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Filling the Federal Appellate Openings on the 9th Circuit

Carl W. Tobias

University of Richmond, ctobias@richmond.edu

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Filling the Federal Appellate Openings on the 9th Circuit

Carl Tobias*

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I. Introduction

The United States Court of Appeals for the 9th Circuit has been the biggest federal appellate court in terms of numerous significant parameters for nearly two decades. The 9th Circuit encompasses the largest geographic expanse, extending from the Arctic Circle to the border of Mexico and from Montana to Guam. The appeals court includes 15 federal districts that are located in eight western states, as well as Hawaii and two island territories. The 9th Circuit addresses the most substantial and most complex docket, consisting of approximately 9,000 cases annually. Congress has authorized 28 active appellate judges for the court. Moreover, the enormous number and complicated character of 9th Circuit

* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. I wish to thank Jay Bybee, Patricia Carney, Michael Higdon, and Peggy Sanner for valuable suggestions and Eleanor Davison for processing this piece. Errors that remain are mine.

filings has prompted the Judicial Conference of the United States, the policy-making arm of the federal courts, to suggest that senators and representatives approve nine additional judgeships for the 9th Circuit. The court presently has six openings, five of which the Judicial Conference designates as "judicial emergencies" because the seats have remained empty for at least 18 months, even as the magnitude and complexity of civil and criminal caseloads in the 9th Circuit continue to increase. President Bill Clinton nominated candidates for all five of these vacancies in 1999; however, the United States Senate had confirmed no one for the empty seats when the initial session of the 106th Congress recessed.

Throughout much of the 1990s, the 9th Circuit has operated with fewer than the court's complete complement of 28 active judges. Since 1995, when Republican senators representing states of the Pacific Northwest instituted a serious campaign to divide the 9th Circuit, the court has essentially functioned absent one-fourth of its membership.¹ The large number of openings and their protracted nature, as well as a steadily expanding docket, have demanded that the 9th Circuit depend on many appellate and district court judges who are not active members of the 9th Circuit when staffing three-judge panels to hear cases. In fact, the Commission on Structural Alternatives for the Federal Courts of Appeals ("The Commission"), which recently completed a thorough study of the appellate courts, determined that 43% of panels that resolved cases after oral argument in the 9th Circuit during the 1997 fiscal year included at least one participant who was not an active judge of the court.²

This Commission apparently premised its major recommendation that Congress and the President require three regionally-based adjudicatory divisions for the 9th Circuit on the

1. Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 30 (Dec. 18, 1998) (noting that the circuit had only 18 active judges out of 28 authorized judgeships for most of the four years preceding the report). See generally Carl Tobias, *A Federal Appellate System for the Twenty-First Century*, 74 WASH. L. REV. 275 (1999) (discussing the origins of the Commission on Structural Alternatives for the Federal Courts of Appeals and its efforts in compiling a report and recommendations related to the 9th Circuit).

2. Commission Final Report, *supra* note 1, at 3 (discussing this court's use of visiting judges to constitute panels); see also 28 U.S.C. §§ 291-92 (1994) (prescribing the means for assigning a federal district court judge to temporarily sit on the circuit court in which the district is located).

perception that the court may decide appeals too slowly, that circuit case law might lack consistency and coherence, that the court's judges could be insufficiently collegial, and that circuit links with the regions served seem inadequate. Insofar as the deficiencies that the commissioners perceived actually exist, however, they may be ascribed more appropriately to the significant number and prolonged character of the vacancies that the court has experienced over the last half decade. Indeed, the expeditious appointment of judges to the six empty seats might obviate the necessity for implementing an untested divisional approach, which could well disrupt many efficacious aspects of 9th Circuit administration. These considerations mean that the judicial openings on the court deserve assessment. This Article undertakes that effort.

Section II evaluates the national judicial vacancies problem, focusing on how circumstances in the 9th Circuit became so problematic. Section III analyzes recent developments that have permitted nearly one-quarter of the 28 active judgeships that senators and representatives have authorized for the court to remain unfilled. Finding that the burgeoning number and increasing complexity of civil and criminal appeals and the substantial difficulty of promptly appointing judges to the empty positions is seriously threatening appellate justice, Section IV offers recommendations for addressing this situation. These recommendations may also apply to other federal circuits experiencing similar judicial vacancies.

II. Origins and Development of the Judicial Vacancies Problem

The beginnings and growth of the judicial selection controversy that currently exists in the 9th Circuit may appear to require relatively little consideration here because numerous observers have already assessed certain important dimensions of the applicable historical background.³ However, comparatively

3. See generally SHELDON GOLDMAN, PICKING FEDERAL JUDGES LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997) (discussing the judicial selection of lower court judges, the changes that have occurred over the years, and the impact of these changes on the judiciary); Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319 (1994) (discussing appointment of judges and providing statistical analysis of judicial vacancies from 1970 to 1992); Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527 (1998)

thorough examination is warranted in order to elucidate how the existing conditions materialized and how the circumstances could be rectified or ameliorated.

The rather large number of vacancies that the 9th Circuit is presently encountering, and their relatively extended character, illustrates much broader phenomena that have adversely affected most of the federal court system. Most of the appeals courts and many of the 94 federal districts have encountered what may be described as a permanent vacancies complication for approximately two decades. This problem, which can be ascribed primarily to political phenomena, has seemingly resulted from the inability of Chief Executives to nominate candidates and the reluctance of the Senate to confirm judges quickly enough to fill the substantial number of openings that have arisen.

A. *Persistent Vacancies*

The initial manifestations of the persistent vacancies conundrum occurred during the 1960s, when members of Congress began enlarging the civil and criminal jurisdiction that lawmakers accorded the federal district courts.⁴ Senators and representatives recognized numerous new civil causes of action and federalized many additional areas of criminal law,⁵ while attorneys and litigants evinced greater willingness to appeal district court determinations.⁶

(examining the history of federal judicial selection, the complication presented by vacancies, and the possible solutions for vacancies that might be employed).

4. See Bermant, *supra* note 3, at 323-33 (discussing such expansion); see also Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1270 (1996) (noting an expansion of federal district court jurisdiction since the 1960s).

5. See, e.g., National Environmental Policy Act of 1970, Pub. L. No. 91-190, 83 Stat. 852 (1970); Occupational Safety and Health Act, Pub. L. No. 91-596, 84 Stat. 1590 (1970); Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

6. See JUDITH MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 17-35 (Federal Judicial Center 1993) (analyzing factors leading to the rise in number of civil cases filed in the federal courts of appeals); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990) (noting that federal courts are in a "crisis of volume" as a result of a "swollen caseload."). *But cf.* Commission on Structural Alternatives for the Federal Courts of Appeals, Working Papers 133 (1998) (finding that growth was fueled by increasing appeals in only a few case types).

These phenomena led to significant growth in civil and criminal district and appellate dockets.

Congress correspondingly attempted to address multiplying caseloads by authorizing considerably more district and appeals court judgeships. Nevertheless, presidents and senators have experienced complications in approving nominees for all of the openings, partly because the judiciary's expansion has created additional vacancies that have happened with increasing frequency. For instance, during most of the administrations of Presidents Bill Clinton and George Bush, the federal bench encountered numerous empty seats; when the second session of the 106th Congress convened in January 2000, there were 76 unfilled judgeships.

