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FILLING FEDERAL APPELLATE VACANCIES

Carl Tobias[†]

Judicial selection for the United States Courts of Appeals has rarely been so controversial. Delay in nominating and analyzing candidates as well as fractious accusations, recriminations, and “paybacks” between Democrats and Republicans have vexed circuit appointments over two decades. Many judgeships remain empty for long periods, while one position has been vacant since 1994. Certain appellate tribunals have confronted acute difficulties. The U.S. Court of Appeals for the Sixth Circuit recently operated absent half its judicial complement across eight months, and numerous courts labored without one in three members at various junctures.

The Senate, which furnishes advice and consent, has accorded particular nominees only minimal consideration. To illustrate, the Senate avoided a confirmation vote on U.S. District Judge Terrence Boyle for almost seven years and delayed the elevation of Ninth Circuit Judge Richard Paez, which demanded the longest time in American history.¹ Moreover, the Judiciary Committee, which assumes major responsibility for upper chamber evaluation, increasingly votes along party lines. The committee did not scrutinize Michigan Court of Appeals Judge Helene White throughout President Bill Clinton’s final administration, although she received confirmation near the end of the George W. Bush presidency.² The 107th and 110th Senates afforded multiple Bush candidates nominal attention for twenty months, and Democrats periodically invoked or threatened filibusters when blocking controversial Republican nominees.

The phenomenon of myriad lengthy openings has adverse effects on selection, courts and judges, those who participate in appointments, and counsel and litigants. For instance, extensive vacancies have slowed

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1. Mickey Kaus, *No Justice, No Paez*, SLATE, March 12, 2000, Kausfiles Special, available at <http://www.slate.com/id/1004818/>; Charles Lane, *N.C. Judge Has Spent 15 Years as a Nominee: Judge Derailed by Partisan Issues*, WASH. POST, May 12, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/11/AR2005051102029.html>.

2. Michael Abramowitz, *Ye Shall Be Judged—Not*, WASH. POST, May 5, 2008, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/04/AR2008050401936.html?hpid=sec-politics>.

appellate disposition and undercut inexpensive and fair resolution, while empty judgeships led courts of appeals to cancel oral arguments. The dilemma's persistence has concomitantly undermined regard for all three branches of government. Despite the complications assessed, President Barack Obama and the new upper chamber have a valuable opportunity to rectify or ameliorate the concerns.

These ideas demonstrate that appellate court selection requires examination, which this article undertakes. The first part investigates why so many circuit nominees languish over prolonged times and detects a few explanations. Among the most important explanations is the significance of the appellate tribunals. Courts of appeals are basically courts of last resort for geographic areas, especially when they decide controversial issues respecting questions such as the death penalty, religion, and abortion, because the Supreme Court now hears a minuscule number of appeals. Equally responsible is divided government, a regime in which one party controls the Executive Branch and the other controls the Senate. Democratic and Republican presidents, as well as upper chambers, assumed opposing views and deserve similar responsibility for the conundrum. The parties depended on relatively identical approaches once both captured the White House and the Senate, although they might have cured the difficulty by applying the necessary political will.

Section two canvasses the appointment of circuit judges across the Bush years. This evaluation finds that multifarious and longstanding considerations—which include tardy nomination and analysis of candidates as well as Republican and Democratic allegations and retorts—hampered the selection process and may have exacerbated the problem. Illuminating examples include the 2002 Judiciary Committee determinations with nine Republicans voting for and ten Democrats voting against Judges Priscilla Owen and Charles Pickering, even though the whole Senate actually might have confirmed both.³ Analogous were the jurists' 2003 re-nomination and the decision championing the recess appointments of Pickering and William Pryor the next year. President Bush similarly nominated Department of Defense General Counsel William Haynes and Judge Boyle multiple times, although a few Grand Old Party (GOP) senators had rejected the candidates.⁴ As trenchant was Democrats' invocation of filibusters to oppose certain nominees.

3. Helen Dewar, *Senate Panel Rejects Bush Nominee*, WASH. POST, Sept. 6, 2002, available at <http://community.seattletimes.nwsources.com/archive/?date=20020906&slug=judge06>.

4. See Jerry Markon, *Vacancies Whittle Away Right's Hold on Key Court*, WASH. POST, Aug. 8, 2007, available at <http://www.washingtonpost.com/wp->

The last segment, accordingly, proffers recommendations which may solve or temper the dilemma. The Chief Executive ought to name attorneys whom upper chamber members approve because they are consensus nominees. The Senate, for its part, might review and adopt numerous concepts which improve appointments. Thus, when senators deem candidates unpalatable, the legislators may want to advocate putative nominees whom they believe superior. A related, efficacious device is consultation, whereby the administration requests, and chamber members provide, frank, informative advice on candidates whom the White House is examining before their actual nomination.

I. THE RISE AND GROWTH OF THE DILEMMA

A. Introduction

The history of the complications that have accompanied circuit selection appears to merit nominal discussion in this piece, because others have treated the background⁵ and the current situation is most applicable. Nonetheless, considerable inquiry is warranted because this might enhance understanding of the appellate tribunals, the concerns which presidents and senators have voiced regarding appointments, and today's conditions assessed in the next part.

The conundrum implicating appeals court selection actually has two major constituents. The first component is the *persistent* openings difficulty that is ascribed to enlarged federal jurisdiction and caseload rises since the 1960s. These attributes made the bench grow, which increased the number and occurrence of vacancies, and complicated attempts to fill them. The second constituent is the *contemporary* dilemma, which is effectively political and mainly results from disparate White House and Senate control

[dyn/content/article/2007/08/07/AR2007080701896.html?hpId=topnews](http://www.weeklystandard.com/Utilities/prINTER_preview.asp?idArticle=14603&R=13BB81D); Adam White & Kevin White, *Misjudging McCain: He Was Right About the Nuclear Option*, WEEKLY STANDARD, Jan. 18, 2008, available at http://www.weeklystandard.com/Utilities/prINTER_preview.asp?idArticle=14603&R=13BB81D; Lane, *supra* note 1.

