent meant that the upper chamber did not completely reorganize until July, which postponed the efficient operation of judicial selection.⁵³

In fairness, nominees for Article III circuit and district judgeships, who will have life tenure and exercise the substantial power of the United States government, warrant deliberate consideration to guarantee that they are qualified. Moreover, calibrating the appropriate balance between scrutiny of the individuals' competence and character and prompt assessment is a task that is simultaneously complex and subtle. Although Senator Hatch asserted that he preferred to discharge this obligation with great care, politics as much as caution seems to explain the few confirmations.⁵⁴

Senator Trent Lott and other Republican leaders were also responsible for

⁴⁹See *supra* notes 44–46, *infra* notes 76–77 and accompanying text (discussing ABA issues).

⁵⁰I rely here on *Confirmation Hearings*, *supra* note 46, at 456–58 (statements of Sen. Leahy and Sen. Hatch); Symposium, *The Judicial Appointments Process*, 10 WM. & MARY BILL RTS. J. 1 (2001); see also Ringel, *supra* note 35 (discussing political difficulties); Jonathan Ringel, *Picking Judges: The Art of the Deal*, THE RECORDER, Apr. 30, 2001, at 1 (discussing conflicts between president and senators in judicial nominations); William Safire, *Battle of the Blue Slips*, N.Y. TIMES, May 10, 2001, at A33 (describing politics behind judicial nominations).

⁵¹See *Confirmation Hearings*, *supra* note 46, at 163–68, 263–67; Neil A. Lewis, *Democrats Are Pushed on Judicial Nominees*, N.Y. TIMES, Oct. 21, 2001, at A22.

⁵²See Jess Bravin, *Aid Bill Is Stalled by Bid to Force Votes on Judges*, WALL ST. J., Oct. 17, 2001, at A16; Paul A. Gigot, *How Feinstein Is Repaying Bush on Judges*, WALL ST. J., May 9, 2001, at A26; Neil A. Lewis, *Party Leaders Clash in Capitol over Pace of Filling Judgeships*, N.Y. TIMES, May 10, 2002, at A33.

⁵³See *supra* note 32 (regarding Jeffords's defection).

⁵⁴Hatch faced conflicts in Senate traditions and obligations to Republican senators who opposed activist judges. He did criticize opposition to some nominees and resist the challenge to Senate traditions, and the 1997 record resembled some other records in similar periods. See 143 CONG. REC. S2536 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch); *supra* note 49 and accompanying text; 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 (citing Hatch's remark that Clinton's nominations should be respected, but that “judicial activists” are not qualified); Neil A. Lewis, *Republicans Seek Greater Influence in Naming Judges*, N.Y. TIMES, Apr. 27, 1997, § 1, at 1 (discussing Hatch's dual role in judicial nominations); Novak, *supra* note 33 (citing Republican opposition despite Clinton's moderate nominees). *But see supra* note 50 and accompanying text (assessing large role of politics in confirmation process).

slowed treatment in 1997. Only nine judges received appointment by September of that year, although the Judiciary Committee had voted favorably on numerous candidates.⁵⁵ Certain observers think the Democratic Party leadership behaved similarly during 2001. The press of other important Senate business and the upper chamber's unanimous consent requirement may explain some delay in placing approved nominees on the Senate calendar and according them floor debates and floor votes. However, the few judges whom President Clinton was able to confirm in 1997, particularly as contrasted with earlier periods, suggest that considerable responsibility could be assigned the Republican leaders and their scheduling of floor votes. At the 105th Congress's outset, Senator Lott pledged that he would assiduously evaluate persons whom the president tendered.⁵⁶ During the spring of 1997, Senator Leahy—who then served as the ranking minority member on the Senate Judiciary Committee—and additional Democratic senators responded by explaining how they had facilitated judicial selection in Republican presidencies and by urging floor debate and votes on nominees.⁵⁷

(d) Nomination and Confirmation

During 1997 and 2001, executive branch staff and Senate employees who had important responsibilities for judicial appointments may have not appreciated the problem's gravity, as witnessed in the uneven pace of nominations and of Judiciary Committee analysis. Numerous observers asserted that the difficulty and considerable delay were animated by politics and by concerns about the ideological perspectives of specific judicial nominees. For instance, during 1997, Democratic Senators Joseph Biden from Delaware, and Paul Sarbanes from Maryland, claimed that their Republican colleagues were politicizing selection and modifying over 200 years of tradition.⁵⁸

⁵⁵This dynamic closely resembled Republican consideration of nominees during the 1996 election year. See 143 CONG. REC. S8045 (daily ed. July 24, 1997) (statement of Sen. Leahy); Hatch, *supra* note 33; see also Goldman & Slotnick, *supra* note 36, at 257 (recounting the 1996 treatment); Tobias, *supra* note 47, at 744–45 (same).

⁵⁶See Lewis, *supra* note 40. See generally Gest & Lord, *supra* note 54 (blaming Senate for vacancies); Novak, *supra* note 33 (assessing Senate's role in continued vacancies).

⁵⁷They urged that all judicial nominees have floor votes. See 143 CONG. REC. S2538–41 (1997) (statements of Sen. Biden and Sen. Sarbanes). When Senator Lott threatened to delay processing, Leahy recounted nominees, with bipartisan support and unanimous panel votes, to courts under pressure. 143 CONG. REC. S5653 (statement of Sen. Leahy).

⁵⁸See 143 CONG. REC. S2538, S2541 (1997) (statements of Sen. Biden and Sen. Sarbanes). Biden even said that the Republicans were attempting to prevent Clinton appellate court appointments. See 143 CONG. REC. S2538 (1997) (statement of Sen. Biden). Other observers proffered similar ideas. Professor Sheldon Goldman said “a newly elected president has [never] faced this kind of challenge to his judicial nominations,” while Professor Geoffrey Stone found the GOP actions “irresponsible.” Gest & Lord, *supra* note 54, at 24.

One action—which some thought was political and that related to the current dilemma and the slow pace of nominee consideration—was the investigation that Republican Senator Charles Grassley undertook when assessing how the regional circuits employ and allocate resources.⁵⁹ The Senate Judiciary Subcommittee on Administrative Oversight and the Courts, which Grassley chaired, sponsored hearings to determine if the appellate system as a whole—and particular tribunals—actually required additions to their judicial complements, or whether they even required their existing judgeships.⁶⁰ After the panel had conducted those sessions and assembled considerable relevant information on the regional circuits, the subcommittee issued a report that found few appeals courts need new judges and that specific tribunals should have no additional seats until the regional circuits implemented measures that would enable them to operate in ways that the subcommittee deemed more efficient.⁶¹ Proper resource deployment is obviously a legitimate congressional concern, but this project may have delayed appointments to the appellate courts, which have encountered large percentages of openings, many judicial emergencies, and significant caseload growth.⁶² Moreover, senators and representatives have not approved circuit positions for fifteen years, even though the Judicial Conference has proposed authorization of numerous seats—a suggestion premised on expert, conservative estimates and carefully gathered empirical data involving dockets and workloads.⁶³

⁵⁹I rely substantially in this paragraph on CHARLES E. GRASSLEY, CHAIRMAN'S REPORT ON THE APPROPRIATE ALLOCATION OF JUDGESHIPS IN THE UNITED STATES COURTS OF APPEALS (1999) [hereinafter GRASSLEY REPORT], and the hearings that Grassley conducted, for example, *Considering Judicial Resources: Considering the Appropriate Allocation of Judgeships in the U.S. Court of Appeals for the Seventh Circuit, Hearing Before the Senate Judiciary Subcomm. on Admin. Oversight and the Courts*, 105th Cong. 893 (1998) [hereinafter *Grassley Hearings I*]; see also Tobias, *supra* note 47, at 752–53 (discussing prospect of increasing number of judges). See generally *infra* notes 141–42 and accompanying text (discussing dispute over whether more judicial seats are needed).

⁶⁰See *Grassley Hearings I, supra* note 59; *Considering Judicial Resources: Considering the Appropriate Allocation of Judgeships for the Fourth, Fifth, and Eleventh Circuits, Hearing Before the Senate Judiciary Subcomm. on Admin. Oversight and the Courts*, 105th Cong. 165 (1997) [hereinafter *Grassley Hearings II*]. See generally *infra* notes 141–52 and accompanying text (discussing structural changes in circuit courts).

⁶¹For example, the subcommittee found that the Sixth Circuit should have no new judges until the court “takes alternative approaches to manage its caseload efficiently” through “channeling more work to staff counsel and by granting oral argument only [if] truly necessary.” GRASSLEY REPORT, *supra* note 59, at II(f)(E) (offering additional view that some judges opposed more positions); Tobias, *supra* note 47, at 749 (finding that majorities on few courts opposed more positions).

⁶²Twenty-seven seats were open. See *Judicial Boxscore*, THIRD BRANCH, July 1997, at 8. For data on docket growth, see LONG RANGE PLAN, *supra* note 15, at 10; POSNER, *supra* note 26, at 58–64.