This permanent openings problem has had special ramifications in the 9th Circuit for several important reasons. This appeals court has confronted the largest docket in the appellate system since 1980, when Congress split the former 5th Circuit into the new 5th and 11th Circuits.⁷ Senators and representatives passed legislation in 1978 that empowered every appeals court having a membership that exceeds 15 active judges to implement special measures, including administrative units and limited en banc procedures, which lawmakers intended would facilitate the disposition of mounting appellate caseloads.⁸ Since that time, the 9th Circuit has employed administrative units that have enhanced efficiency, and it has been the only appeals court to employ the limited en banc process.⁹

7. See Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980) (codified at 28 U.S.C. § 41 (1994)) (providing for the reorganization of the former 5th Circuit into the 5th and 11th Circuits). See generally DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED-THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM* (1988) (discussing the splitting of the 5th Circuit and the policy and the implications behind the division); HARVEY COUCH, *A HISTORY OF THE FIFTH CIRCUIT 1891-1981* (1984) (tracing the establishment, composition, and decisions of the 5th Circuit).

8. Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633, supplemented by Act of Oct. 15, 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1981).

9. See JOE CECIL, *ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS* Project 13-14, 41-45 (1985) (discussing steps taken in the 9th Circuit to more efficiently handle its docket); Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 Emory L.J. 1357, 1363 (1995) (describing the 9th Circuit's implementation of the limited en banc

A different provision of the 1978 statute authorized 10 additional judicial positions for the 9th Circuit,¹⁰ while President Jimmy Carter undertook extraordinary efforts to fill the judgeships by naming 13 members for the court in 1979 and 1980.¹¹ Enactment of another judgeship bill in 1984 brought the 9th Circuit to its existing complement of 28 active judges,¹² so that the tribunal has many more members than the remaining appellate courts and experiences openings with much greater frequency.

B. *The Current Vacancies Conundrum*

There is a related conundrum involving the 70 empty seats on the federal appeals and district courts, which somewhat resembles the permanent openings problem, but differs in several significant ways. An impasse in processing judicial nominations, apparently resulting from political considerations, derives principally from control of the White House and the Senate by the Democratic and Republican political parties. The impasse may concomitantly result from the inability or reluctance of the president and senators, as well as their assistants, in fulfilling their obligations to nominate candidates and confirm judges for the federal bench.

Notwithstanding who may be responsible for, or who could have prevented, the permanent openings problem and the recent confirmation impasse, these developments have led to a large number of vacancies on the federal appellate and district courts, including six empty positions on the 9th Circuit. These vacancies have had numerous detrimental impacts. Many federal district courts have encountered backlogs on their civil dockets – some district judges have not conducted trials in any civil lawsuits during the past two years, a phenomenon that can partly be attributed to the

mechanism); *see also* Commission Final Report, *supra* note 1, at 21, 32 (noting this circuit's usage of these administrative devices).

10. Act of Oct. 20, 1978, Pub. L. No. 95-486, § 3, 92 Stat. 1629, 1632 (1978).

11. *See generally* GOLDMAN, *supra* note 3, at 236-84 (discussing President Carter's approach to federal judicial appointments).

12. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 201, 98 Stat. 333, 347 (adding five additional circuit judges); *see also* Commission Final Report, *supra* note 1, at 30 (discussing the creation and size of this circuit court in terms of geographical area and number of authorized judgeships).

requirement in the Speedy Trial Act that judges promptly resolve criminal cases.¹³

Practically all of the appellate courts have correspondingly had to rely with considerably enhanced frequency on judges who are not active members of the appeals courts, a circumstance that may have adversely affected judicial collegiality and could even have undermined the uniformity of circuit law. The Commission found that one-third of the three-judge panels that decided cases in the appellate system during 1997 had at least one member who was not an active judge of the particular appeals court.¹⁴ The Commission further determined that the 11th Circuit had so constituted an astounding 64% of the court's panels and that the 9th Circuit had so comprised 43% of its panels.¹⁵

Appellate court judges have also depended more substantially on circuit administrative employees. Illustrative are the efforts of staff attorneys, who often preliminarily screen cases. With 48 staff attorneys, the 9th Circuit relies on the largest contingent of these support personnel.¹⁶ Appellate courts have also sharply restricted the percentage of oral arguments and written decisions they have allowed. The Commission determined that 40% of appeals pursued nationally in 1997 received oral argument; however, the 3rd, 4th, 10th, and 11th Circuits conducted oral argument in only 30% of their cases.¹⁷ The Commission concomitantly found that 23% of appeals across the country during 1997 received published opinions, but that five appellate courts issued these opinions in fewer than 19% of their cases.¹⁸

13. See Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-74 (1994) (requiring the commencement of a federal criminal trial within 70 days of the filing of the indictment); see also ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROJECT ANNUAL REPORT (1994) (supplying data on backlogs); Robert Schmidt, *The Costs of Judicial Delay*, LEGAL TIMES, Mar. 28, 1997, at 6 (ascribing backlogs to judicial vacancies).

14. Commission Working Papers, *supra* note 6, at 108, table 6a.

15. See *id.* (indicating the percentages of visiting judges that participate in decisions at the circuit level).

16. Commission Final Report, *supra* note 1, at 24 (listing, in Table 2-8, the various circuit courts' use of central staff attorneys).

17. See *id.* at 22 (stating that 9th Circuit conducted oral argument in 39% of cases).

18. See *id.* (stating that the 9th Circuit issued published opinions in 18% of cases).

The permanent judicial vacancies complication and the present confirmation problem have had numerous other detrimental impacts on the 9th Circuit. Perhaps most instructive, these difficulties led the court to postpone 600 oral arguments it had scheduled in 1997.¹⁹

III. Developments Since 1995

The third part of this Article considers the significant number and prolonged nature of empty judgeships on the 9th Circuit.

A. *Developments Between 1995 and 1997*

For most of the two decades since 1978, when senators and representatives authorized significant increases in the judicial complement of the 9th Circuit, the court experienced relatively few openings. The vacancies only rose to comparatively disturbing levels, and the seats began to remain empty for extended periods, in 1995, when filling judgeships became enmeshed with the ongoing controversial debate over the possible division of the 9th Circuit.

In May 1995, Republican members of the Senate, who represented states that are located in the Pacific Northwest, orchestrated the fifth serious effort since 1983 to bifurcate the 9th Circuit.²⁰ The senators proposed legislation that would have placed Alaska, Idaho, Montana, Oregon, and Washington in a projected 12th Circuit, leaving the remaining states and territories of the

19. See Viveca Novak, *Empty-Bench Syndrome*, TIME, May 26, 1997, at 37 (noting that the criminal caseload is pushing civil cases to the back of the queue); see also *Chronic Federal Judge Shortage Puts Lives, Justice on Hold*, LAS VEGAS REVIEW-JOURNAL, Aug. 13, 1997, at A9 (observing that the 6th Circuit was required to cancel 60 arguments in 1997 and commenting on the deleterious effects of the vacancies on the 9th Circuit); Bill Kisliuk, *Judges' Conference Slams Circuit-Splitting, Vacancies*, THE RECORDER, Aug. 19, 1997, at 1 (reporting on 9th Circuit judges' frustration with congressional delay in filling judicial vacancies).