5. See, e.g., WHITE BURKETT MILLER CENTER OF PUBLIC AFFAIRS, REPORT OF THE COMMISSION ON THE SELECTION OF FEDERAL JUDGES 3–6 (1996), http://web1.millercenter.org/commissions/comm_1996.pdf [hereinafter MILLER REPORT]; Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319, 320–23 (1994). I depend substantially in this sentence and throughout this paper on these sources and on Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527, 529–31 (1998).

by Republicans and Democrats respectively over the last 20 years. The article focuses on this notion, and its political dimensions, as they best inform the signature concerns about circuit appointments. However, a somewhat cursory review of the longstanding problem is justified because this may accentuate an appreciation for the contemporary situation.⁶

B. *The Dilemma of Persistent Vacancies*

The perennial difficulty of filling vacancies comprises numerous strands, mostly regarding Article II of the Constitution and the American founding. Nevertheless, I concentrate on its modern hallmarks, whose primary sources have been expanding jurisdiction and burgeoning appeals that led Congress to authorize greater numbers of judgeships, which multiplied the quantity and frequency of openings as well as the selection complications.

1. The Origins and Early History

The appointments clause directs the President to nominate, and with Senate advice and consent, appoint judges.⁷ Many constitutional Framers, notably Alexander Hamilton, believed the chamber would operate as a measured safeguard against chief executives' propensity for favoritism, would limit the approval of unqualified lawyers, and would bring needed stability.⁸ The Founders realized that politics would be meaningful, and occasionally crucial, to appointments.

6. It merits less, as some delay is intrinsic and thus resists easy solution, while politics explains it more than the current dilemma, which others have analyzed. *See* Bermant et al., *supra* note 5, at 319–20; COMMITTEE ON FEDERAL COURTS, *Remedying the Permanent Vacancy Problem in the Federal Judiciary – The Problem of Judicial Vacancies and Its Causes*, 42 REC. ASS'N B. CITY N.Y. 374 (1987) [hereinafter N.Y. CITY BAR]; Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947-1998*, 46 AM. J. POL. SCI. 190, 190–91 (2002); Victor Williams, *Solutions to Federal Judicial Gridlock*, 76 JUDICATURE 185, 186 (1993).

7. Appellate selection may be vested in the judiciary. U.S. CONST. art. II, § 2, cl. 2; Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783, 784 (2006); *see* Elliot E. Slotnick, *Appellate Judicial Selection During the Bush Administration*, 48 ARIZ. L. REV. 225, 226–27 (2006). The Constitution delegates the President and the Senate more responsibility than the House and the bench. The President includes Executive officers, such as White House Counsel and Justice Department lawyers. The Senate includes the Judiciary Committee, the Majority Leader, and individual senators.

8. THE FEDERALIST No. 76, at 510, 513 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see* MICHAEL GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 28 (2000); SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 5 (1997); JAN CRAWFORD GREENBURG, SUPREME CONFLICT 47–52, 308 (2007); JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD

Senators have been involved with the process since the country's origins, as they essentially have a pivotal stake in approving judges, while complex political accommodations that implicate the lawmakers and presidents during nascent stages of the regime, have effectively fostered its operation.⁹ The body's members traditionally helped identify and confirm nominees, particularly for district vacancies. Senators, or high-level elected officials of the administration's party who were from the state where the position opened, commonly recommended aspirants whom the White House in turn nominated.¹⁰

Politics, accordingly, has long suffused, and is a critical facet of, appointments. If the President and senators differ, the legislators can affect judicial choices in part by tactically relying on delay.¹¹ For example, Senator Spencer Abraham (R-Mich.) obstructed chamber review of Michigan attorneys whom President Clinton had nominated in his final administration, and the jurisdiction's Democratic Senators Carl Levin and Debbie Stabenow prevented hearings on four Michigan nominees over Bush's initial two years.¹² Senator Jesse Helms (R-N.C.) analogously restricted chamber analysis of many prospects whom President Clinton designated for Fourth Circuit vacancies in North Carolina, while Senator

OF THE SUPREME COURT 265–66 (2007). *See generally* CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* (2007); Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619 (2003).

9. HAROLD W. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* 7 (1972); Bermant et al., *supra* note 5, at 321; *see* GERHARDT, *supra* note 8, at 29–34; Albert P. Melone, *The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality*, 75 JUDICATURE 68, 70 (1991).

10. President Dwight D. Eisenhower chose few nominees whom home-state senators would oppose. *See* Lawrence E. Walsh, *The Federal Judiciary . . . Progress and the Road Ahead*, 43 J. AM. JUDICATURE SOC'Y 155, 156 (1960); *see also* MILLER REPORT, *supra* note 5, at 4 (stating Attorney General Robert Kennedy's view of judicial confirmation process as "Senatorial appointment with the advice and consent of the President.").

11. CHASE, *supra* note 9, at 14, 40; Bermant et al., *supra* note 5, at 321; *see* Melone, *supra* note 9, at 73–79.

12. Jonathan Ringel, *The Battle for the 6th Circuit*, LEGAL TIMES, Nov. 12, 2001, at 8; Nedra Pickler, *Bush Picks State Judge for Appeals Panel: Richard Griffin's Nomination to the 6th Circuit U.S. Court of Appeals May Be Blocked by Senators Debbie Stabenow and Carl Levin*, GRAND RAPIDS PRESS, June 27, 2002, at A15; *see also* ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (Dec. 1, 2002), <http://www.uscourts.gov/vacancies/archives/02-1201/list.pdf>; Sheldon Goldman et al., *Picking Judges in a Time of Turmoil: W. Bush's Judiciary During the 109th Congress*, 90 JUDICATURE 252, 270 (2007); Paul Egan & Gordon Trowbridge, *Bush, Mich. Senators End Fed Judge Fight*, DETROIT NEWS, Apr. 16, 2008, at 1A, available at http://infoweb.newsbank.com.ezproxy1.lib.asu.edu/iw-search/we/InfoWeb?p_product=AWNB&p_theme=aggregated5&p_action=doc&p_docid=1234E6A8795D2E40&p_docnum=1&p_queryname=1; *infra* notes 49, 91, 93, 131, 140, 145, 147, 164–66, 168, 188–91 and accompanying text.