⁶³See S. 1145, 106th Cong. (1997) (affording judgeships bill); S. 920, 108th Cong. (2003) (same); 143 CONG. REC. S2540 (1997) (statement of Sen. Biden) (claiming that Conference showed need to fill vacancies and for more judgeships but that GOP urged reducing number of

Similar developments attended judicial selection throughout 2001. For example, only three of the eleven appeals court nominees forwarded by President Bush during May received confirmation over the year.⁶⁴ Senator Leahy and other Democrats, such as Senator Charles Schumer, Democrat from New York, announced publicly that the chamber would accord prompt approval to individuals who were capable and who possessed relatively moderate political views.⁶⁵ For instance, Judge Roger Gregory and Judge Barrington Parker, whom President Clinton had named earlier, received smooth confirmation.⁶⁶

The behavior of senators whose political party did not occupy the White House supports the notion that the existing complication and the delayed assessment of judicial nominees is motivated by politics, especially concerns about the nominees' perceived ideological viewpoints. The many appellate vacancies illustrate the significance of politics. Senators find these vacancies more critical than empty seats on the districts, because the shrinking Supreme Court docket and the application of appeals court decisions across states mean the regional circuits increasingly function as courts of last resort for those areas.⁶⁷

(e) *Prospects for Change*

To the extent that specific political factors that accompanied judicial appointments during 1997 and 2001 and underlie the contemporary problem are inherent in the process, they might resist treatment. For example, the analysis of persistent openings suggested that approaches that enhance resources and increase efficiency will only limit delay that does not result from politics. However, the assessment of political factors that explain the current difficulty indicated that public officers could address the situation, if they

judgeships); Tobias, *supra* note 47, at 753 (assessing proposals and their basis); *see also* Letter from L. Ralph Mecham, Secretary, Judicial Conference of the U.S., to Sen. Patrick Leahy (May 28, 2002) (urging expeditious action on Judicial Conference proposals).

⁶⁴*See* Jonathan Groner, *Privilege Fight Looms over Estrada*, LEGAL TIMES, June 3, 2002, at 1; Neil A. Lewis, *Democrats Are Pushed on Judicial Nominees*, N.Y. TIMES, Oct. 21, 2001, at A22; *see also supra* note 34 and accompanying text (discussing Bush's nominees). *But see infra* notes 66, 99–101 and accompanying text (recounting smooth confirmations and ideas to resolve impasse).

⁶⁵*See* Neil A. Lewis, *More Battles Loom over Bush's Nominees for Judgeships*, N.Y. TIMES, Apr. 7, 2002, § 1, at 24; sources cited *supra* note 48 (recounting impasse in Senate); *see also infra* notes 89–90 and accompanying text (citing examples of bipartisanship).

⁶⁶Mark Hamblett, *Parker Brings Experience and Intellect to Circuit*, N.Y. L.J., Oct. 25, 2001, at 1; Neil A. Lewis, *Bush Appeals for Peace on His Picks for the Bench*, N.Y. TIMES, May 10, 2001, at A29; Editorial, *Unappealing Judges*, BOSTON GLOBE, Mar. 16, 2002, at A18. Clinton accorded Judge Gregory a recess appointment to the Fourth Circuit. Alison Mitchell, *Senators Confirm 3 Judges, Including Once-Stalled Black*, N.Y. TIMES, July 20, 2001, at A16.

⁶⁷*See supra* note 26 and accompanying text (discussing role of appellate courts); *see also supra* notes 25, 27–32 and accompanying text (recounting nomination procedures of Clinton and Bush Administrations).

exercised sufficient political will. Indeed, politics alone appeared to preclude both the Clinton and Bush Administrations from expeditiously tendering additional nominees who held centrist political viewpoints and a Senate majority from swiftly approving those individuals.

(f) *Effects of the Current Impasse*

The existing dilemma has fostered numerous complications, a number of which resemble those that the longstanding conundrum promotes.⁶⁸ For instance, the modern problem has pressured circuit and district judges, and parties and counsel—effects manifested by phenomena such as increasing appellate and trial court dockets and workloads. Escalating federal criminal prosecutions, many of which are quite complex, mean that some district judges try few civil matters, numerous district courts experience substantial civil backlogs, and people and institutions must wait years for trials.⁶⁹ Moreover, burgeoning appeals and empty seats in 1997 required that the Ninth Circuit cancel six hundred oral arguments, while an analogous situation compelled the Sixth Circuit to postpone sixty arguments.⁷⁰ During that summer, the imminent crisis fueled by significant numbers of vacancies and the difficulties—namely slowed civil trials and criminal docket increases that stemmed from delayed confirmation—led major national bar associations to publish an open letter urging that President Clinton and Senator Lott accelerate judicial selection.⁷¹ At the end of 1997 and 2001, Chief Justice William H. Rehnquist remonstrated each White House and Senate, which opposing political parties controlled, to expedite appointments with almost identical strong language.⁷² Insofar as citizens believe the present complication reflects political machinations, these activities may undermine respect for the federal government, in particular for Chief Executives and senators, but perhaps for the Third Branch.

⁶⁸See *supra* notes 21–22 and accompanying text (assessing delays for litigants and increased workloads for courts); see also *infra* notes 69–72 and accompanying text (same).

⁶⁹See Gest & Lord, *supra* note 54, at 24; see also Robert Schmidt, *The Costs of Judicial Delay*, LEGAL TIMES, Apr. 28, 1997, at 6 (evaluating significant backlogs of civil cases and disadvantages that those backlogs impose).

⁷⁰See Novak, *supra* note 33, at 37; *Chronic Federal Judge Shortage Puts Lives, Justice on Hold*, LAS VEGAS REV.-J., Aug. 13, 1997, at A9; see also *id.* (documenting Sixth Circuit cancellations); Bill Kisliuk, *Judges' Conference Slams Circuit-Splitting, Vacancies*, THE RECORDER, Aug. 19, 1997, at 1 (documenting the Ninth Circuit cancellations).

⁷¹See Letter from N. Lee Cooper, ABA President, et al., to William J. Clinton, President, & Trent Lott, U.S. Senate Majority Leader (July 14, 1997), reprinted in 143 CONG. REC. S8046 (1997).

⁷²See Chief Justice William H. Rehnquist, *1997 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 1998, at 1; Chief Justice William H. Rehnquist, *2001 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 2002, at 1. Similar ideas are in Editorial, *supra* note 48, and in a recent ABA resolution. See Alfred P. Carlton, Jr., *More and Faster—Now*, A.B.A. J., Apr. 2003, at 8; Jonathan Groner, *ABA: Speed up Judicial Nomination Process*, LEGAL INTELLIGENCER, Aug. 14, 2002, at 4.

In sum, the foregoing examination of the permanent vacancies problem and the current difficulty shows that those constituents—alone and together—impeded judicial selection and, therefore, eroded the criminal and civil justice that the federal appeals courts have been able to deliver since the late 1980s, particularly the last seven years. The next segment evaluates how President George W. Bush chose nominees and senators approved judges for the regional circuits since the initial year of his administration concluded.

II. APPEALS COURT SELECTION SINCE 2002

There are several reasons why the recent nomination and confirmation of federal appellate court judges is important. First, those circuit appointments are most immediate. Moreover, neither the president nor Senate members may persuasively assert that lack of experience with the selection process was responsible for the complications which the White House and the upper chamber encountered. Third, the appointment process over that time resembled the processes for choosing judges that prevailed in 1997 and 2001. Judicial selection witnessed the same divisiveness, polarization, and bickering between Democratic and Republican senators as well as Democrats and administration officials. Indeed, these phenomena, which were Section I's focus, continued—and might have been exacerbated—during the latest period.

Since January 2002, a few specific dimensions of the process for nominating federal appeals and trial court judges seemed to have improved, even as numerous features remained almost identical, and certain ones may have deteriorated. For example, President Bush steadily tendered large numbers of district court nominees; most individuals appeared to be competent, ethical, and rather politically moderate.⁷³ The submissions' pace as well as the abilities, integrity and ideological perspectives of the nominees seemed to facilitate Senate consideration.⁷⁴

By contrast, the state of the appellate court nomination process apparently declined. For instance, throughout 2002, President Bush sent to the Senate the names of only three new nominees. The whole year, the president proposed no nominees for nine circuit vacancies, five of which had existed since the administration's beginning.⁷⁵

Throughout this time, the ABA continued to analyze and to rate the qualifications possessed by those individuals whom President Bush

⁷³See *supra* notes 34–38 and accompanying text (discussing Bush's moderate nominations).

⁷⁴See *supra* notes 34–38 and accompanying text (discussing Bush's moderate nominations).