20. See S. 956, 104th Cong., 2d Sess. § 1(b) (1995) (authorizing a study of structure and alignment of the 9th Circuit); see also Thomas E. Baker, *On Redrawing Circuit Boundaries - Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917 (1990) (recounting a history of prior efforts to split the circuit). See generally Tobias, *Impoverished Idea*, supra note 9 (discussing the need to fill vacancies on the 9th Circuit).

current 9th Circuit in this court.²¹ Upon Senate Bill 956's introduction, Senator Conrad Burns (R-Mont.) declared that he would place a hold on all nominees for the 9th Circuit until Congress bifurcated the court. Senator Burns only released this hold in January 1996, when the Senate confirmed Judge A. Wallace Tashima and Judge Sidney Thomas for the 9th Circuit.²² However, there were no appointments to the court throughout the remainder of the 1996 presidential election year or in 1997, the first year of the Clinton Administration's final term.

During 1996 and 1997, eight active appellate judges on the 9th Circuit chose to assume senior status or to retire, thereby leaving empty seats. Both Democratic and Republican Chief Executives had named these members to the court. Certain jurists seemed to honor an informal understanding whereby judges take senior status or retire during the administration of a President who is a member of the same political party as the Chief Executive who appointed that judicial officer. This notion may explain why a small number of Democratic appointees assumed senior status near the beginning of 1996, thus theoretically permitting President Clinton to select their successors. Some judges whom Republican Chief Executives placed on the 9th Circuit may have awaited the outcome of the 1996 elections to determine whether the Republican candidate would become President; those jurists may have chosen to assume senior status after that event did not occur rather than serve another four years.²³

There are a few reasons why only two judges received appointment to the 9th Circuit between May 1995 and January 1998. One important explanation was that the Senate could not approve nominees for the court after Senator Burns imposed his hold on confirmations because a single member can delay the whole Senate's

21. S. 956, *supra* note 20.

22. See David G. Savage, *Political Logjam on Filling Vacant Judgeships Broken*, L.A. TIMES, May 9, 1998, at A17 (concluding that Chief Justice Rehnquist helped to break the political impasse that was delaying appointments to the 9th Circuit); *Legislator Imperils All 9th Circuit Nominations*, S.F. DAILY J., June 8, 1995, at 1 (reporting that "[Senator] Burns . . . feel[s] that the court is too unwieldy . . . dominated by Californians and too slow . . ."). See generally, Orrin Hatch, *Judicial Nominees: The Senate's Steady Progress*, WASH. POST, Jan. 11, 1998, at C9 (reporting on the Senate's progress in confirming nominees to the 9th Circuit).

23. An active judge is eligible for senior status when the total of the judge's age and years of service is 80. 28 U.S.C. § 371 (1994).

action under its unanimous consent procedure. When Senator Burns removed his hold during early 1996, the Senate was able to approve Judge Tashima and Judge Thomas.²⁴

The upper chamber, however, confirmed no other nominees for the 9th Circuit in 1996.²⁵ The clearest and most persuasive explanation for this inactivity was that 1996 was a presidential election year. Thus, during the initial five months of 1996, Senator Robert Dole (R-Kan.), who was serving as Senate majority leader and attempting to capture the Republican Party presidential nomination, may have been unwilling to schedule floor votes on appeals court nominees because doing so could have evidenced a lack of confidence in his own presidential candidacy.

Once Senator Dole resigned from the Senate in June and Senator Trent Lott (R-Miss.) became the majority leader, there ensued a period when Senator Lott appeared to proceed cautiously in exercising his responsibilities as the new majority leader. By the time that Senator Lott seemingly was prepared to schedule floor debate and floor votes on nominees, it had become mid-summer of an election year, a period when the confirmation process conventionally slows in anticipation of the presidential campaign. The Republican Party's hopes that Senator Dole would defeat President Clinton and enable the GOP to fill numerous judicial openings, as well as Senator Lott's apparent unwillingness to undermine confidence in the Dole candidacy by expeditiously scheduling votes on judicial nominees, might have further delayed confirmation.

Notwithstanding these complications during the summer of 1996, the Republican and Democratic leadership in the Senate ultimately agreed on a procedure for processing nominees that enabled senators to consider one nominee per day on the Senate floor until the Labor Day recess. That understanding permitted 13 district court judges to secure confirmation. A few appellate court nominees did have hearings before the Judiciary Committee in 1996, but no judges apart from Judges Tashima and Thomas were appointed to any appeals court, including the 9th Circuit.

24. Savage, *supra* note 22.

25. A few nominees secured committee hearings or committee votes, but none received full Senate consideration.

Relevant developments respecting the court's possible bifurcation also occurred at this time. In March 1996, advocates of the proposal to divide the 9th Circuit determined they had insufficient support to approve the bill.²⁶ Accordingly, these Republican senators assembled a compromise that would have authorized a national commission to evaluate the federal appeals courts.²⁷ The measure easily passed the Senate; however, the House of Representatives did not promptly consider the proposal. Congress eventually appropriated \$500,000 for the assessment, but it failed to adopt authorizing legislation.²⁸

During 1997, members of the Senate and the House offered several study commission bills.²⁹ On June 3, the House agreed to legislation that would have authorized an analysis of the federal courts system.³⁰ In late July, the Senate approved an appropriations rider that would have split the 9th Circuit.³¹ During November, Congress passed a measure that prescribed a national examination of the appellate courts, with particular emphasis on the 9th Circuit, which President Clinton signed into law.³²

26. See Carl Tobias, *Why Congress Should Not Split the Ninth Circuit*, 50 SMU L. REV. 583, 589 (1997) (detailing the legislative history of the proposal to split the 9th Circuit); see also 142 CONG. REC. S2219-S2303 (Mar. 18, 1996) (reflecting the numerous state bar resolutions and Senate speeches opposing the division of the 9th Circuit); S. 956, *supra* notes 20-21 and text accompanying notes (recounting the debate whether to split the 9th Circuit into two courts).

27. See 142 CONG. REC. § 2236 (Mar. 18, 1996) (discussing the proposal of and reproducing the text of the amendment).

28. See 142 CONG. REC. H11,859 (Sept. 28, 1996) (authorizing the funding of a commission to study the federal courts of appeals).

29. See, e.g., S. 248, 105th Cong., 1st Sess. § 1(b) (1997); S. 283, 105th Cong., 1st Sess. § 1(b) (1997); H.R. 639, 105th Cong., 1st Sess. § 1(b) (1997) (discussing commissions to study the federal court system and to recommend possible changes).