John Edwards (D-N.C.) precluded assessment of Judge Boyle, whom Senator Helms favored, in the 107th Congress.¹³ So long as advice and consent is mandatory for appointment, the White House and the institution will face tensions.¹⁴

The Chief Executive and the Senate, therefore, have chosen judges in a regime that was always politicized. However, the need to fill large numbers of vacancies that were empty for protracted times has only become severe in the past thirty years. For virtually two centuries after Congress enacted the 1789 Judiciary Act, court of appeals and district judgeships gradually reached 300; the few, and comparatively infrequent, vacancies permitted lawyers' smooth appointment and minimized the complications which ultimately arose.¹⁵

2. History Since 1960

Federal jurisdiction has greatly expanded since the 1960s.¹⁶ Lawmakers federalized much criminal activity and instituted a plethora of civil actions, so trial court suits experienced 300 percent annual growth over the last five decades.¹⁷ Congress responded to these docket rises by substantially

13. See Roland S. Martin, *Commentary: Don't Sanitize Helms' Racist Past*, CNN.COM, July 2, 2008, <http://www.cnn.com/2008/POLITICS/07/09/roland.martin/index.html>; David G. Savage, *Clinton Losing Fight for Black Judge*, L.A. TIMES, July 7, 2000, at A1, available at <http://articles.latimes.com/2000/jul/07/news/mn-49040>; see also ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (Dec. 1, 2002), <http://www.uscourts.gov/vacancies/archives/02-1201/list.pdf>; Carl Tobias, *Federal Judicial Selection in the Fourth Circuit*, 80 N.C. L. REV. 2001, 2025–29 (2002). See generally *infra* notes 49, 90, 93, 166, 169, 171, 186–87 and accompanying text.

14. There seem to be two major ways of addressing the constitutional restraint. “One requires constitutional interpretation, the other constitutional amendment.” Bermant et al., *supra* note 5, at 322.

15. MILLER REPORT, *supra* note 5, at 3; Slotnick, *supra* note 7, at 229; Tobias, *supra* note 5, at 531.

16. See MILLER REPORT, *supra* note 5, at 3. See generally Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1268–70 (1996); Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 23–24.

17. See, e.g., Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 42 U.S.C. §§ 13701–14223 (2006)); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2006)); see also William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 722–23 (1995); Slotnick, *supra* note 7, at 238.

augmenting the number of active judges, and creating 179 appellate and 678 district seats.¹⁸

When the Judicial Conference of the U.S. Committee on Long Range Planning analyzed the court system fourteen years ago, it predicted that docket increases would necessitate tripling judgeships by 2010 and would require even more additions one decade later.¹⁹ Moreover, the number of judgeships will continue to grow because lawmakers will not reduce jurisdiction,²⁰ although those officers, jurists, practitioners, and scholars think the bench's magnitude is controversial, especially at the appellate level.²¹ The committee also found that the period needed to appoint judges had lengthened considerably, and much delay happened between the time a position opened and the time the Chief Executive recruited someone.²² In the decade and a half following 1980, the average confirmation required three months and the average nomination required twelve, while the actual time mandated for both dramatically increased.²³ A helpful Federal Judicial Center (FJC) study ascertained that vacancy rates from 1970 until 1992 were practically twice as high in the district courts, and this vacancy rate was even greater for the appellate tribunals.²⁴

The persistent conundrum appears to impose a broad range of detriments. For example, the conundrum has seemingly prolonged actions' resolution in the district courts and restricted expeditious, inexpensive, and fair appellate disposition. It has also exerted unnecessary pressures on judges as well as frustrated clients and attorneys who must compete for

18. See 28 U.S.C. §§ 44, 133 (2006). See generally ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (Aug. 1, 2009), http://www.uscourts.gov/vacancies/archives/200908/jdarvac1_current_circuit.html.

19. See U.S. COURTS, JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 16 (1995), <http://www.uscourts.gov/lrp/CH02.PDF> [hereinafter LONG RANGE PLAN] (The committee predicted that 1,370 judgeships would be required by 2000. Nevertheless, Congress failed to authorize the seats mainly for political reasons.).

20. MILLER REPORT, *supra* note 5, at 3; William Reynolds & William Richman, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996).

21. Compare Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52, with Gerald Bard Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70; see also sources cited *supra* note 16; *infra* notes 68–71, 193–204 and accompanying text.

22. See LONG RANGE PLAN, *supra* note 19, at 103; see also Viveca Novak, *Empty-Bench Syndrome*, TIME, May 26, 1997, at 37.

23. See LONG RANGE PLAN, *supra* note 19, at 103–04; see also Novak, *supra* note 22.

24. Bermant et al., *supra* note 5, at 323; see 28 U.S.C. §§ 620–29 (2006) (creating FJC as courts' research arm); William Schwarzer, *The Federal Judicial Center and the Administration of Justice in the Federal Courts*, 28 U.C. DAVIS L. REV. 1129, 1133 (1995).

limited available court resources.²⁵ Between 1970 and 1992, the openings had a statistically significant effect on average workloads for district and circuit members of ten and nine percent respectively.²⁶

This assessment suggests politics has influenced federal judicial choices since the early days of the American Republic.²⁷ However, many observers believe politicization has skyrocketed over the last four decades, commencing with the GOP administration of President Richard Nixon, who secured his election with a campaign vow to institute “law and order” by picking judges characterized as “strict constructionists.”²⁸ A modern variant originated with President Ronald Reagan’s doomed attempt to grant Robert Bork Supreme Court appointment during 1987.

C. *The Contemporary Dilemma*

Political elements apparently have greater relevance to the modern selection concern than the longstanding vacancies’ dilemma, although politics necessarily infuses both and obscures their exact relationship. These concepts indicate that political factors undergird the existing difficulty, and the two ideas may share responsibility for today’s federal appellate court appointment process. Accordingly, the present complication warrants much examination.