⁷⁵See *supra* notes 34, 39 and accompanying text (citing moderate nominees and efficient committee hearings). *But see infra* note 91 and accompanying text (recounting Bush's slow nominations). The administration could have concluded that it was fruitless and therefore a waste of scarce resources to recommend more individuals when so many nominations were pending before the Senate.

forwarded.⁷⁶ The ABA Standing Committee on Federal Judiciary assigned most people strong rankings; it seemed to discharge its traditional responsibility in an expert, prompt, and careful manner, which may have rebutted contentions that the group's assessments and ratings are overly political and consume substantial temporal and economic resources.⁷⁷ Despite these ABA endeavors, the administration has not reconsidered the president's March 2001 decision to terminate early ABA involvement, a judgment that apparently fostered delay because Democratic senators required the organization's participation prior to Senate Judiciary Committee votes on candidates.⁷⁸

The process of confirming nominees appeared better in several ways, was analogous for others, and was worse in a few. For example, the Judiciary Committee conducted hearings on each attorney whom the White House had recommended for district court positions during spring 2002 and remained current almost the entire year; in 2002, the panel held twice the number of sessions for appeals court nominees by the August recess as the Committee had provided throughout 2001.⁷⁹ Appellate consideration improved, mainly because ten nominees testified in February, April, May, June, and September, although only a single nominee appeared at each hearing in many other months, and no nominee testified at the October hearings.⁸⁰ Moreover, four members of the Bush Administration's first appeals court package—whose names President Bush had submitted on May 9, 2001—never received hearings; the Senate took no final action respecting many Sixth Circuit nominees and two nominees for the District of Columbia Circuit.⁸¹ The Judiciary Committee also failed to conduct hearings on many nominees for numerous Michigan Sixth Circuit vacancies in either 2001 or 2002, even though the president had recommended three candidates during the initial year

⁷⁶I rely mainly in this paragraph on Groner, *supra* note 46, at 10; see also Ashcroft, *supra* note 32 (stating intent of Bush Administration to stop ABA involvement because ABA was not impartial); Jonathan Groner, *Judge Fight Within ABA*, LEGAL TIMES, Aug. 12, 2002, at 1 (same). See generally *supra* notes 44–46 and accompanying text (referring to ABA involvement and Republican opposition to process).

⁷⁷See *supra* note 44 (referring to ABA as overly political); see also *supra* note 76 and accompanying text (showing usefulness of ABA rankings).

⁷⁸See *supra* note 46 and accompanying text (regarding Bush's elimination of ABA review); see also *supra* note 45 and accompanying text (regarding Hatch's opposition to ABA contribution).

⁷⁹See *supra* note 48 and accompanying text (observing slow progress in 2001 and increase in 2002); see also *supra* notes 34, 53, 73 and accompanying text (discussing nominees and reasons for delay).

⁸⁰See United States Senate Comm. on the Judiciary, *Nominations Hearings*, at http://judiciary.senate.gov/nominations_hearings.cfm (last visited May 18, 2005) [hereinafter *Nominations*] (listing nomination hearings for 2002 to the United States Court of Appeals). See generally *supra* notes 39, 47–48 and accompanying text (discussing Judiciary Committee operation).

⁸¹See *supra* notes 34, 65–66 and accompanying text (discussing nominees and smooth confirmations).

and another prospect the subsequent June.⁸²

In 2002, little delay in the confirmation process could fairly be attributed to the Senate Majority Leader. Senator Tom Daschle expeditiously scheduled Senate floor votes and debates, when warranted, for many district and a number of appellate court nominees after he learned that the Judiciary Committee had granted approval, and the entire chamber promptly confirmed the nominees.⁸³

Quite a few candidates to whom the Judiciary panel did not give hearings were nominated to appeals court positions for which the Republican Senate had never seriously assessed Clinton Administration candidates. Thus, payback may explain Senate inaction with respect to GOP appellate nominees. Helpful illustrations are two Michigan judgeships and one Ohio seat on the Sixth Circuit, two North Carolina Fourth Circuit openings, and a pair of vacancies on the D.C. Circuit. The circumstances in Michigan and North Carolina are particularly illuminating. In the Clinton Administration, Republican senators required that Judge Helene White, whom President Clinton nominated for an empty Michigan seat, wait more time than any nominee in United States history for a hearing—which the Judiciary Committee failed to afford. Further, the Senate did not vote on four nominees whom Clinton suggested for the North Carolina appeals court positions.⁸⁴ For their part, Democrats granted no hearings to some of the individuals nominated by President Bush for these seven openings and other vacancies, because the nominees engendered substantial controversy, which often implicated their political views. This was true of nominees from Ohio, as well as candidates proffered for the Fourth, Ninth, and District of Columbia Circuits, all of whom sparked vociferous and frequently effective opposition from interest and advocacy groups.⁸⁵

Appellate court selection was also marked by charges, recriminations, and bitter partisan disputes. These phenomena were most palpable when senators analyzed controversial nominees. For instance, the Judiciary Committee rejected the appointment of Judges Owen and Pickering to the Fifth Circuit on ten to nine party-line votes after exceptionally contentious hearings and much

⁸²See *Vacancy List Archives* [hereinafter *Vacancies*], at <http://www.uscourts.gov/vacancies/archives.cfm> (last visited May 18, 2005) (listing vacant judicial seats in 2001 and 2002); see also *Nominations*, *supra* note 80 (observing that in April, Committee did conduct hearings for Sixth Circuit nominee Julia Gibbons). See generally Byron York, *Much More Democratic Obstruction*, NAT'L REV. ONLINE, Mar. 20, 2003, at <http://www.nationalreview.com/york/york032003.asp> (discussing senatorial blocking of numerous Sixth Circuit nominees).

⁸³*Nominations*, *supra* note 80. See generally *supra* note 55 and accompanying text (referring to stall tactics by minority party).

⁸⁴For Michigan, see sources cited *supra* notes 8, 82. For North Carolina, see sources cited *supra* note 9. A total of nine individuals whom President Clinton nominated for the seven appellate openings never received hearings.

⁸⁵The Fourth, Ninth, and D.C. Circuit nominees were Judges Terrence Boyle, Carolyn Kuhl, and John Roberts. Jonathan Groner, *Placing Bets on Bush Bench*, LEGAL TIMES, May 13, 2002, at 1; Savage, *supra* note 37.

spirited interchange, even though the entire Senate might have confirmed both jurists.⁸⁶ When the Committee decided against sending Owen's name to the chamber floor, President Bush remarked that this action was "bad for the country [and] the bench" and that he did not "appreciate it one bit, and neither do the American people"; President Bush accorded Pickering a recess appointment in 2004.⁸⁷ The Committee treated Third Circuit nominee District Judge D. Brooks Smith in a somewhat analogous manner; however, the Committee ultimately approved him by a twelve to seven margin, and the whole Senate confirmed the jurist in a sixty-four to thirty-five vote.⁸⁸

Democratic senators reiterated earlier public statements that the chamber would expeditiously approve nominees whom its members believed possessed strong qualifications and moderate ideological viewpoints, and the lawmakers honored this pledge over 2002 and 2003.⁸⁹ For example, Circuit Judges Carlos Bea, Richard Clifton, Allyson Duncan, Julia Gibbons, Jeffrey Howard, Terrence O'Brien, and Reena Raggi easily secured confirmation.⁹⁰

Notwithstanding the significant efforts that both the Democratically controlled Senate and the Bush Administration devoted to appeals court selection, the appellate appointments process apparently improved little throughout 2002. At the conclusion of the 107th Congress and of the President's initial two years, the regional circuits were left with almost the identical number of openings as they had experienced before the beginning of the 107th Congress and the Bush Administration.

When the 108th Congress assembled and organized shortly after the new year began, the Republican Party commanded a narrow fifty-one to forty-nine

⁸⁶Albert R. Hunt, *The Politics of Lifetime Appointments*, WALL ST. J., Mar. 14, 2002, at A19; Neil A. Lewis, *Democrats Reject Bush Pick in Battle over Court Balance*, N.Y. TIMES, Sept. 6, 2002, at A1; see also Sheldon Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 U.C. DAVIS L. REV. 695, 716 (2003); Neil A. Lewis, *On 2nd Try, U.S. Court Nominee Advances*, N.Y. TIMES, Mar. 28, 2003, at A14; Byron York, *Bored by Estrada? Owen May Prove to Be a Reprise*, THE HILL, Mar. 19, 2003, at 43; *infra* notes 91, 133 (discussing some controversial nominees, but generally cooperative confirmations).

⁸⁷See Julie Hirschfeld Davis, *Bush Defies Democrats in Senate, Installs Judge*, CHI. TRIB., Jan. 17, 2004, at 1. William Pryor was also recess appointed. Neil A. Lewis, *Bypassing Senate a Second Time, Bush Seats Judge*, N.Y. TIMES, Feb. 21, 2004, at A1; see also Helen Dewar, *Senate Panel Rejects Bush Court Nominee*, WASH. POST, Sept. 6, 2002, at A1 (discussing committee rejection of Owen); Charles Hurt, *Senate Panel OKs Owen for Judgeship*, WASH. TIMES, Mar. 28, 2003, at A6 (discussing eventual approval of Owen after political composition of Committee shifted).

⁸⁸148 CONG. REC. S7651 (2002); Audrey Hudson, *Senate Confirms Nominee to Court*, WASH. TIMES, Aug. 1, 2002, at A3; see also Neil A. Lewis, *Panel Approves Bush Appeals Court Pick*, N.Y. TIMES, May 23, 2002, at A19; *infra* note 139 and accompanying text (discussing Smith nomination); Jack Newfield, *The Right's Judicial Juggernaut*, NATION, Oct. 7, 2002, at 11.