30. See H.R. 908, 105th Cong., 1st Sess. § 1 (1997) (establishing the Commission on Structural Alternatives for the Federal Courts of Appeals); see also Carl Tobias, *House Authorizes Appellate Court Study Commission*, 80 JUDICATURE 292 (1997) (discussing the legislative history of the Commission).

31. See S. 1022, 105th Cong. 1st Sess. § 305 (1997) (proposing the Ninth Circuit Court of Appeals Reorganization Act of 1997); see also Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 FLA. L. REV. 189, 212-14 (1997) (discussing the history of the attempt to bifurcate the 9th Circuit).

32. See Act of Nov. 26, 1997, Pub. L. No. 105-119, § 305, 111 Stat. 2440, 2491-92 (1997) (formally establishing a study to report on the appellate courts); see also Carl Tobias, *Congress Authorizes Appellate Study Panel*, 81 JUDICATURE 125 (1997) (discussing the Commission's mandate, the challenges it faces, and

In 1997, the Senate failed to confirm any judges for the 9th Circuit. The reluctance to approve judges for the court could be attributed to the machinations that involved the ongoing controversy over splitting the 9th Circuit. For instance, the more vacancies the court encounters, and the longer that they remain unfilled, the greater the problems the 9th Circuit will experience in expeditiously resolving cases and the more circuit members who may believe that they should accede to bifurcation.³³ However, it is exceedingly difficult to prove that senatorial proponents of division were using delay or refusal to approve judges as a strategy for imposing pressure on the 9th Circuit and promoting its bifurcation.

The relatively small number of individuals who were appointed to the 9th Circuit in 1996 and 1997 can also be explained by the then-current dispute over confirming federal judges for the 80 vacancies that existed. For example, President Clinton may have tendered too few nominees whom Republican members of the Senate deemed acceptable, especially in early 1997. Moreover, Senator Orrin Hatch (R-Utah), who was the chair of the Senate Judiciary Committee, might have conducted an inadequate number of hearings and committee votes on the nominees whom the Chief Executive had submitted. Majority Leader Lott concomitantly did not schedule floor votes and floor debates on candidates who had received Senate Judiciary Committee approval. In short, all of the people and entities responsible for choosing judges could have undertaken greater efforts to expedite the selection process. For instance, during early 1997, President Clinton re-nominated three persons whom the Senate had previously refused to approve.³⁴ Nonetheless, the Chief

suggested a review strategy). The study's authorization should have temporarily removed the issue of 9th Circuit division as an obstacle to the confirmation of judges for the court.

33. See generally Hatch, *supra* note 22 (denying that there is any crisis created by the vacancies on the 9th Circuit); Carol M. Ostrom, *Fuming Senators Ready to Carve Up 9th Circuit - NW States Would Be in New District*, SEATTLE TIMES, Nov. 2, 1997, at A1 (reporting that critics of the 9th Circuit support dividing the court as a solution to its loaded docket while opponents of splitting the circuit blame the Senate's slow confirmation process for the burdensome court docket); David G. Savage, *Debate Rises Over Proposal to Break Up Appeals Court*, L.A. TIMES, Sept. 21, 1997, at A3 (noting that the best way to relieve the 9th Circuit docket would be for the Senate to quicken its response to vacancies on the court).

34. They were Professor William Fletcher, practicing attorney Margaret McKeown, and District Judge Richard Paez. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, *President Clinton Nominates Twenty-Two to the Federal Bench*

Executive only forwarded two other nominees in late June and July³⁵ and subsequently proposed two additional individuals for vacancies on the 9th Circuit during November.³⁶ President Clinton may have considered efforts to submit more candidates fruitless in light of the rather slow pace at which the Senate was considering nominees. The Senate Judiciary Committee accordingly held hearings on only one of seven candidates for the 9th Circuit, who later asked that his name be withdrawn,³⁷ as well as hearings on another nominee to the 9th Circuit on whom the Senate did not vote before it recessed.³⁸

Disputes over filling specific openings also arose. For example, Republican senators from Arizona and Washington contended that they must be involved in suggesting persons for vacancies in their respective states and even claimed that they were entitled to proffer the recommendations.³⁹ These developments

(Jan. 7, 1997) <<http://www.pub.whitehouse.gov/uri-es/12R?urn:pdi://oma.eop.gov.us/>>; see also Hatch, *supra* note 22 (noting that President Clinton had renominated two candidates from the previous Congress).

35. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, *President Clinton Nominates James S. Ware to the Federal Bench* (June 27, 1997) <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/>>; THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, *President Clinton Nominates Susan Graber to the Federal Bench* (July 30, 1997) <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/>>.

36. See THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, *President Clinton Nominates Three to the Federal Bench* (November 9, 1997) <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/>> (announcing the nominations of Ronald M. Gould and Barry G. Silverman).

37. This was Judge Ware. See David G. Savage & Maura Dolan, *Judge Admits Tale of Brother's Death Was a Lie*, L.A. TIMES, Nov. 7, 1997, at A1 (reporting that Judge Ware, who was expected to win Senate confirmation easily, withdrew his nomination).

38. This was Magistrate Judge Silverman, whom the Senate later confirmed in January 1998. OFFICE OF THE PRESS SECRETARY, *supra* note 36; *Arizonan Gets 9th Circuit Seat*, THE TUCSON CITIZEN, Jan. 30, 1998, at 2C (announcing that the Senate had confirmed Barry Silverman's nomination).

39. See 143 CONG. REC. S2538, S2541 (daily ed. Mar. 19, 1997) (recounting Sen. Biden's support of the practice of conferring with a senator before judges from that senator's state are nominated); see also Peter Callaghan, *Senators Agree on Selecting Judges*, TACOMA NEWS TRIBUNE, Aug. 12, 1997, at B1 (reporting on the concessions that Republican Senator Gorton had won from his Democratic counterpart, Sen. Patty Murray); Neil A. Lewis, *Clinton Has A Chance to Shape the Courts*, N.Y. TIMES, Feb. 9, 1997, at 1 (reporting that Republican Senators were considering a proposal to insist that the President cede half of the judicial appointments to the Republican majority).

significantly delayed nominations for openings in Arizona and Washington; however, compromises seemingly were struck, and the President tendered nominees for the two vacancies during November 1997.⁴⁰

B. *Developments Since 1998*

The pace of nomination and confirmation quickened somewhat nationally and in the 9th Circuit during 1998.⁴¹ Relatively close cooperation between President Clinton and Senator Hatch contributed to the appointment of 65 federal judges, five of whom assumed positions on the 9th Circuit. Judges William Fletcher, Susan Graber, Margaret McKeown, Barry Silverman, and Kim Wardlaw received appointments to the court in 1998.⁴² Indeed, at one juncture during that year, the 9th Circuit experienced as few as five vacancies.