1. General Survey of the Contemporary Dilemma

Over the past several decades inexpeditious candidate nomination and analysis, as well as Republican and Democratic charges, recriminations, and gamesmanship, have frequently accompanied the circuit judge selection procedures. Across most of this time frame, the government has been divided; one party controlled the White House and the other the Senate.

25. See N.Y. CITY BAR, *supra* note 6, at 374; see also Novak, *supra* note 22; Robert Schmidt, *The Costs of Judicial Delay*, LEGAL TIMES, Apr. 28, 1997, at 6 (assessing the substantial civil backlogs and their disadvantages); Letter from Lee Cooper, President, A.B.A., et al., to President William Clinton & Senate Majority Leader Trent Lott, (July 14, 1997), reprinted in 143 CONG. REC. S8046 (daily ed. July 24, 1997) [hereinafter Letter from Lee Cooper]; William H. Rehnquist, 1997 Year-End Report on the Federal Judiciary, THE THIRD BRANCH, Jan. 1998, available at <http://www.uscourts.gov/ttb/jan98ttb/january.htm>.

26. Bermant et al., *supra* note 5, at 327; see also Schwarzer, *supra* note 24.

27. *Supra* text accompanying notes 7–15; see GERHARDT, *supra* note 8, at 257; GOLDMAN, *supra* note 8, at 2.

28. See, e.g., DAVID M. O’BRIEN, JUDICIAL ROULETTE 20 (1988); GOLDMAN, *supra* note 8, at 205–06; Roger F. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees*, 80 JUDICATURE 274, 274 (1997); Slotnick, *supra* note 7, at 228–29; see also *infra* text accompanying notes 162–63.

There are numerous explanations why more controversy has beset the appellate nomination process as opposed to the federal district or Supreme Court nomination processes. First, a small number of High Court vacancies occurred in the last two decades and most people engendered little opposition. After the controversial appointment of Justice Clarence Thomas, presidents have generally nominated, and the Senate has approved, individuals with relatively moderate views.²⁹ Choosing district judges has also been the prerogative of elected figures who represent the locales where openings arise. Senatorial courtesy and the notion that district judgeships constitute practically the sole remnant of unalloyed patronage mean that the vacancies are infrequently disputed. Third, the regional circuits are effectively deemed the courts of last resort in their areas to decide fundamental issues, such as questions regarding terrorism and freedom of the press, because the Justices entertain so few appeals.³⁰

Notwithstanding these difficulties, circuit appointments have functioned rather well at various junctures. For instance, President George H. W. Bush as well as Democratic and GOP Senate members essentially rejected divisive infighting and worked constructively after the battle related to Justice Thomas.³¹ This promoted the uneventful confirmation of Justice David Souter and relatively efficacious appellate and district court selection in the early 1990s. However, when the administration terminated, more than 100 lower court judgeships remained open.³² Democrats attributed the empty positions to the White House which they claimed was slow to nominate qualified candidates whom the Democrats found palatable.³³

29. JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 357–59 (1994); TIMOTHY M. PHELPS & HELEN WINTERNITZ, *CAPITOL GAMES* 425 (1992); see Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254 (1997). Some observers question whether Chief Justice John Roberts and Justice Samuel Alito are relatively moderate. See, e.g., GREENBURG, *supra* note 8, at 191, 301; TOOBIN, *supra* note 8, at 275–76, 313–14.

30. Neil A. Lewis, *Move to Limit Clinton's Judicial Choices Fails*, N.Y. TIMES, Apr. 30, 1997, at D1; Jeffrey Rosen, *Obstruction of Judges*, N.Y. TIMES MAG., Aug. 11, 2002, available at <http://www.nytimes.com/2002/08/11/magazine/11JUDGES.html?pagewanted=1>; Editorial, *Obstruction of Justice*, THE NEW REPUBLIC, May 19, 1997, at 9; see RICHARD A. POSNER, *THE FEDERAL COURTS* 80–81, 194–95 (1996); Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 403–04 (1997).

31. See Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 283 (1993).

32. Denis Rutkus & Mitchell Sollenberger, *Judicial Nomination Statistics: U.S. District & Circuit Courts, 1977–2003*, CONG. RESEARCH SERV., Feb. 23, 2004, at CRS-10 tbl.1, available at <http://www.senate.gov/reference/resources/pdf/RL31635.pdf>.

33. 143 CONG. REC. S2538 (1997); see Goldman, *supra* note 31; Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477, 477–78 (1991); see The White House, Office of the Press Sec'y, *President Clinton Nominates Twenty-two to the Federal Bench* (Jan.

Senate Republicans blamed the vacancies on tardy assessments by the Democratic majority, who allegedly delayed nominee assessment in the hope that a Democratic candidate would win the presidency.³⁴

There were a few unusual times when selection operated rather effectively in President Bill Clinton's Administration. For example, cooperative actions of the President and Democratic senators, who controlled the body, and their outreach to the GOP, yielded 125 judicial appointments the first half term.³⁵ Moreover, the upper chamber approved sixty jurists four years later, when Republicans dominated the institution.³⁶

Between early 1995 when the GOP possessed a majority in the Senate, thereby reestablishing a divided government, and the end of the final Clinton Administration, assertions and countercharges as well as rampant distrust often attended the judicial selection process. Thus, when President Clinton finished his second administration, thirty circuit judgeships lacked occupants, which resembled the number of appellate judicial vacancies that existed when his presidency began.³⁷

Following the 2000 elections, the GOP enjoyed a thin chamber majority, and the government was no longer divided. This regime only prevailed until

7, 1997) [hereinafter *The White House January*]; *The White House, Office of the Press Sec'y, President Clinton Nominates Thirteen to the Federal Bench* (July 31, 1997) [hereinafter *The White House July*]; Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309 (1996); Goldman & Slotnick, *supra* note 29; Orrin G. Hatch, *There's No Vacancy Crisis in the Federal Courts*, WALL ST. J., Aug. 13, 1997, at A15 (affording data); *infra* note 60 and accompanying text.