⁸⁹See *Nominations*, *supra* note 80; *supra* notes 65–66 and accompanying text (citing examples of bipartisan cooperation in confirmation of moderate, qualified judges).

⁹⁰See *Nominations*, *supra* note 80; *infra* notes 96, 106, 108 and accompanying text (affording examples).

majority in the upper chamber. On January 7, 2003, President Bush renominated the individuals whom he had tendered for appellate court vacancies during his first half-term in office. He did not submit new people for certain other empty positions, although by March, only seven of these circuit judgeships lacked nominees.⁹¹ The appeals court selection process remained highly partisan and sharply contested, even as Republicans instituted numerous modifications meant to facilitate this dimension of appointments. For example, Senator Hatch, who reassumed responsibility for chairing the Judiciary Committee after a one-and-a-half year hiatus, quickly scheduled multiple hearings for appellate court nominees, while Tennessee Senator Bill Frist, the new Majority Leader, implemented measures that would expedite Senate floor debate and votes. Indeed, the alacrity with which the Committee chair noticed and conducted sessions elicited vehement objections from Democratic Committee members, who claimed that they lacked sufficient time to investigate the qualifications of the nominees. Illustrative was Hatch's late January determination that he would rely upon a single hearing for three controversial appeals court nominees whom the 107th Senate had given little serious examination; this announcement sparked adamant Democratic protests and culminated in a marathon ten-hour question and answer session during which nominees were questioned.⁹² The panel concomitantly granted hearings and committee votes to quite a few other nominees whom the 107th Senate had failed to confirm.⁹³ Nonetheless, a Democratic filibuster, which blocked Miguel Estrada's approval for the District of Columbia Circuit, delayed somewhat Senate floor debate and votes. The controversy that surrounded Estrada's nomination to the District of Columbia Circuit, which enjoys a reputation as the nation's second most important tribunal because of the crucial questions that it resolves, ultimately proceeded throughout the summer of 2003. The dispute's blend of judicial politics, selection norms, Senate traditions, and race, as well as high stakes—which implicated both the District of Columbia Circuit, whose active membership included equal numbers of Democratic and Republican appointees, and a possible Supreme Court

⁹¹Jonathan Groner, *Judiciary Battle Starts Anew*, LEGAL TIMES, Jan. 13, 2003, at 10; see also *Vacancies*, *supra* note 82. After the GOP had recaptured the Senate during 2002, the Democrats, in an apparent goodwill gesture, confirmed Fourth and Tenth Circuit Judges Dennis Shedd and Michael McConnell, who were quite controversial. See Richard Simon, *Senate OKs Long-Delayed Appeals Court Nomination*, L.A. TIMES, Nov. 20, 2002, at A22.

⁹²See Helen Dewar, *Republicans Push Speedy Action on Court Picks*, WASH. POST, Jan. 30, 2003, at A7; Jonathan Groner, *Hatch off to Fast Start on Judges*, LEGAL TIMES, Feb. 3, 2003, at 1; Neil A. Lewis, *G.O.P. Links Judicial Nominees to Thwart Opponents*, N.Y. TIMES, Jan. 30, 2003, at A21.

⁹³Illustrative are Ninth Circuit appointee Jay Bybee and Tenth Circuit appointee Timothy Tymcovich. See Henry Weinstein, *Conservative Confirmed as 9th Circuit Judge*, L.A. TIMES, Mar. 14, 2003, at B6; *Nominee Approved for Appeals Court*, DENVER POST, Apr. 2, 2003, at B1; see also *infra* note 122 and accompanying text (considering relations between Senate, Committee, and administration that could facilitate filling vacancies).

opening—complicated and slowed the appeals court confirmation process.⁹⁴

Selection in 2004 differed minimally from appointments in 2003, although the process slowed as traditionally occurs in presidential election years. Bush continued to nominate, and press for confirmation of, some individuals Democrats found controversial and, thus, persisted in filibustering, while the Senate did not agree to cloture on the filibustered nominees.

In sum, both the persistent vacancies dilemma and the current political problem continued to dilute the justice that the appellate judiciary and specific appeals courts provide. These difficulties require careful treatment. Thus, Part III examines many concepts that public officials in the three branches of the federal government could institute in response to the appointments complications.

III. ANALYSIS OF PREFERABLE SOLUTIONS

A. *The Executive Branch and the Senate*

The president and all senators, regardless of political party affiliation, must implement a number of measures to improve various selection responsibilities.⁹⁵ For instance, the Chief Executive, assistants who help him recruit judges, Senate members, and chamber personnel should undertake to streamline the appointments obligations that they discharge while meticulously calibrating assessment of nominee qualifications and character.

The Bush Administration and senators must directly confront—and institute efforts that will decrease—burgeoning politicization; they must appreciate that such actions may be highly controversial and difficult to secure. Executive and legislative branch officers should cooperate, reconcile diverse perspectives, anticipate conflicts before disputes materialize, and efficaciously treat differences when they do in fact arise. The officials must also halt or severely restrict particular actions, such as charging each other with obstructionism, which seem to reflect gamesmanship and the realization of immediate political benefit. Insofar as politicization hinders judicial appointments and creates the impression that government officers are elevating

⁹⁴See Helen Dewar, *Bush Calls for Limit to Senate Debates*, WASH. POST, Mar. 12, 2003, at A4; Neil A. Lewis, *Impasse on Judicial Pick Defies Quick Resolution*, N.Y. TIMES, Mar. 30, 2003, at A16. The ongoing filibusters may have similar effects. See Goldman, *supra* note 86, at 707–16; Helen Dewar, *Nomination of Tex. Judge Is Blocked*, WASH. POST, May 2, 2003, at A2; Lewis, *supra* note 86; Press Release, The White House, Office of the Press Secretary, President Bush Says Filibuster Decision a “Disgrace” (Mar. 6, 2003), at <http://www.whitehouse.gov/news/releases/2003/03/20030306.html>.

⁹⁵See *supra* note 3 (explaining constitutional division of powers). The persistent dilemma’s best solution would apparently be the authorization of sufficient new positions to accord the bench every judge now authorized; this would avoid many theoretical, practical, and legal difficulties. See Tobias, *supra* note 1, at 569–70. Other approaches may only limit effectively irreducible temporal restraints. For an assessment of numerous remedies, a number of which apply to the regional circuits, see *id.* at 552–73.

short-term, partisan advantage over the best interests of the United States and of the federal courts, the behavior may limit public respect for those who are involved with selecting judges and even for the Third Branch itself.

The above ideas pertain both to the appellate system generally and to specific appeals courts. For example, the president must work constructively with senators throughout all regions. An effective technique on which he should capitalize is consultation—that is, informally contacting and seeking the advice of these lawmakers and other Senate leaders prior to official nomination. Express consultation or analogous interactions with Democratic Senate members from California, Hawaii, and New York might have prompted comparatively expeditious appointment for Ninth Circuit Judges Bea and Clifton and Second Circuit Judges Raggi and Richard Wesley.⁹⁶ In contrast, abbreviated consultation, or undervaluing the notions articulated during consultation, may have delayed the submission of certain Bush designees and the confirmation of some nominees.⁹⁷ Moreover, choosing a nominee for the next vacancy on each appellate court provides an excellent opportunity to solicit this input. Officials who are responsible for choosing candidates and for shepherding them through the approval process should clearly and thoroughly communicate before and after the administration tenders its nominations.

All senators who represent jurisdictions that are situated in a particular regional circuit must cooperate with the president and with one another on important matters, such as whether Senate members will continue to honor the traditions that hold that appeals court judges should be residents of the states in which positions open, and should have chambers in those states.⁹⁸ When a seat becomes empty, senators from the jurisdiction could identify and propose to the president an extremely well-qualified individual. A related concept is the identification of acceptable compromise designees for intractable or prolonged vacancies, namely those which now remain in California and Michigan. Chamber members might also think about implementing an intrastate merit-

⁹⁶See *District Judge Raggi Gets Big Promotion*, NEWSDAY, Sept. 21, 2002, at A12; David G. Savage, *Bush Court Nominee Is Voted Down*, L.A. TIMES, Sept. 6, 2002, at A17; see also *Politics Hinders Senate Confirmation Process*, HONOLULU STAR-BULLETIN, May 12, 2002, at D2 (analyzing Clinton nominations). See generally *supra* notes 88–89 and accompanying text (illustrating expedited nominations for moderate judges).

⁹⁷Examples of candidates not nominated are Peter Keisler, for the Fourth Circuit, and Representative Christopher Cox, for the Ninth Circuit. See *supra* note 42 and accompanying text (highlighting paybacks for certain circuits due to Clinton nominee treatment); see also *infra* note 110 and accompanying text (illustrating political role in denial of hearings). The phenomena described in the text may explain Senate inaction on the Bush Sixth Circuit nominees from Michigan. See *supra* notes 8, 82 and accompanying text (citing role of in-state senator consultation); *infra* notes 105, 112–13, 134–35 and accompanying text (discussing solutions, such as trades and ABA scrutiny).