An important explanation for the success in naming judges to the 9th Circuit during 1998 was that the Chief Executive steadily nominated candidates for openings as seats became empty. For instance, President Clinton promptly submitted the names of practicing attorney Marsha Berzon and District Judge Wardlaw upon the Senate's return for the second session of the 105th Congress.⁴³ Moreover, a comparatively large number of judges secured appointment to the 9th Circuit because of Senator Hatch's willingness to hold Judiciary Committee hearings and panel votes on nominees. Senator Lott correspondingly evidenced greater willingness to schedule floor debate and votes on candidates whom the Judiciary Committee had approved. Finally, the nominations of Judge Fletcher and Judge McKeown had been pending for several

40. See OFFICE OF THE PRESS SECRETARY, *President Clinton Nominates Three to Federal Bench*, *supra* note 36 (announcing nominees Magistrate Judge Barry Silverman and practicing attorney Ronald Gould).

41. See Carl Tobias, *Leaving a Legacy on the Federal Courts*, 53 U. MIAMI L. REV. 315 (1999) (reviewing the Clinton administration's record of judicial appointments of women and minorities); see also Orrin Hatch, *Judicial Nominee Confirmations Smoother Now*, DALLAS MORNING NEWS, June 27, 1998, at 9A (stating that the nomination and confirmation process was working more effectively).

42. Tobias, *Leaving a Legacy*, *supra* note 41, at 325-26.

43. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, *President Clinton Nominates Twelve to the Federal Bench and One to the D.C. Court of Appeals* (Jan. 27, 1998) <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/>>.

years because some senators apparently found their candidacies to be controversial; however, once the entire Senate considered these individuals, they won confirmation rather easily.⁴⁴

Despite the relative success in judicial selection nationally and in the 9th Circuit during 1998, another impasse arose in early 1999.⁴⁵ Shortly after the first session of the 106th Congress convened, President Clinton re-nominated four candidates and chose Chief Justice Barbara Durham of the Washington Supreme Court for the fifth empty seat.⁴⁶ During March, the Chief Executive forwarded a sixth nomination but did not submit a candidate for the seventh opening until the summer of 1999.⁴⁷

The Senate confirmed two judges for positions on the Northern District of Illinois during the spring. Nevertheless, the Senate Judiciary Committee delayed scheduling hearings on additional nominees for any of the courts until the summer of 1999, although 35 judges eventually received appointments in that year. Moreover, the Senate approved judges for two of the seven openings on the 9th Circuit during 1999.

The major obstacle to judicial selection in 1999 was apparently a dispute that involved a vacancy on the district court in

44. See 144 CONG. REC. S11,872 *et seq.* (daily ed. Oct. 8, 1998) (outlining the Fletcher debate); *Id.* at S11,882 *et seq.* (outlining the McKeown debate).

45. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (June 14, 1999).

46. The four were practicing attorneys Marsha Berzon, Barry Goode, Ronald Gould, and District Judge Richard Paez. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, *President Nominates Seventeen to the Federal Bench* (Jan. 26, 1999) <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/>>. Justice Durham later requested that her name be withdrawn because her spouse became ill. See Neil A. Lewis, *A Nomination is Withdrawn, and a Deal is Threatened*, N.Y. TIMES, May 28, 1999, at A18 (discussing the unusual political environment that led to President Clinton's appointment of a conservative Republican to the 9th Circuit); Danny Westneat, *Judge Won't Seek Higher Post*, SEATTLE TIMES, May 28, 1999, at B1 (questioning if the White House would allow Sen. Gorton the freedom to select another candidate after Justice Durham's withdrawal).

47. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, *President Clinton Nominates Raymond C. Fisher and Adalberto Jose Jordan to the Federal Bench* (Mar. 15, 1999) <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/>>; THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, *President Clinton Nominates Maryanne Trump Barry, James E. Duffy, Jr., and Elena Kagan to the Federal Bench* (June 17, 1999) <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/>>.

Utah, the state which Senator Hatch represents.⁴⁸ During January, the Senate Judiciary Committee chair began “demanding that the president nominate a conservative aide to Republican Governor Mike Leavitt as a federal judge in Salt Lake City.”⁴⁹ The controversy was seemingly exacerbated because the candidate was a “self-described Ronald Reagan conservative whose views on the environment are anathema to Clinton and to environmental and other liberal groups that are politically important to the administration”⁵⁰ and because Utah Democrats strongly opposed the individual’s nomination.⁵¹ The Chief Executive ultimately acceded to the committee chair’s request. Several federal courts observers assert that this six-month stalemate explains the failure to confirm any nominees apart from the lawyers who were named to the Northern District of Illinois.⁵²

Additional, less salient factors might have slowed judicial appointments. For example, the President may have sporadically submitted too few candidates whom Republican members of the Senate considered acceptable, especially in the early part of 1999. At the same time, Senator Hatch held no hearings, much less permitted committee votes, before mid-June on nominees whom the administration had forwarded. The inability or unwillingness to

48. See Joan Biskupic, *Hatch, White House at Impasse on Judgeships*, WASH. POST, June 5, 1999, at A1 (reporting that Senator Hatch was delaying the consideration of 42 nominees to the federal bench as leverage in his bid to have Ted Stewart nominated); Paul Elias, *Berzon's Ninth Circuit Bid Looks Good*, THE RECORDER, June 17, 1999, at 1 (stating that Senator Hatch had “bottled up the confirmation process” by refusing to hold hearings on any of the pending judicial nominations due to the Senator’s anger at President Clinton’s refusal to nominate Stewart, who was then acting as Utah Governor Mike Leavitt’s chief of staff); Judy Fahys, *Utahn is Bottleneck in U.S. Judge Pipeline*, SALT LAKE TRIBUNE, May 17, 1999, at A1 (reporting on the impasse over the nomination for the vacant judgeship in Utah); David G. Savage, *Federal Benches Left Vacant Over Utah Tug of War*, L.A. TIMES, May 10, 1999, at A1 (discussing the political controversy concerning the possible nomination of Republican Ted Stewart).

49. Savage, *Federal Benches Left Vacant*, *supra* note 48, at A1; see also Biskupic, *supra* note 48 (discussing the controversy swirling around the impasse over the Stewart nomination); Fahys, *supra* note 48, at A1 (describing the controversy surrounding Stewart’s nomination).

50. Savage, *Federal Benches Left Vacant*, *supra* note 48, at A1.

51. Elias, *supra* note 48, at 1; Fahys, *supra* note 48, at A1.

52. Biskupic, *supra* note 48, at A6; Elias, *supra* note 48, at 1; Fahys, *supra* note 48, at A1; Savage, *Federal Benches Left Vacant*, *supra* note 48, at A1.

confirm judges, therefore, can be ascribed to numerous people and entities who participated in the appointments process.

In fairness, President Clinton did submit names for five openings on January 26, 1999, which is remarkable because his Senate impeachment trial was proceeding at the time.⁵³ The Chief Executive might have believed that it was futile to nominate additional candidates, given the slow pace at which the Senate was considering them. The Senate Judiciary Committee correspondingly did not conduct hearings on any of the nominees before the summer, while the Senate approved only two candidates prior to the November recess.