34. See, e.g., Goldman, *supra* note 31, at 282–85; see also ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (Jan. 20, 1993), http://www.uscourts.gov/vacancies/archives/1981_1985/Jan_Vacancies_1993.pdf; 143 CONG. REC. S2538, S2538–41 (daily ed. Mar. 19, 1997). See generally Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. REV. 1257, 1270–74.

35. Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 278–79 (1995); Carl Tobias, *Increasing Balance on the Federal Bench*, 32 HOUS. L. REV. 137, 145–46 (1995).

36. See 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); see also Novak, *supra* note 22; Letter from Lee Cooper, *supra* note 25; Rehnquist, *supra* note 25.

37. U.S. COURTS, *supra* note 34; ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (Jan. 4, 2001), <http://www.uscourts.gov/vacancies/01042001/judgevacancy.htm>; see Carl Tobias, *Dear President Bush*, 67 MO. L. REV. 1, 1 (2002). The Clinton impeachment, like the Bush U.S. Attorney controversy, complicated judicial selection. See RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 124–32 (1999); DAVID IGLESIAS, IN JUSTICE: INSIDE THE SCANDAL THAT ROCKED THE BUSH ADMINISTRATION (2008); Dan Eggen, *Several Top Positions at Justice Department Unfilled*, WASH. POST, Dec. 23, 2007, at A9; *infra* text accompanying note 134.

May 2001, when Democrats resumed control of the institution; yet, Democratic control of the Senate was short-lived, as Republicans captured a narrow majority in 2002, which the GOP sustained and essentially increased over the next four years.³⁸

2. Analysis of the Contemporary Dilemma

I attempt to describe below the contemporary conundrum through the actions of, and the viewpoints enunciated by, individuals and entities involved with the federal court appointment process. The subsection evaluates the last Clinton, and the initial George W. Bush, Administrations, emphasizing the first year of both. The federal court appointments process then, and over the specific presidencies, is comparatively recent and analogous in certain ways, and especially telling is the significance of divided government.

Many political considerations, which implicated selection over the two administrations, underlay the existing circumstances, but a few aspects of the longstanding complication have involved appointments since 1997, particularly in 1997 and 2001. The Republican and Democratic chief executives and senators — including the Majority Leaders, the Judiciary panels, and numerous specific members — were responsible for the perpetuation of the current dilemma. These officials alone or together could have stopped or limited a number of problems, had they mustered sufficient political will.

The period of time that the Clinton and Bush Administrations, as well as the Senate, required to complete the nomination and approval processes was lengthy and similar throughout most of 1997 and 2001. For instance, over the first period of President Clinton's second administration and the initial period of President Bush's first administration, more than 600 days on average were consumed by nominations, and confirmations took a record high of six months.³⁹

38. See Slotnick, *supra* note 7, at 235. Senator James Jeffords (R-Vt.) became an independent during May 2001. See Neil A. Lewis, *Road to Federal Bench Gets Bumpier in Senate*, N.Y. TIMES, June 26, 2001, at A16; David Rogers, *Sen. Jeffords Defects From GOP, Creating Era of 'Tripartisanship'*, WALL ST. J., May 25, 2001, at A16; Review and Outlook, *True Bipartisanship*, WALL ST. J., May 31, 2001, at A16; see also ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (April 1, 2003), <http://www.uscourts.gov/vacancies/archives/03-0401/list.pdf>.

39. Novak, *supra* note 22; see Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 904-08 (2004) (affording comparable data on Clinton's second, and Bush's first, term); Editorial, *Clearing the Bench: Federal Court Vacancies are Delaying Justice*, DALLAS MORNING NEWS, June 17, 1997, at A16

a. Nomination Process

The dearth of 1997 and 2001 appointments may have resulted in part from slow nomination. Certain difficulties should be ascribed to the chief executives and the bodies' members or other figures who suggested attorneys for White House consideration. In 1997, however, additional participants, especially Senate Majority Leader Trent Lott (R-Miss.) and Judiciary Chair Orrin Hatch (R-Utah), and Republican lawmakers, stalled analysis as they harbored concerns about issues, namely the proclivity of candidates for "judicial activism." In 2001, the Republican leaders' counterparts, Senators Thomas Daschle (D-S.D.) and Patrick Leahy (D-Vt.), might have stymied assessment because they worried about the political views of GOP nominees.

The chief executives appeared somewhat responsible for the lack of confirmations attributed to the delay when proposing individuals. For example, in January, President Clinton sent 22 attorneys, many of whom had been transmitted the year before or already received hearings or Judiciary Committee approval, but a few of whom GOP senators opposed, while President Bush did not tender his first circuit nominee list until May and it omitted prominent attorneys considered earlier.⁴⁰ Both gradually, if sporadically, afforded more counsel. Instructive was their propensity to advance big groups as the chamber neared recess.⁴¹ Most attorneys tapped seemed highly qualified, and numerous particular designees had been federal or state court judges.⁴² Quite a few nominees apparently held rather moderate views. Several were not members of the party that controlled the

(also affording comparable data on Clinton's second, and Bush's first, term); LONG RANGE PLAN, *supra* note 15 (affording comparable 1980–1995 data); Hatch, *supra* note 33; *see also infra* note 141 (affording comparable data on Bush's terms).

40. *See* The White House January, *supra* note 33; President's Remarks Announcing Nominations for the Federal Judiciary, 1 PUB. PAPERS 504 (May 9, 2001) [hereinafter President's Remarks]. Those omitted were Rep. Christopher Cox (R-Cal.), Peter Keisler and Judge Carolyn Kuhl, although Bush did nominate Kuhl in September 2001. *See* Slotnick, *supra* note 7, at 243; *infra* notes 94, 144 and accompanying text.

41. *See, e.g.*, ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (2001), http://www.uscourts.gov/vacancies/archives_2001.html [hereinafter VACANCIES 2001]; Jonathan Ringel, *Bush Nominates 18 to Federal Bench*, AM. LAW. MEDIA, Aug. 3, 2001, available at <http://www.law.com/jsp/article.jsp?id=900005524433>; The White House July, *supra* note 33. President Bush transmitted analogously substantial packages of nominees immediately preceding most of the 2001 Senate recesses.