⁹⁸Senate opposition to Fourth Circuit nominee Claude Allen shows this. See Letter from Alberto Gonzales, White House Counsel, to Sen. Barbara Mikulski (D-Md.) and Sen. Paul Sarbanes (D-Md.) (July 17, 2003); Letter from Sen. Mikulski and Sarbanes, to Sen. Orrin Hatch (R-Utah) and Sen. Patrick Leahy (D-Vt.) (July 11, 2003).

selection group for appellate court openings. Such a group might resemble the Circuit Judge Nominating Commission fashioned and employed by President Jimmy Carter,⁹⁹ the similar committee that Michigan Democratic Senators Levin and Stabenow broached in 2001,¹⁰⁰ or the district court panel that the Chief Executive as well as California Democratic Senate members Dianne Feinstein and Barbara Boxer have relied upon for the last three years.¹⁰¹ This type of entity could facilitate the appeals court appointments process in the two jurisdictions mentioned immediately above because Republicans have a narrow fifty-five to forty-four margin in the Senate in the 109th Congress. Finally, if that prospect and other remedial mechanisms now available do not cure or temper the appellate selection dilemma, the current administration and senators must redouble efforts to break impasses that now prevail in these states and elsewhere.¹⁰²

B. The Executive Branch

Presidents Bill Clinton and George W. Bush bear considerable responsibility for the situation that exists today.¹⁰³ The present Chief Executive has recommended sufficient able, ethical lawyers with moderate ideological views for the district bench, and the Senate Judiciary Committee can process these nominees. He must continue nominating more exceptionally qualified attorneys, in particular to the regional circuits, at a rate that will facilitate senators' consideration. President Bush might have proceeded with caution

⁹⁹See, e.g., LARRY C. BERKSON & SUSAN B. CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES 1-2* (1980) (detailing Carter's commission); Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 *JUDICATURE* 136, 140 (1987) (highlighting merit commission activities); see also GOLDMAN, *supra* note 4, at 238-50, 260-61, 267-68, 270, 274, 290 (analyzing Carter's commission and Reagan's disbanding of it). See generally GERHARDT, *supra* note 4, at 9, 119-20, 146-47 (discussing Carter's commission).

¹⁰⁰See Editorial, *Empty Chairs on the Bench*, GRAND RAPIDS PRESS, Nov. 27, 2001, at A12; Carl Levin & Debbie Stabenow, *Bipartisanship Can End Judge Stalemate*, GRAND RAPIDS PRESS, Dec. 5, 2001, at A15; see also John Wagner, *Panel Would Suggest Nominees*, NEWS & OBSERVER, June 19, 2002, at B5 (assessing North Carolina Bar Association recommendation to create similar North Carolina entity); York, *supra* note 82 (discussing negotiations for bipartisan commission).

¹⁰¹See Carla Marinucci, *Feinstein, Boxer Given a Say Over Judges*, S.F. CHRON., Apr. 27, 2001, at A3; Henry Weinstein, *Process of Judge Selection Set Up*, L.A. TIMES, May 30, 2001, at B1; see also Jason Hoppin, *Court Tosses out Suit Against Groups that Vet Judges for Bush*, THE RECORDER, Apr. 1, 2003, at 1 (noting that suit would have shed light on judicial nomination process).

¹⁰²Less traditional ideas, such as trades, may be indicted. See *infra* notes 109-15 and accompanying text (explaining need for Bush Administration and Senate to do more).

¹⁰³In early 1997 and 2001, President Clinton and President Bush submitted comparatively small numbers of nominees, most of whom appeared highly competent and politically moderate; however, Senator Hatch and Senator Leahy asserted that quite a few nominees were not, in fact, moderate. See *supra* notes 34-38, 40-42 and accompanying text (discussing nominations and views of senators).

when he first assumed office, because the mistakes committed by nascent administrations have sometimes eroded credibility, delayed appointments, and even threatened selection.

The president must examine and institute conciliatory devices. These techniques could be productive, and officials responsible for identifying candidates and facilitating appointments can rely on the measures' prior employment if dependence on less cooperative approaches later becomes necessary. The Chief Executive should invoke practices that will enhance the performance of administration duties. For instance, he and his assistants might compile a list of designees who could fill all present and future appeals court vacancies.¹⁰⁴ President Bush might also consider revisiting the judgment to eliminate advance ABA scrutiny, because termination of the organization's input has delayed the selection process, especially for appellate court seats.¹⁰⁵ A related promising alternative would be the nomination of more lawyers whom Democrats will deem acceptable. For example, Second Circuit Judge D. Barrington Parker, whom President Clinton had initially named to the United States District Court for the Southern District of New York during 1994, received prompt Senate approval.¹⁰⁶ Elevation is a profitable mechanism, as district judges nominated for appeals courts rarely encounter complications securing appointment.¹⁰⁷ Indeed, President Reagan placed on the district bench Julia Gibbons, who became the first person the Bush Administration named to the Sixth Circuit—which currently has two vacant judgeships.¹⁰⁸

The Chief Executive should at least consider forwarding additional

¹⁰⁴President Bush could enhance nomination and confirmation through consultation with the Committee and with senators and by implementing a merit-selection commission. *See supra* notes 99–101 and accompanying text (discussing merit selection commission).

¹⁰⁵*See supra* notes 45–46 and accompanying text (discussing abandonment of ABA input).

¹⁰⁶Parker was easily approved because he had been confirmed once, enjoyed Democrats' support, and had served as a district judge, which informed an analysis of his qualifications. Parker's promotion resembled President Clinton's elevation of Judge Sonia Sotomayor, whom President Bush's father had named to the bench. *See* Neil A. Lewis, *After Delay, Senate Approves Judge for Court in New York*, N.Y. TIMES, Oct. 3, 1998, at B2; *see also supra* note 66 and accompanying text (explaining Parker's confirmation).

¹⁰⁷All of the presidents who have served since 1981 have elevated significant numbers of federal district judges to the appellate courts. *See* 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; Tobias, *supra* note 47, at 752; *see also supra* note 106 (illustrating examples of district court judges' elevation to appellate courts). *But see supra* notes 84–86 and accompanying text (discussing opposition to some appeals court nominees).

¹⁰⁸*See* James W. Brosnan, *Senate Confirms Gibbons 95-0 for Appeals Bench*, MEMPHIS COM. APPEAL, July 30, 2002, at B2; Kathleen Gray, *Judges Confirmed to U.S. 6th Circuit Court Posts*, DETROIT FREE PRESS, June 10, 2005, at 1; Editorial, *At Last, a Beginning*, CIN. POST, July 31, 2002, at 12A; *see also* UK Professor Confirmed to Appeals Court, LOUISVILLE COURIER-J., Nov. 16, 2002, at 3B (discussing John Rogers' confirmation to Sixth Circuit). *See generally supra* note 42 (discussing partisan politics hindering Sixth Circuit appointments).

competent lawyers who are affiliated with the Democratic political party.¹⁰⁹ This notion could be quite effective for appellate courts that have had lengthy openings, encounter significant caseloads, or include jurisdictions that normally elect Democrats to statewide public offices. Illustrative are Maryland—whose Senators apparently stymied nomination of a Bush designee because the administration had neglected to consult them and because the candidate had never practiced law in the jurisdiction—and the Sixth Circuit, a court that today experiences unfilled judgeships and confronts one of the nation's most substantial dockets.¹¹⁰ Republican and Democratic infighting seems to explain the Michigan positions that remain unoccupied on the Sixth Circuit.¹¹¹

For courts with multiple longstanding vacancies and large numbers of appeals, and upon which the parties cannot reach accord, Bush might think about “trades,” such as enabling Democrats to recommend one third of the designees.¹¹² Instructive is the proposal by Senators Levin and Stabenow that they would support certain individuals whom the Bush Administration has tapped for Michigan openings if the Judiciary Committee grants hearings to Clinton nominees from the jurisdiction—a suggestion which the White House apparently rebuffed when it tendered nominations to fill each vacancy.¹¹³ The president could also exchange judgeships legislation that authorizes new appellate and district court positions for Democratic recommendations of some candidates, thus initiating a bipartisan judiciary; this approach may resolve the

¹⁰⁹See *supra* notes 37, 66, 105 and accompanying text (suggesting opposition party appointments).

¹¹⁰For Maryland, see Lewis, *supra* note 32; see also *supra* notes 41, 98 and accompanying text (noting Maryland senators' reaction to Bush nominations); Carl Tobias, *The Bush Administration and Appeals Court Nominees*, 10 WM. & MARY BILL RTS. J. 103, 110, 114 (2001).

¹¹¹See *The Federal Court Blockade*, GRAND RAPIDS PRESS, May 12, 2002, at G2; Jonathan Groner & Jonathan Ringel, *Judicial Nominee Horsetrading Heats up as Confirmation Process Gets Weighed*, AM. LAW. MEDIA, at <http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZ0136F2RC> (Aug. 31, 2001); *Senate Nomination Process Needs Repair*, DETROIT NEWS, Mar. 4, 2002, at 8A; see also *supra* notes 8, 82 (citing difficulties in Michigan).

¹¹²Senator Biden observed that Republicans had previously broached a similar “informal agreement” during 1997 but that this proposition contravened two centuries of American tradition. See 143 CONG. REC. S2538, S2541 (1997); see also sources cited *supra* note 40 (discussing Republican insistence on being able to suggest nominees during Clinton years). The notion of “horsetrading” judgeships remains a very controversial concept. See Groner & Ringel, *supra* note 111. See generally GERHARDT, *supra* note 4, at 157–63 (discussing wish of senators to have greater involvement).