It is also important to remember that limited action on the 9th Circuit vacancies in 1999 may well have been attributable to the ongoing, controversial debate over possible division of that court, a situation which closely resembles the circumstances in 1997.⁵⁴ The Commission on Structural Alternatives for the Federal Courts of Appeals, after studying the appellate system for a year, clearly and strongly recommended that Congress and the President not split the 9th Circuit.⁵⁵ Instead, the commissioners proposed that lawmakers and the Chief Executive require three regionally-premised adjudicatory divisions for the 9th Circuit and authorize divisions for the remaining appellate courts as they increase in size.⁵⁶ These suggestions proved to be somewhat controversial; nevertheless, senators from the Pacific Northwest who had favored 9th Circuit bifurcation included the recommendations in proposed legislation introduced in January.⁵⁷ Uncertainty about, and dispute involving, the fate of this bill, and ultimately of the 9th Circuit, may have slowed Senate consideration of nominees for the court. However, it

53. See *supra* note 47 and text accompanying note (recounting Clinton's nominations during this time).

54. See S. 956, 104th Cong., 2d Sess. § 1 (1995) (proposing to establish the Commission of Structural Alternatives for the Federal Courts of Appeals). See generally Tobias, *Impoverished Idea*, *supra* note 9 (noting that the Senate approved no new appointments the year after some senators proposed bifurcating the 9th Circuit).

55. Commission Final Report, *supra* note 1, at 29-30.

56. *Id.* at 40-52, 60-62 (outlining the Commission's recommendations regarding the divisional arrangement for the 9th Circuit, as well as its further suggestions regarding the divisional organization of the remaining Courts of Appeals). See generally Tobias, *A Federal Appellate System*, *supra* note 1 (discussing the Commission's suggestions related to the 9th Circuit).

57. S. 253, 106th Cong., 1st Sess. § 2 (1999).

is virtually impossible to demonstrate that advocates of either the divisional arrangement or of splitting the 9th Circuit have delayed the conformation of judicial nominees to place pressure on Congress to implement one of the approaches.

Controversy also attended specific 9th Circuit openings. For instance, when Chief Justice Durham requested that President Clinton withdraw her nomination, there was substantial disagreement over who should select the candidate's replacement.⁵⁸ Senator Slade Gorton (R-Wash.) insisted that he was entitled to choose the successor, but the Chief Executive did not accede to this demand. The dispute meant that the Clinton Administration did not submit a new nominee for the empty judgeship until shortly before the legislature recessed in 1999.⁵⁹ Controversy also accompanied efforts to designate someone for an unfilled seat that 1997 legislation had mandated be assigned to Hawaii as the only state in the circuit without a resident appellate judge.⁶⁰ The apparent inability of the Democratic party leadership in Hawaii to agree on a candidate prevented President Clinton from submitting a nominee until mid-June.⁶¹

The significant number and prolonged character of the vacancies have imposed quite a few disadvantages. The openings have placed great pressure on the present active appellate judges, appellate judges who have assumed senior status, as well as on the active and senior district judges in the 9th Circuit. The active and senior appellate judges have been required to hear a larger number of oral arguments and write more opinions than they would have if the

58. Lewis, *supra* note 46, at A18; Westneat, *supra* note 46, at B1.

59. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, *President Clinton Nominates James D. Whittemore and Richard C. Tallman to the Federal Bench* (Oct. 20, 1999) <<http://www.pub.whitehouse.gov/urires/12R?urn:pd://oma.eop.gov.us/>>.

60. Pub. L. No. 105-119, § 307, 111 Stat. 2493 (1997) (codified at 28 U.S.C. § 44 (c) (1994)); see also Paul Elias, *Clinton Submits Five Nominees for 9th Circuit*, THE RECORDER, Jan. 27, 1999, at 1 (noting that a 1998 law requires that each state within a circuit be represented by a judge and discussing the difficulties in securing a candidate from Hawaii); Paul Elias, *DOJ No. 3 Fisher Tapped for Ninth Circuit Opening*, THE RECORDER, Mar. 16, 1999, at 2 (noting that the sole remaining seat on the 9th Circuit which did not have a nominee was "reserved for a Hawaiian candidate").

61. See OFFICE OF THE PRESS SECRETARY, *President Clinton Nominates Maryanne Trump Barry*, *supra* note 47 and text accompanying note (announcing the President's nomination of James E. Duffy).

9th Circuit possessed the full complement of judges to which it is entitled.

The court might have applied certain measures permitting it to decide growing caseloads with deficient resources. For example, scarce resources may have required the 9th Circuit to grant fewer oral arguments and to publish written determinations in a smaller percentage of appeals. These circumstances could have prompted the judges to depend more on court personnel, namely staff attorneys and law clerks. Judges might even have had inadequate time to review petitions and briefs, to prepare for oral arguments, and to confer on, draft, circulate, and finalize opinions.

Illustrative of the above problems is the 9th Circuit's significantly increased dependence on judges who are not active members of the court to staff three-judge panels. The 9th Circuit has a lengthy tradition of relying on the court's senior appellate and district judges, but the 9th Circuit has followed this practice with pronounced frequency since 1995. Indeed, the Commission on Structural Alternatives for the Federal Courts of Appeals found that forty-three percent of the panels that resolved cases after oral argument in the court during 1997 had one judge who was not an active member of the 9th Circuit, a statistic that exceeded the national average by 10 percent.⁶² It is difficult to delineate the precise effects of increased dependence on judges who are not active members of the 9th Circuit. Nonetheless, reliance on visiting jurists could have eroded collegiality, which may facilitate appellate disposition. Reliance on these non-member judges might correspondingly have reduced consistency and coherence in the case law of the circuit, because the visitors may have less familiarity with the court's substantive determinations and circuit traditions.

This phenomenon could also have delayed the 9th Circuit's resolution of certain cases, thereby frustrating the efforts of a court, which already encounters considerable difficulty in expediting treatment of the nation's largest appellate docket. A circuit that is attempting to function with only three-quarters of its authorized contingent will experience even more complications in promptly resolving appeals. Indeed, the numerous considerations examined above required the 9th Circuit to cancel 600 oral arguments during

62. Commission Working Papers, *supra* note 6, at 108; *see also* Commission Final Report, *supra* note 1, at 31 (noting the circuit's use of visiting judges on its panels).

1997. This development imposed unnecessary expense and delay on the court, its judges, counsel, and parties.

IV. Suggestions for Improving the 9th Circuit Situation

The numerous judicial openings that currently exist in the 9th Circuit and their rather lengthy duration have seemingly had many detrimental impacts on the court. The federal executive, legislative, and judicial branches, and particularly President Clinton and the United States Senate, must, therefore, work closely together in efforts to confirm judges for every vacant position on the court as expeditiously as possible.

A. An Introductory Word About the Commission Recommendations and the 9th Circuit Split

Now that the Commission on Structural Alternatives for the Federal Courts of Appeals has issued its final report and recommendations, Republican members of the Senate must not treat the debate over splitting the 9th Circuit as an obstacle to approving judges for the court. By clearly and forcefully articulating numerous persuasive arguments against the court's division, the expert, independent commissioners have essentially eliminated the issue of 9th Circuit bifurcation as a reason to delay judicial selection. Moreover, the Commission's divisional approach would be less responsive to certain perceived deficiencies in 9th Circuit administration than the prompt confirmation of nominees for the court's vacancies. Prompt appointments may vitiate the need to experiment with the untested, potentially disruptive, divisional concept. Before Congress imposes an apparently ineffective divisional arrangement, legislators should at least approve the 9th Circuit's complete complement of 28 judges and carefully assess whether filling the vacant positions successfully addresses the difficulties detected by the Commission. Only if an expert, independent evaluator systematically collects, analyzes, and synthesizes empirical data on the court's operation at full capacity and definitively concludes that this remedy does not suffice, should lawmakers resort to the divisional idea.