42. *See, e.g.*, President's Remarks, *supra* note 40; Tobias, *supra* note 33; *see also* Goldman & Slotnick, *supra* note 29. *See generally* 143 CONG. REC. S5653 (daily ed. June 16, 1997).

White House, and a few were district judges whom earlier administrations had appointed.⁴³

The chief executives' tendency to proffer many lawyers when Senate recesses approached may have complicated the Judiciary panel's attempts to facilitate investigations. Although President Clinton had submitted a mere eight new attorneys by June 1997, Senator Hatch deemed a couple of the attorneys in President Clinton's January package unacceptable, thus allowing the committee to make the argument that it lacked the requisite candidates for efficient processing.⁴⁴

The administrations failed to select counsel for all circuit and district vacancies, which would have pressured the committees and the bodies. However, tendering greater numbers than Senators Hatch and Leahy suggested they would analyze might have been fruitless.⁴⁵ In portions of 1997 and 2001, the Chief Executives sent more attorneys than the Chairs observed they would assess.⁴⁶ The presidents also had to balance speed with assiduous review of nominee qualifications, as persons who became controversial or lacked sufficient ability or character may have eroded administration initiatives and delayed or threatened selection.

The elected officers who recommended individuals to the chief executives slowed the appointment process. In jurisdictions without senators from the party that controlled the White House, delineating these officials and effectively addressing requests that they be involved were very time consuming. Across the Clinton Administration, GOP legislators essentially insisted on participating and even on suggesting counsel.⁴⁷ When

43. Bush and Clinton elevated district appointees named by the other party. Goldman & Slotnick, *supra* note 29, at 267; Shannon P. Duffy, *Clinton Announces Nominees for Eastern District Court*, LEGAL INTELLIGENCER, Aug. 4, 1997, at 1; see David G. Savage, *Bush Picks 11 for Federal Bench*, L.A. TIMES, May 10, 2001, at A1; see also *infra* notes 74, 159, 162, 165, 167, 169, 185, 189 and accompanying text.

44. See Hatch, *supra* note 39; see also Neil A. Lewis, *Keeping Track; Vacant Federal Judgeships*, N.Y. TIMES, Aug. 11, 1997, at A12. Similarly, Bush submitted comparatively few new nominees by June 2001 and Senator Leahy's seemingly found certain attorneys in the May 2001 group unpalatable. See VACANCIES 2001, *supra* note 41; Neil A. Lewis, *Democrats Are Pushed on Judicial Nominees*, N.Y. TIMES, Oct. 21, 2001, at A22 [hereinafter Lewis 2001].

45. In 1997, Senator Hatch usually held a hearing each month that the 105th Senate was in session for one Clinton appellate court nominee and four Clinton district court nominees. See *infra* note 54 and accompanying text. Senator Leahy proceeded rather analogously in 2001. Ringel, *supra* note 41.

46. See VACANCIES 2001, *supra* note 41; ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (1997), http://www.uscourts.gov/vacancies/archives_1997.html.

47. Peter Callaghan, *Senators Agree on Selecting Judges*, TACOMA NEWS TRIBUNE, Aug. 12, 1997, at B1; Neil A. Lewis, *Clinton Has a Chance to Shape the Courts*, N.Y. TIMES, Feb. 9, 1997, at 1; see 143 CONG. REC. S2538, S2541 (1997) (suggesting that certain GOP senators

President Bush proffered an initial appellate list, nominal consultation was afforded to California and Maryland Democratic lawmakers, which seemingly undercut the prospects of one attorney in both states.⁴⁸ Moreover, the truncated consideration which Republicans had accorded Clinton nominees apparently spurred Democrats' paybacks in Michigan, North Carolina, and Ohio.⁴⁹

Each administration had at least certain responsibility for delayed submissions.⁵⁰ Insofar as they might have asked public officers to expedite recommendations of lawyers, White House personnel could have instituted additional endeavors, but these may have been frustrated with the "start-up" costs of initiating an administration. Helpful examples include the periods of time which the presidents consumed assembling the Department of Justice (DOJ).

Presidents Clinton and Bush, accordingly, treated nomination matters similarly in 1997 and much of 2001. They failed to rely on the same concepts, yet the differences were not issues of kind. The administrations may correspondingly have anticipated or resolved some problems by deriving lessons from earlier judicial selection work, but a few complications appeared to be intrinsic.

b. American Bar Association Evaluation

Throughout the 105th Congress, the American Bar Association (ABA) Standing Committee on Federal Judiciary, which has analyzed and ranked nominees in terms of intelligence, ethics, diligence, collegiality, independence, and temperament for at least 50 years, continued to provide a

apparently insisted on participating); see also President's Remarks, *supra* note 40; 143 CONG. REC. S2538, (daily ed. Mar. 19, 1997).

48. For California, see Jean O. Pasco & Henry Weinstein, *Cox Gives Up Shot at Judgeship*, L.A. TIMES, May 26, 2001, at A1; Savage, *supra* note 43. For Maryland, see David L. Greene & Thomas Healy, *Bush Sends Judge List to Senate*, BALT. SUN, May 10, 2001, at 1A; Lewis, *supra* note 38. See generally Slotnick, *supra* note 7, at 234; President's Remarks, *supra* note 40; Tricia Bishop, *U.S. Courts Due for Left Turn with Obama*, BALT. SUN, Dec. 7, 2008, at 1A; Candace Rondeaux, *Md. Federal Prosecutor Nominated to Appeals Court in Richmond*, WASH. POST, Nov. 16, 2007, at B3.

49. For Michigan and North Carolina, see sources cited *supra* notes 12, 13, 140, 145. 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 140, 145, 161. See generally Slotnick, *supra* note 7, at 232, 235.