¹¹³See Levin & Stabenow, *supra* note 100; see also sources cited *supra* notes 8, 82, 100 (citing problems in nominations for Sixth Circuit). North Carolina Senator John Edwards similarly delayed blocking Judge Terrence Boyle's consideration for the Fourth Circuit until Edwards could discuss with Bush possible selection of a Clinton nominee. See Matthew Cooper & Douglas Waller, *Bush's Judicial Picks Could Be a Battle Boyle*, TIME, May 21, 2001, at 22; see also *supra* notes 9, 42 and accompanying text (citing problems in North Carolina nominations).

current dilemma.¹¹⁴ The Chief Executive might even agree with Senators Arlen Specter, Republican from Pennsylvania and the new Judiciary Chair, and Leahy on a prearranged number of people whom the chamber would approve in a specific year.¹¹⁵

If conciliatory endeavors are unsuccessful, President Bush and administration officials should consider and perhaps implement particular techniques that seem less cooperative. For instance, the Chief Executive could use the presidency even more as a bully pulpit to shame or blame the Democrats for specific conduct, such as the filibusters of several circuit nominees. He might aggressively force the judicial selection issue by taking the question to the public or making it a Senate election issue. Analogous devices might include the submission of lawyers for each current opening or recess appointments, measures that could pressure the Senate by publicizing or dramatizing how sustained vacancies can undermine the delivery of appellate justice. President Clinton's Fourth Circuit recess appointment of Judge Roger Gregory might well have facilitated his confirmation during the subsequent administration, but this particular circumstance was quite unusual. Judge Gregory is the first African American to serve on the Fourth Circuit. No Chief Executive since President Carter depended on recess appointment for judicial selection, and significant legal, political, and pragmatic restraints limit the mechanism's efficacy, as Judges Pickering and Pryor illustrate.¹¹⁶ The Bush Administration has deployed, or has threatened to invoke, these and similar kinds of techniques mainly when leveraging Democratic senators, but the president has exercised caution, and has evidenced concern about the maintenance of a dignified appointments process.¹¹⁷

The above-mentioned propositions implicate the appellate courts as a group and separately. For example, consultation has often been advantageous and has seemed to entail little political expense. Insofar as discounting the advice that Senate members furnished stalled the candidacies of nominees or designees whom Democrats in various jurisdictions apparently opposed, the

¹¹⁴See Goldman & Slotnick, *supra* note 36, at 271. President Eisenhower made a similar proposal in 1960. See *id.*; see also *supra* note 63 and accompanying text (affording judgeships bill and Judicial Conference proposals).

¹¹⁵I am not recommending that President Bush institute the ideas in this paragraph, but the president should evaluate them and be pragmatic about approving judges. President Bush might assess how important openings are and may conclude that filling the federal judiciary is less important than certain principles, such as appointing the type of jurists he prefers.

¹¹⁶For example, when the Senate does not accord judges permanent appointments, what effect will be assigned the cases in which they participated? See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 125 S.Ct. 1640 (2005); *United States v. Woodley*, 751 F.2d 1008, 1009–14 (9th Cir. 1985) (discussing legality of recess appointments); Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758, 1758–59 (1984) (same). See generally *supra* note 66 and accompanying text (citing smooth confirmation of Gregory).

¹¹⁷See Remarks, *supra* note 34; Lewis, *supra* note 66; see also sources cited *supra* note 48 (evidencing blame for vacancies leveled at Democrats).

Chief Executive may wish to broach future prospects with the elected officials or to give their ideas more substantial weight. Had the president or administration employees responsible for selecting judges conferred with California, Maryland, Michigan, and North Carolina Democratic senators regarding lawyers under White House assessment, the Chief Executive might have foreseen and even avoided the difficulties that materialized when the legislators later objected. The president may have at least minimized the problems.¹¹⁸

The president should also keep in mind that concerns about the political viewpoints held by nearly all judicial nominees seemingly delayed assessment and confirmation. To the extent that nominees' perceived ideological perspectives triggered interest group opposition, prolonged appointment, and sometimes fostered rejection, the Chief Executive could forward individuals who are less doctrinaire or might be more realistic about the significant influence which the organizations can wield.¹¹⁹ The president should concomitantly refrain from employing selection measures that might perpetuate and even accentuate the deleterious cycle of paybacks. Illustrative were the Chief Executive's January 2003 decisions to renominate Judges Owen and Pickering for the Fifth Circuit, despite the fact that the Judiciary Committee had opposed floor consideration of each jurist on a ten to nine vote in 2002, and to recess appoint Pickering in 2004. Submitting nominations twice and using a recess appointment may have encouraged Democrats to prevent or delay confirmation of these and other nominees by using filibusters.

C. *The Senate*

All senators must analyze and implement cooperative mechanisms because the upper chamber also bears responsibility for the existing appellate vacancies. GOP lawmakers should remember that the Democratic Senate approved more appeals court judges—notwithstanding how politicized selection was—when Republicans were Chief Executives.¹²⁰ Democrats might want to keep in mind that the public could hold them accountable for the difficulties that lengthy openings can impose and that Republicans once again

¹¹⁸See *supra* notes 8–9, 41, 75, 81, 84, 96–97, 110–13, *infra* notes 131–35 and accompanying text (illustrating party politics hindering nominations).

¹¹⁹Neil A. Lewis, *Bush Judicial Choice Imperiled by Refusal to Release Papers*, N.Y. TIMES, Sept. 27, 2002, at A28; David M. Savage, *Despite Own Views, Nominee Would Back 'Roe'*, L.A. TIMES, Sept. 19, 2002, at A13; see also Jonathan Groner, *Abortion Returns to Nominations Stage*, LEGAL TIMES, July 22, 2002, at 1; *supra* notes 42, 84–86 and accompanying text (recognizing role of politics in nominations). See generally GERHARDT, *supra* note 4, at 217–29 (discussing interest group pressure); GOLDMAN, *supra* note 4, at 310–11 (using Daniel Manion's nomination as example of purely party opposition).

¹²⁰See *supra* notes 47, 50–51 and accompanying text (referencing low confirmation rates during Clinton Administration); see also Hartley & Holmes, *supra* note 24, at 275–77 (same).

have a Senate majority.¹²¹

Democratic senators, therefore, should depend on conciliatory selection techniques. These members must be receptive to potential administration overtures with frank, informative consultation as well as swift approval of each Clinton district court appointee whom President Bush might decide to elevate—and of additional nominees who possess rather moderate ideological perspectives. Moreover, the lawmakers could invoke many specific cooperative measures. For example, when Democrats think Republican bench candidates are unacceptable, the legislators might suggest compromise designees whom they believe preferable.¹²² Democratic Senate members may also want to review carefully the numerous particularized recommendations for improvement in discrete phases of judicial selection that President Bush espoused and publicized less than one week before the November 2002 elections. However, a number of specific propositions that President Bush championed—such as advocating that active circuit and trial judges declare their intention to assume senior status at earlier junctures and imposing strict deadlines on particular stages in court appointments, namely Judiciary Committee hearings and Senate floor debates and votes—appear impractical and could undermine and even contradict venerated judicial and senatorial prerogatives and traditions.¹²³

Insofar as slowed nominee examination has left appellate seats open, the upper chamber could think about specific mechanisms that will expedite appeals court appointments. For instance, the Judiciary Committee might continue to grant hearings and panel votes on more attorneys with the rather limited evaluation procedures Senator Hatch and the Committee members seemingly followed in 2003, and the panel may wish to abrogate sessions for those individuals who prompt no controversy. To the extent Democratic senators have delayed nominees because of their ideological outlooks, longstanding norms and some recent practices indicate that people

¹²¹See sources cited *supra* notes 32, 48, 69–72 (recognizing problems with judicial vacancies and who is blamed). See generally Newfield, *supra* note 88, at 11–16 (discussing problems stemming from role of ideology in confirmation hearings).

¹²²Washington Senators Slade Gorton, a Republican, and Patty Murray, a Democrat, agreed to suggest designees in 1997, as have Nevada Senators John Ensign, a Republican, and Harry Reid, a Democrat, since 2001. See 149 CONG. REC. S3678–S3688 (2003) (statements of Sen. Ensign, Sen. Hatch, and Sen. Reid); Tony Batt, *With Feeling and Fealty, Reid Counsel Helps Guide Judges Through Senate*, LAS VEGAS REV.-J., Aug. 26, 2001, at 2F; Callaghan, *supra* note 40. Senator Frist should reconcile disputes over the process and over nominees, and he might want to seek assistance from Senators Leahy and Reid.