Regardless of how Congress resolves the controversies over the efficacy of the Commission's suggestions, and ultimately over

the court's possible division, these disputes should no longer serve as impediments to 9th Circuit appointments. Even if senators and representatives adopt the divisional arrangement proposed by the commissioners, bifurcate the court, or retain the status quo, none of these developments would alter the total number of steadily growing cases that appellate judges in the West must process. In the final analysis, the controversies that implicate the Commission's proposals and possible 9th Circuit division should have limited relevance to filling the court's vacancies.

B. Suggestions for the Senate

GOP members, who constitute a majority in the Senate, could implement certain measures to facilitate the confirmation of judges for the six present openings on the 9th Circuit. The Senate Judiciary Committee and its chair, Senator Hatch, Senate Majority Leader Lott, and individual Republican senators, especially lawmakers who represent states that are located in the 9th Circuit where vacancies exist, might apply these approaches. The Senate Judiciary Committee, the panel chair, and all lawmakers who serve on this committee must re-institute the kind of concerted judicial selection efforts that they successfully employed throughout 1998. The process invoked during that year permitted the Senate to approve 65 appellate and district court judges as well as five new members of the 9th Circuit.

Now that the second session of the 106th Congress has convened, the Committee and Senator Hatch should expeditiously hold confirmation hearings on those candidates whom the panel had investigated but for whom it had failed to conduct hearings in 1999 as well as on nominees whom President Clinton tenders during 2000. The Judiciary Committee and the chair must substantially modify the schedule that they employed in the first session of the 106th Congress, whereby no nominees for the 9th Circuit received hearings until the summer of 1999. The panel and Senator Hatch might even seek to change the method which they used throughout the 105th Congress, wherein only one appellate court candidate appeared at each hearing, and hearings were normally held only once a month.⁶³

63. See Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309, 318 (1996) (discussing Senator Hatch's process for the confirmation of a judicial nominee); see also Carl Tobias, *Choosing Federal Judges in the*

The Committee and the chair should seriously consider scheduling more than a single hearing every month or allowing multiple nominees for appeals court positions to testify in a particular hearing. The panel could consider holding a special hearing for several 9th Circuit candidates or entertain the idea of placing these nominees at the front of the queue. Indeed, the Committee and Senator Hatch might forego hearings for candidates who are not controversial because proceedings for such nominees are rather perfunctory. However, the symbolic and practical importance of appointments to the appellate courts, which are effectively the courts of last resort in the federal system because the Supreme Court grants so few petitions for certiorari, could make this suggestion unpalatable to certain senators.

The Senate Judiciary Committee and Senator Hatch must schedule Committee hearings and votes on each candidate whom the president proffers, even if members of the Senate oppose individual nominees. These candidates should be permitted to testify, and the panel should discuss and vote on their suitability for the federal bench. The Chief Executive is entitled to tender the names of persons whom he thinks will serve with distinction on the courts; the President and nominees can expect that the candidates will receive hearings on the merits of their candidacies, as well as equitable consideration and fair votes. Subject to institutional restraints and conventional understandings of the Senate role in affording its advice and consent, the Judiciary Committee, panel members, and particular senators can thoroughly and rigorously probe nominees whom the Chief Executive submits. They may vote against those people whom the senators believe lack the requisite qualifications to serve as members of the appellate bench. For example, senators who think that candidates could be “activist judges” once on the court might wish to explore in confirmation hearings whether nominees may so behave after they are confirmed.⁶⁴

Second Clinton Administration, 24 HASTINGS CONST. L.Q. 741, 744 (1997) (describing the confirmation hearing process and how often hearings are held).

64. See 143 CONG. REC. S2515 (daily ed. Mar. 19, 1997) (statement of Senator Hatch suggesting that the primary criterion in the confirmation process might be to determine the political activism of the candidate). See, e.g., *Judicial Activism: Defining the Problem and the Impact: Hearings on S.J. Reg. 26 Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 105th Cong. (1997).

It is preferable to explore freely and openly in a public forum issues such as those examined above, especially if individual candidates favor doing so. However, certain nominees might want these questions to be asked in private. The possibilities of embarrassment, wasting scarce resources, or creating citizen disrespect for the process may suggest that public treatment is less beneficial or even undesirable. These circumstances will probably be unusual, and should be handled through private negotiations involving specific candidates, Senator Hatch, and President Clinton or their designees, and ought to honor the preferences of the nominees whose reputations can be at stake.

The Senate Majority Leader should institute actions similar to those he apparently implemented in 1998 to facilitate the entire Senate's consideration of candidates whom the Judiciary Committee forwards. For instance, Senator Lott must schedule floor votes soon after receiving notification of panel approval. When slow processing can be attributed to controversy involving individual nominees, especially objections of the Majority Leader or specific members of the Senate, Senator Lott may want to allow greater floor debate and final votes on these candidates. For example, the floor debate in which members of the upper chamber participated before they voted on Judge Fletcher's confirmation promoted open and constructive exchange among senators.⁶⁵

C. *Suggestions for President Clinton*

President Clinton should implement measures that could expedite the appointment of judges for the six openings that currently exist on the 9th Circuit. The Clinton Administration tendered nominations for five of those vacancies immediately after the first session of the 106th Congress convened.⁶⁶ The Chief Executive should promptly forward nominees for the remaining

65. See 143 CONG. REC. S2538, S2541, *supra* note 39 and accompanying text (containing Senator Biden's opinions on the judicial confirmation process); see also 143 CONG. REC. S2515-S2541 (daily ed. Mar. 19, 1997) (suggesting that floor debate over D.C. Circuit Judge Merrick Garland elicited a similar exchange).

66. See OFFICE OF THE PRESS SECRETARY, *President Nominates Seventeen to the Federal Bench*, *supra* note 46 and text accompanying note (announcing the nominations of Marsha Berzon, Barry Goode, Ronald Gould, Richard Paez, and Barbara Durham).

vacancy and should be prepared to submit names expeditiously as additional openings occur.