50. I depend substantially in this sentence and in the remainder of 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. See generally *President's Counsel Quits*, N.Y. TIMES, Dec. 12, 1996, at B22; Savage, *supra* note 43.

service that many people still find valuable.⁵¹ Nevertheless, over time, Senator Hatch articulated more concerns respecting Bar Association contributions and, in February 1997, he discontinued the American Bar's formal participation related to Judiciary Committee assessment, even though President Clinton depended on the ratings for his whole second administration.⁵² During March 2001, the Bush White House concluded that it would eschew the group's input prior to submitting attorneys officially.⁵³

c. Confirmation Process

In both years, the Judiciary Committee was partly responsible for less expeditious appointments because it did not investigate, stage hearings for, and vote on more candidates. The panel routinely afforded a hearing in which one circuit nominee and five district possibilities appeared each month of the 105th Congress's initial session and virtually every month of the final Clinton Administration; yet, only nine judges had been confirmed through mid-September 1997.⁵⁴ President Bush and many additional commentators leveled analogous criticisms at the few appellate nomination hearings conducted and the few judges approved in 2001; however, the

51. For this idea as well as the notions that the ABA is too political and requires excessive time when it rates nominees, see MILLER REPORT, *supra* note 5, at 335–36, 338, n.45. See generally AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON FEDERAL JUDICIARY - WHAT IT IS AND HOW IT WORKS (1983).

52. See, e.g., Terry Carter, *A Conservative Juggernaut*, 83 A.B.A. J., June 1997, at 32; N. Lee Cooper, *Standing Up to Critical Scrutiny*, 83 A.B.A.J., Apr. 1997, at 6; see also Editorial, *ABA Plots a Judicial Coup*, WALL ST. J., Aug. 14, 2008, at A12, available at <http://online.wsj.com/article/SB121867190633138889.html>; Editorial, *The A.B.A. and Judicial Nominees*, N.Y. TIMES, Apr. 14, 2009, at A22, available at <http://www.nytimes.com/2009/04/14/opinion/14tue2.html>.

53. Letter from Alberto R. Gonzales, White House Counsel, to Martha Barnett, ABA President (Mar. 22, 2001), available at <http://abcnews.go.com/us/story?id=93754&page=1>; see Sheldon Goldman et al., *W. Bush's Judiciary: The First Term Record*, 88 JUDICATURE 244, 254–55 (2005); 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, 45 (2001); Sidney Blumenthal, *Dick Cheney Was Never a "Grown Up"*, SALON.COM, Apr. 14, 2008, <http://www.salon.com/books/excerpt/2008/04/14/cheney/>. Democrats' insistence on ABA input fostered greater delay. See *Senate Judiciary Comm. Hearings on Judicial Nominations*, Oct. 7, 2002 (statement of Sen. Leahy), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_senate_hearings&docid=f:88116.wais.pdf [hereinafter *Leahy Statement*].

54. See Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L. Q. 741 (1997). Senator Joseph Biden (D-Del.), the Judiciary Chair from 1987 until 1994, said that he held one hearing every two weeks. See 143 CONG. REC. S2538, S2539 (1997).

committee seemed to operate better and had accorded each trial court nominee a hearing by spring of the following year.⁵⁵

Limited resources and politics might indicate why 1997 yielded appointments for minuscule numbers of designees. Examples were how the Judiciary Chair attempted to resolve the controversy involving Bar Association participation, and the dispute with Republican senators over the Judiciary Chair's confirmation duties and those of the panel and members, which eventually led the GOP to retain the status quo.⁵⁶ These issues devoured resources that could have been used for appointments. The small number of 2001 confirmations may also be attributable to deficient resources and politics,⁵⁷ but Senator Leahy effectuated certain special techniques that facilitated investigation, such as unusual hearings during the August recess.⁵⁸ To the extent Democrats slowed the confirmation process, their behavior was apparently payback for Clinton nominees whom the lawmakers thought Republicans had stalled.⁵⁹ The May decision of GOP Senator James Jeffords (Vt.) to become an independent essentially prevented the body from thoroughly reorganizing until July, which disrupted and slowed the process's initiation and efficacious functioning.⁶⁰

55. See, e.g., Neil A. Lewis, *Bush and Democrats in Senate Trade Blame for Judge Shortage*, N.Y. TIMES, May 4, 2002, at A9; Editorial, *Judicial Nominations Scorecard*, WASH. POST, Aug. 9, 2002, at A22.

56. See sources cited *supra* note 30; see also *supra* notes 51–53 and accompanying text; *infra* notes 86–87 and accompanying text. See generally *infra* note 158 and accompanying text.

57. I rely substantially in this sentence and in the remainder of this paragraph on Symposium, *Symposium on The Judicial Appointments Process*, 10 WM. & MARY BILL RTS. J. 1–176 (2001); *Confirmation Hearings on Federal Appointments: Senate Judiciary Comm. Hearings on Judicial Nominations* (Feb. 26, 2002) (statement of Sen. Leahy), <http://judiciary.senate.gov/resources/transcripts/107transcripts.cfm>; *id.* (Mar. 19, 2002) (statement of Sen. Hatch); see also Jonathan Ringel, *Picking Judges: The Art of the Deal*, THE RECORDER, Apr. 30, 2001, at 1; Ringel, *supra* note 41; William Safire, *Battle of the Blue Slips*, N.Y. TIMES, May 10, 2001, at A33.

58. *Senate Judiciary Comm. Hearings on Potential Judicial Nominations* (Aug. 22, Aug. 27, 2001), <http://judiciary.senate.gov/resources/transcripts/107transcripts.cfm>; see Lewis 2001, *supra* note 44.

59. Jess Bravin, *Aid Bill is Stalled By Bid to Force Judge Vote*, WALL ST. J., Oct. 17, 2001, at A16; Paul 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, 2001, at A33.

60. See *supra* note 38. The presidents were also responsible. In early 1997 and 2001, they sent few nominees, some of whom Hatch, Leahy or others opposed, and sent others unevenly, thus delaying selection, but Hatch's claim that he lacked nominees to process seemed unpersuasive, as delay also came from the few nominee hearings and votes and senators' opposition. By 2001's end, Bush had also sent enough nominees, but that may have been too late for expeditious review. See *supra* notes 41, 44–45 and accompanying text.