¹²³See Mike Allen & Amy Goldstein, *Bush Has Plan to Speed Judicial Confirmations*, WASH. POST, Oct. 31, 2002, at A21; Edwin Chen & Henry Weinstein, *Liberals Bracing for Quick Judicial Action by Bush*, L.A. TIMES, Nov. 7, 2002, at A22. See generally Bermant et al., *supra* note 1, at 333–44 (suggesting solutions to vacancy problem); *infra* note 125 and accompanying text (suggesting compromises).

recommended should have Committee hearings and ballots.¹²⁴ Senate Majority Leader Frist could apply techniques to encourage greater assessment in the full chamber. For example, he might facilitate votes on larger numbers of nominees by scheduling floor consideration immediately after he receives notification of positive Committee action. Insofar as disputes over specific persons may have fostered delay, Frist should attempt to permit more floor debate and additional final ballots on the individuals, although Democrats' ongoing use of filibusters might thwart these efforts.¹²⁵

Senate members must calculate the necessity for thorough exploration and prompt approval of nominees while confirming lawyers with the requisite ability and the character to render superior federal judicial service. Democrats could ask whether they now overemphasize ideology, just as Republicans should have rejected the quixotic attempt to discern whether Clinton Administration nominees would engage in "judicial activism" once on the bench.¹²⁶ Article II language prescribing Senate advice and consent¹²⁷ envisions that the chamber members will scrutinize nominees' competence and ethics as well as the degree to which nominees appreciate and respect separation of powers;¹²⁸ senators should not delay a candidate to evaluate how

¹²⁴See *supra* notes 47, 75–78 and accompanying text (discussing scheduling and ABA analysis); see also *supra* notes 34–38 and accompanying text (showing large groups of nominees submitted immediately before Senate recess). The 2002 party-line votes against Judges Owen and Pickering may be paybacks. See *supra* notes 86–87 and accompanying text (discussing Owen and Pickering). Now that the panel has sufficient, acceptable names to facilitate processing, President Bush may warrant less criticism.

¹²⁵Democrats premise filibusters on lack of information; however, they might consider a compromise by, for instance, allowing a floor vote in exchange for nomination of one of Clinton's nominees. The debate before confirmation of Circuit Judges Merrick Garland, Marsha Berzon, William Fletcher, and D. Brooks Smith included some candid, healthy exchange. See 143 CONG. REC. S2515–41 (1997); 144 CONG. REC. S11872 (1998); sources cited *supra* note 87; see also Neil A. Lewis, *After Long Delays, Senate Confirms 2 Judicial Nominees*, N.Y. TIMES, Mar. 10, 2000, at A16 (citing similar healthy exchange with Judge Paez); *Memorandum of Understanding on Judicial Nominations*, N.Y. TIMES, May 24, 2005, at A9 (agreeing to reduce filibuster use and to vote on nominees).

¹²⁶See generally, *The Judicial Nomination and Confirmation Process: Hearings Before the Senate Judiciary Subcomm. on Administrative Oversight and the Courts*, 107th Cong. 1–4 (2001) [hereinafter *2001 Hearings*] (statement of Sen. Schumer). This hearing discusses "the question of what role ideology should play in the selection and confirmation of judges." *Id.* at 1 (statement of Sen. Schumer); see also *Judicial Activism: Defining the Problem and Its Impact, Hearings Before the Senate Judiciary Subcomm. on the Constitution, Federalism, and Property Rights*, 105th Cong. 1 (1997) (statement of Sen. Ashcroft) (discussing necessity of these hearings to examine "problem of judicial activism"); 143 CONG. REC. S2515 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch) (same); Newfield, *supra* note 88, at 11–16 (discussing problems posed by emphasis on ideology).

¹²⁷U.S. CONST. art. II, § 2.

¹²⁸See *2001 Hearings*, *supra* note 126, at 8–9 (statement of Sen. Sessions); see also Albert Alschuler, *Making Ideology an Issue*, CHI. TRIB., Sept. 18, 2002, at 23 (discussing whether views should block nominee despite qualifications); Douglas Laycock, *Forging Ideological Compromise*, N.Y. TIMES, Sept. 18, 2002, at A31 (questioning Senate inquiry into legal views of nominees).

the lawyer, if appointed, would resolve substantive questions. Probing these matters may compromise the judiciary's independence.¹²⁹

Democrats might also consider approving people whose qualifications would make them excellent judges, as the GOP often so behaved when Republicans held a Senate majority and a Democrat occupied the White House.¹³⁰ Certain Democratic senators remain disturbed about the treatment that the GOP afforded numerous Clinton nominees, while some Republicans continue to resent Judge Bork's 1987 Senate defeat and the acrimonious confirmation fight over Justice Thomas, activities that the GOP thinks reflected opposition to the jurists' decisionmaking.¹³¹ Democrats and Republicans alike must reject this poisonous dynamic that is characterized by incessant paybacks and should seriously entertain some global agreement or at least forge a modicum of consensus.¹³²

These notions implicate the appellate system and each appeals court. For instance, Democrats from geographic locales that have experienced deadlocks could propose compromises or trades. Illustrative of the first suggestion are the Maryland Senate members, who should recommend a moderate candidate whom Republicans would deem acceptable to fill a Fourth Circuit vacancy.¹³³ California furnishes a helpful example of potential trading.¹³⁴ Democrats there

¹²⁹See generally UNCERTAIN JUSTICE POLITICS AND AMERICA'S COURTS 1-75, 121-71, 205-42 (2000) (supporting proposition); Symposium, *Judicial Independence and Accountability*, 72 S. CAL. L. REV. 315 (1999) (same). Numerous Republicans apparently believe that Democratic senators' decision to filibuster Miguel Estrada's nomination illustrates these ideas. See sources cited *supra* note 93 (discussing Estrada filibuster).

¹³⁰See *supra* notes 47, 76-77 and accompanying text (citing procedures during Clinton Administration and ABA analysis of qualifications). See generally *supra* notes 34-38 and accompanying text (discussing nominations of moderates).

¹³¹See Gest & Lord, *supra* note 54, at 24; Goldman & Slotnick, *supra* note 36, at 256; Melone, *supra* note 5, at 68. See generally MARK GITENSTEIN, MATTERS OF PRINCIPLE (1992) (recounting Bork's rejection); PAUL SIMON, ADVISE AND CONSENT (1992) (discussing confirmation of Justice Thomas). Democrats' actions may be distinguishable, as Supreme Court selection is so critical, and they rarely so assessed lower court nominees. See 143 CONG. REC. S2538-41 (1997) (statements of Sen. Biden and Sen. Sarbanes). See generally Michael J. Gerhardt, *Supreme Court Selection as War*, 50 DRAKE L. REV. 393 (2002) (assessing strategies during Supreme Court nominations).

¹³²See, e.g., sources cited *supra* notes 111-14, 126 (citing controversies and proposed solutions); see also *supra* notes 42, 84-88 and accompanying text (discussing political motives blocking confirmations or creating delays).

¹³³See, e.g., *supra* notes 41, 110 and accompanying text (recognizing problems with Maryland's situation). But see Mike Allen, *Virginian Picked for 4th Circuit Judgeship*, WASH. POST, Apr. 29, 2003, at B1 (citing Bush's nomination of two conservatives to Fourth Circuit). The 2002 Committee rejection, and 2003 renomination, of Fifth Circuit nominees Owen and Pickering as well as the 2004 recess appointment of Pickering make that situation too sensitive for either approach. See *supra* notes 86-87, 90, 123 and accompanying text (explaining past problems and benefits of moderate nominees and parties working together).

¹³⁴See, e.g., Howard Mintz, *Bush Picks Latina for Appeals Court*, SAN JOSE MERCURY, Feb. 14, 2003, at 19A (discussing Ninth Circuit appointment of Consuelo Callahan); Henry Weinstein, *Conservative State Judge Nominated for Federal Bench*, L.A. TIMES, Feb. 14, 2003, at B8 (same); see also 149 CONG. REC. S4604 (2003) (statement of Sen. Leahy) (naming

might reduce opposition to a stalled Republican appellate court nominee, if Bush later forwards a nominee whom they proffered.¹³⁵ Analogous circumstances in the Sixth Circuit could warrant similar measures. For instance, the Michigan senators might end or temper the stalemate that has prevented the Republican Administration from naming someone to this jurisdiction's two unoccupied appeals court seats and that denied both Clinton nominees thorough Senate examination.¹³⁶ Senators Levin and Stabenow have intimated that they may be willing to support a Bush Administration candidate, if the White House proposes a Clinton nominee.¹³⁷

D. The Judicial Branch

The federal courts are less able than the political branches to improve the existing situation, because Article II of the Constitution assigns the Chief Executive and the Senate principal responsibility for selection. Nonetheless, the judiciary could undertake increased efforts to publicize vacancies and the grave difficulties that they often create.¹³⁸ The Third Branch should also develop salutary methods for enhancing appointments that the president and the Senate in turn implement. Members of the bench might also directly ask or encourage senators to facilitate the process. For example, when Third Circuit Chief Judge Edward Becker requested that the Senate fill more openings on that tribunal, his personal advocacy may well have led Senator Biden to favor a

qualified Clinton nominees who never got hearings); Neil A. Lewis, *Judicial Nominee Distances Herself from Past Positions*, N.Y. TIMES, Apr. 2, 2003, at A15 (discussing Bush nominee Carolyn Kuhl); *supra* notes 112–13 and accompanying text (suggesting that trades would be beneficial).