The President can most felicitously encourage the confirmation of judges for the unfilled positions by continuing to follow several practices that he had implemented near the end of the initial session and during much of the second session of the 105th Congress.⁶⁷ President Clinton must identify and nominate people who are exceptionally well qualified and who will be considered acceptable by members of the Senate from states in which the empty seats arise, possibly by consulting closely with those solons about candidates. Typical is the Chief Executive's decision to submit the name of Magistrate Barry Silverman, whom the Republican Senators from Arizona, Jon Kyl and John McCain, clearly supported.⁶⁸ The Clinton Administration forwarded the nomination during early November 1997, Magistrate Judge Silverman testified before the Senate Judiciary Committee on November 12th, and the panel approved the candidate on November 13th.⁶⁹ Congress recessed before the full Senate was able to vote on Silverman; however, he gained confirmation soon after the second session of the 105th Congress convened.⁷⁰

Therefore, the Chief Executive should seek out and nominate candidates who are intelligent and independent, who will work diligently, and who possess balanced judicial temperament. President Clinton may wish to consider tendering individuals who have moderate political viewpoints, perspectives shared by many nominees who were forwarded throughout both Clinton Administrations.⁷¹ This approach would be responsive to the Senate

67. See Tobias, *Federal Judicial Selection*, *supra* note 3, at 541-42 (noting that throughout 1997, the Clinton Administration steadily and with increased speed forwarded names of nominees).

68. See OFFICE OF PRESS SECRETARY, *supra* notes 36, 40 and accompanying text.

69. See Adrienne Flynn, *Arizona Lawmakers Post Wins as Session Ends; Actions Include Court Nominee, Key Bills Passed*, ARIZONA REPUBLIC, Nov. 13, 1997, at A2 (predicting Senate approval of Silverman's appointment before the recess); *Senate Dems Put Judge Pick on Hold*, ARIZONA REPUBLIC, Nov. 15, 1997, at B1 (reporting on the hold placed on Silverman's appointment).

70. See *supra* note 39 (reporting on Silverman's confirmation).

71. See Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254, 255 (1997) (describing the nominees for both of Clinton's administrations); Ronald Stidham et al., *The Voting Behavior*

Judiciary Committee chair and a number of Republican senators who have forcefully and repeatedly stated that they will not vote for persons whom they believe might be “activist judges.” This could well become a political necessity in a presidential election year.⁷²

Although it should not be dispositive, previous service on the federal or state bench constitutes valuable experience. For example, Judge Wallace Tashima and Judge Kim Wardlaw had been well-respected members of the Central District of California before the Clinton Administration elevated them to the 9th Circuit. People who have served on the federal or state courts bring the benefit of that experience, and most federal district judges can be rather readily confirmed, as they have already secured Senate approval. President Clinton might consider continuing to submit the names of current district judges who are Republican appointees, such as Judge Sonia Sotomayor, because the GOP Senate majority should be favorably disposed toward the candidacies of these jurists.⁷³

The Chief Executive must also work closely with Senator Hatch on appointments. The Clinton Administration ought to solicit the Chair’s advice and recommendations, even if Executive Branch officials depart from the counsel that the Senator affords. The President should correspondingly consult with additional members of the Judiciary Committee and senators from states in which there are vacancies, because these lawmakers can be critical to the confirmation process, as they seemingly were in Arizona.⁷⁴ Neither the administration nor Senator Hatch should allow disputes, such as

of President Clinton’s Judicial Appointees, 80 JUDICATURE 16, 18 (1996) (discussing Clinton’s ideology in nominating judges).

72. See, e.g., Elias, *Berzon’s Ninth Circuit Bid*, *supra* note 51; Orrin G. Hatch, *There’s No Vacancy Crisis in the Federal Courts*, WALL ST. J., Aug. 13, 1997, at A15; Savage, *Political Logjam*, *supra* note 22; *Judicial Activism*, *supra* note 64 and text accompanying note.

73. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, *President Nominates Sonia Sotomayor to the Federal Bench* (June 25, 1997) <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/>>; see also Neil A. Lewis, *After Delay, Senate Approves Judge for Court in New York*, N.Y. TIMES, Oct. 3, 1998, at B3 (stating that Judge Sotomayor was confirmed for 2nd Circuit). *But see supra* notes 33, 34 and accompanying text (referring to Senator Hatch’s complaints of renominated individuals who were controversial or viewed as “activist judges”).

74. See *supra* notes 38, 39 and accompanying text (discussing the desire of Republican Senators from Arizona and Washington to have greater input into potential judicial nominees).

the controversy that arose over the Utah district court vacancy, to stymie the judicial selection process.⁷⁵ The Chief Executive and the Senate Judiciary Committee chair might follow the constructive approach which they used in 1998, as both must seek the maximum possible consensus and refrain from imposing unreasonable demands.

Should these recommendations, which can aptly be described as conciliatory, not work, the Clinton Administration could implement less cooperative measures. For example, the President might use his office as a bully pulpit from which to charge Republican senators with confirming only two 9th Circuit judges in 1999 or perhaps to embarrass lawmakers into facilitating appointments. The Chief Executive could also force the issue of slowed judicial selection by taking the question to the American people. President Clinton might even invoke the notion of recess appointments, or proffer the prospect of bipartisan judicial appointments, in exchange for passage of legislation authorizing more judgeships.⁷⁶ These possibilities could pressure the Senate to expedite the judicial selection process by publicizing how the number and prolonged nature of openings can erode justice and the significance of expeditiously confirming additional judges.⁷⁷

The serious circumstances that presently exist in the 9th Circuit clearly warrant implementation of the ideas proposed.

75. See *supra* note 48 and accompanying text (discussing the alleged delaying tactics that Senator Hatch used to influence the selection of Republican Ted Stewart as a judicial nominee).

76. See *United States v. Woodley*, 751 F.2d 1008, 1010 (9th Cir. 1985) (en banc) (1985) (holding that the President may constitutionally confer temporary federal judicial commissions during a recess of Senate pursuant to recess appointment clause); *United States v. Allocco*, 305 F.2d 704, 708-09 (2d Cir. 1962) (holding that the President's constitutional authority to make interim appointments includes authority to appoint "temporary" judges); Thomas A. Curtis, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758 (1984) (suggesting the constitutionality of recess appointments); Goldman & Slotnick, *supra* note 71, at 272 (suggesting that President Clinton invoke the ideas in the text); Neil A. Lewis, *Clinton Agrees to GOP Deal in Judgeships*, N.Y. TIMES, May 5, 1998, at A1 (discussing bipartisan judicial selection).

77. Although this Article does not necessarily champion the ideas in this or the preceding sentence, President Clinton must be realistic about filling vacancies and should calculate their significance generally and in the 9th Circuit, especially during an election year.

“Fundamental concepts of fairness and due process”⁷⁸ require that the judges of this appellate court have responsibility for caseloads similar to those of their colleagues in the remaining appeals courts. Lawyers and parties in the 9th Circuit should not have to wait substantially longer for appellate resolution than their counterparts in other courts. In the end, the 9th Circuit’s troubling situation should lead Republican and Democratic senators, as well as President Clinton, to rise above partisan politics and confirm judges for the court.

V. Conclusion

The 9th Circuit presently has vacancies in nearly one-quarter of the court’s 28 authorized judgeships, even as the court experiences a docket that continues to increase in magnitude and complexity. The inability, or reluctance, to appoint judges for these openings has undermined appellate justice in the 9th Circuit. Members of the Senate and President Clinton must work cooperatively, so that they can promptly approve judges for these empty seats.

78. Pub. L. No. 105-119, 305(a)(1)(B)(iii), 111 Stat. 2440, 2491 (1997).