¹³⁵See *supra* notes 9, 42, 74, 80, 84–85, 118 and accompanying text (noting partisan politics in appeals court confirmations); see also *infra* note 144 and accompanying text (suggesting fewer judges may be better for circuits). Recent actions may preclude this option in the near term. See Allen, *supra* note 133 (relating Bush's continued nominations of conservatives); Mintz, *supra* note 134 (noting Democratic opposition to appointments of conservatives to Ninth Circuit).

¹³⁶See *supra* notes 8, 42, 82, 84, 97, 107, 110–12 and accompanying text (discussing phenomenon of Senate opposition).

¹³⁷My ideas depend on seats being vacant, how the filibusters are resolved, and ongoing contention. See *supra* notes 8, 40–42, 81, 84–85, 97–98, 113, 118 and accompanying text (citing political reasons for continued vacancies). For recent ideas, compare *Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right to Consent, Hearing Before the Senate Judiciary Subcomm. on the Constitution, Civil Rights and Property Rights*, 108th Cong. 3 (2003) (statement of Sen. Cornyn) (discussing abuse of filibusters to block nominees), with Press Release, Sen. Charles E. Schumer, Schumer Proposes New Confirmation Process for Judicial Nominations (Apr. 30, 2003), at http://schumer.senate.gov/SchumerWebsite/pressroom/pr-archives_judiciary.html (last visited May 18, 2005) (noting problem of extremists and suggesting state commissions).

¹³⁸The federal judiciary's institution of these types of efforts could increase public awareness of, and may galvanize citizen support to rectify or ameliorate, the vacancies problem; such endeavors might even accentuate the sensitivity of executive and legislative branch officials to the important need for expeditious judicial appointments.

controversial nominee.¹³⁹ However, this technique has rather limited application, because some could find the measure overly political or might believe that it threatens the notion of an independent judiciary.¹⁴⁰

Numerous concepts above implicate the appellate system as a whole, as well as specific appeals courts. For instance, all judges who are members of particular regional circuits may want to reconsider whether the active judicial complements that Congress now authorizes for their courts permit the tribunals to deliver justice and, if not, exactly how much supplementation is indicated. The Senate Judiciary Subcommittee on Administrative Oversight and the Courts found that none of the twelve regional circuits required any additional seats, and a majority of judges who serve on three tribunals have concurred with this determination.¹⁴¹ Nevertheless, a study commission, which lawmakers established in 1997 to analyze and formulate suggestions for improving the regional circuits, detected that members of significantly more courts believed their tribunals would function better with larger contingents.¹⁴²

The issue of optimal circuit size has provoked sharp disputes and been quite controversial in the appeals courts, especially among the appellate bench.¹⁴³ For example, then-Chief Judge J. Harvie Wilkinson, III, testified before the Senate panel eight years ago that the Fourth Circuit worked effectively with fewer active judicial positions than Congress had authorized,¹⁴⁴ and Senator Helms invoked similar ideas when he opposed multiple Clinton nominees for North Carolina vacancies on the appeals court.¹⁴⁵ However, the members of the Fourth Circuit positively answered in the highest percentages study commission survey questions that asked whether

¹³⁹The controversial Bush nominee for the Third Circuit was District Judge D. Brooks Smith. See Jonathan Groner, *Stars Align for Circuit Nominee*, LEGAL TIMES, May 27, 2002, at 1; see also sources cited *supra* note 88 (noting Smith's confirmation).

¹⁴⁰See, e.g., sources cited *supra* notes 126–29 (analyzing judiciary independence). See generally Lauren Robel, *Impermeable Federalism, Pragmatic Silence, and the Long Range Plan for the Federal Courts*, 71 IND. L.J. 841, 846–51 (1996) (discussing judiciary's limited role).

¹⁴¹See *supra* notes 59–61 and accompanying text (discussing hearings on this issue). But see *infra* notes 142, 146–47, 150 and accompanying text (discussing advantages of larger judiciary).

¹⁴²See COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, WORKING PAPERS 18–21 (1998) [hereinafter WORKING PAPERS]; see also COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 77 (1998) [hereinafter FINAL REPORT]. Congress authorized the commission in 1997, and the commission completed its study in 1998. See *id.* at 1.

¹⁴³See, e.g., sources cited *supra* note 17 (discussing opposing views on increase in number of judges). See generally GORDON BERMANT ET AL., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS 23–53 (1993) (discussing both sides of argument).

¹⁴⁴*Grassley Hearings II*, *supra* note 60 (discussing hearings).

¹⁴⁵See David Firestone, *With New Administration, Partisan Battle Resumes over a Federal Appeals Bench*, N.Y. TIMES, May 21, 2001, at A13; see also *supra* notes 9, 42, 84 and accompanying text (discussing issues in North Carolina). This conflict did not prevent Senator Helms from recommending that President Bush nominate Judge Boyle. See Firestone, *supra*.

the court's growth would enable the jurists to "correct prejudicial errors," "minimize appellate litigation costs," avoid inconsistent decisionmaking, and "hear oral argument."¹⁴⁶ Moreover, the tiny percentages of oral arguments and published opinions that the Fourth Circuit produces suggest that the tribunal might dispense greater justice if the court had a bigger complement or at least were at full strength.¹⁴⁷

By comparison, then-Chief Judge Boyce F. Martin, Jr., asserted that the Sixth Circuit operates well with the tribunal's present contingent but could function more efficaciously with several additional seats.¹⁴⁸ A majority of active judges on the court asked lawmakers to create new positions,¹⁴⁹ and members affirmatively responded in the largest percentages to the commission queries that asked whether enhancing circuit size would help the tribunal "avoid a backlog" and "write a statement of reasons for all decisions in nonfrivolous appeals."¹⁵⁰ With all due respect, the miniscule percentage of published determinations that the appellate court now furnishes, its comparatively slow resolution times, and its substantial dependence on visiting appeals and district court judges to staff panels indicate that the tribunal might work better if additional seats were authorized.¹⁵¹ Those members who currently oppose expansion may wish to reassess whether the appellate court would operate more effectively using new judgeships.¹⁵²

V. CONCLUSION

Protracted federal appeals court vacancies threaten the delivery of appellate justice in the twenty-first century. The situation comprises a longstanding difficulty and a present complication, which is essentially political. President Bush, as well as GOP and Democratic senators, should institute concerted efforts to depoliticize and expedite the modern judicial

¹⁴⁶See WORKING PAPERS, *supra* note 142, at 18–19; see also *infra* notes 147, 150 and accompanying text (proposing additional judges).

¹⁴⁷See WORKING PAPERS, *supra* note 142, at 93, tbls. 2, 3; see also *infra* note 151 and accompanying text (suggesting greater productivity and efficiency with more judges).

¹⁴⁸Letter from Boyce F. Martin, Jr., Sixth Circuit Chief Judge, to Sen. Charles Grassley, Chair, Senate Judiciary Subcomm. on Admin. Oversight and the Courts (June 19, 1998); see also *supra* note 61 and accompanying text (articulating Grassley's views).

¹⁴⁹Some judges did dissent. See GRASSLEY REPORT, *supra* note 59, at II(f); Tobias, *supra* note 47, at 749.

¹⁵⁰WORKING PAPERS, *supra* note 142, at 18, 21. The conservative estimates on which the Judicial Conference premises judgeship proposals suggest that the Sixth Circuit needs one new judgeship. See S. 920, 108th Cong. § 2(a)(3) (2003); see also Tobias *supra* note 47, at 753 (listing considerations for determining if additional seats are needed). *But see* GRASSLEY REPORT, *supra* note 59, at 2–7 (noting "little consensus" on necessity of more judges). In 1999, the Conference had proposed two new positions. See S. 1145, 106th Cong. § 2(a)(3) (1999).

¹⁵¹See WORKING PAPERS, *supra* note 142, at 93, tbl. 2, 95, tbl. 7, 108, tbl. 6a.

¹⁵²These are sharply contested, unresolved issues. See *supra* notes 59–61 and accompanying text (discussing hearings on this issue). Of course, the authorization of new judgeships will have little effect, unless and until the process improves.

selection process. They might discontinue—or at least should minimize—criticism of each other, reconcile partisan disagreements, and solve or ameliorate the contemporary appointments dilemma. Upper-echelon legal officials, including Attorney General Alberto Gonzales and White House Counsel Harriet Miers, the Republican and Democratic Senate leadership, and Judiciary Committee members could assume responsibility for this endeavor.

The Bush Administration and senators on each side of the aisle have perpetuated the unproductive dynamics that attended earlier appeals court selection. For example, the Chief Executive has renominated quite a few controversial lawyers, the Senate Judiciary Committee may have attempted to process some nominees more quickly than was advisable, and the Democrats have stalled floor debates and votes with filibusters. President Bush and senators from both political parties might want to abandon, or at least should reconsider, use of these measures, which have proved divisive and which can halt judicial appointments.

Senate members who represent all states located in particular regional circuits must enlarge communications there, among themselves and with the Chief Executive. If senators from every jurisdiction and the president assess and implement the recommendations above, they should be able to enhance the federal judicial selection process in these states, their appellate courts, and perhaps the nation.