Individuals receiving federal bench nomination, who will have life tenure and who exercise the substantial power of the state, deserve meticulous analysis to insure that they are qualified. Balancing comprehensive assessment of candidate ability and ethics with the need for alacrity is a rather complex, subtle obligation. Senator Hatch argued that he must carefully discharge this assignment, yet not considering more nominees was animated by politics to some extent.⁶¹

Senator Lott and GOP chamber members apparently had greater responsibility for creating delay in 1997. Merely nine judges were appointed by that September, even though the Judiciary Committee had reviewed and approved many people.⁶² Certain observers believed that analogous Democratic leaders' conduct caused delay in 2001.⁶³ The necessity for addressing other important business and the unanimous consent requirement might explicate the delay in placing some nominees who had Judiciary panel approval on the Senate calendar and in scheduling floor debates and votes. However, the few appointments made throughout 1997, especially contrasted with prior times, indicate the scheduling of floor votes by the GOP's leadership actually deserves much credit. As the 105th Congress began, Senator Lott promised to review assiduously each nominee whom President Clinton tapped.⁶⁴ In spring 1997, Senator Leahy, the panel's ranking member, and additional Democratic colleagues, reacted by asserting they had supported confirmation endeavors in GOP administrations and by urging floor debates, as required, and votes on prospects.⁶⁵

61. He treated conflicts in duties to GOP senators who opposed activism but did resist opposition to some nominees and the challenge to Senate traditions, while 1997's record resembled some in previous, analogous periods. 143 CONG. REC. S2536 (daily ed. Mar. 19, 1997); *supra* note 56 and accompanying text; see 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; Neil A. Lewis, *Republicans Seek Greater Influence in Naming Judges*, N.Y. TIMES, Apr. 27, 1997, at § 1, p. 11; Novak, *supra* note 22. But see *supra* note 57 and accompanying text.

62. This dynamic resembled GOP nominee analysis during the 1996 election year. See Hatch, *supra* note 33; 143 CONG. REC. S8041, S8045 (daily ed. July 24, 1997) (statement of Sen. Leahy). See generally Goldman & Slotnick, *supra* note 29, at 257 (recounting the 1996 treatment); Tobias, *supra* note 54 (same).

63. Gigot, *supra* note 59; Neil A. Lewis, *Party Leaders Clash in Capitol over Pace of Filling Judgeships*, N.Y. TIMES, May 10, 2002, at A33.

64. See Lewis, *supra* note 47; see also Slotnick, *supra* note 7, at 233-34; Novak, *supra* note 22.

65. They said all nominees deserve floor votes. 143 CONG. REC. S2538, S2538-41 (daily ed. Mar. 19, 1997). When Lott threatened delay, Leahy reviewed nominees for understaffed courts with bipartisan support and unanimous panel votes. 143 CONG. REC. S5653, S5653-54 (daily ed. June 16, 1997) (statement of Sen. Leahy).

d. *Nomination and Confirmation*

In 1997 and 2001, Executive Branch and chamber personnel with integral selection duties seemingly failed to appreciate the complication's seriousness, as manifested in the erratic pace of nominations, Judiciary Committee assessment, and candidate approval. Critics argued that the present conundrum, and rather significant delay, were motivated by politics and questions about the ideological outlook of certain lawyers whom administrations transmitted. For example, in 1997, Senators Joseph Biden (D-Del.) and Paul Sarbanes (D-Md.) observed that GOP members were politicizing confirmation and altering several centuries of tradition.⁶⁶

An apparently political effort, which implicated the existing conundrum and stalled processing, was the analysis of how circuit resources are distributed and applied.⁶⁷ Senator Charles Grassley (R-Iowa), who led the Judiciary Subcommittee on Administrative Oversight and the Courts, attempted to determine whether individual circuits or the appellate system needed larger, or even their present, judicial complements.⁶⁸ After conducting hearings and gathering much applicable information, the subcommittee published a report which determined that no tribunals required more judges and specific circuits ought not to have additional positions until the courts functioned in ways the subcommittee deemed more efficient.⁶⁹ Appropriate resource use is obviously a valid legislative

66. *Id.* at S2538, S2541. Biden even said the GOP was attempting to stop circuit appointments. *Id.* at S2538. Professor Sheldon Goldman analogously said “a newly-elected president has [never] faced this sort of challenge to his judicial nominations,” while Professor Geoffrey Stone characterized the GOP actions as irresponsible. *See Gest & Lord, supra* note 61 (quoting both professors).

67. I depend substantially in this paragraph on CHARLES E. GRASSLEY, SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS OF THE S. COMM. ON THE JUDICIARY, 106TH CONG., CHAIRMAN'S REPORT ON THE APPROPRIATE ALLOCATION OF JUDGESHIPS IN THE UNITED STATES COURTS OF APPEALS, Analysis of the Sixth Circuit at 4 (Executive Summary 1999) [hereinafter GRASSLEY REPORT] (affording the quotation and idea that some judges opposed new seats), and the hearings he held. *See, e.g., infra* note 68; Tobias, *supra* note 54; *see also infra* notes 193–94 and accompanying text.

68. *See, e.g., Considering the Appropriate Allocation of Judgeships in the U.S. Courts of Appeals for the Fourth, Fifth, and Eleventh Circuits: Hearings Before the Subcommittee on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 105th Cong. (1997); *Considering the Appropriate Allocation of Judgeships in the U.S. Courts of Appeals for the Seventh Circuit: Hearing Before the Subcommittee on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 105th Cong. (1998). *See generally supra* note 21 and accompanying text; *infra* notes 193–204 and accompanying text.

69. The Sixth Circuit merits no more judges until it attempts to manage its caseload efficiently “by channeling more work to staff counsel and by granting oral argument only . . . [if] truly necessary.” GRASSLEY REPORT, *supra* note 67; Tobias, *supra* note 54, at 750 (finding that majorities on some courts opposed new seats).

concern, but this project delayed appointments for the circuits, which have experienced intractable vacancies, numbers of judicial emergencies, and substantial rises in appeals.⁷⁰ Moreover, lawmakers have failed to pass a comprehensive judgeships act since 1990, despite the Judicial Conference recommendation for twelve appellate judgeships, a suggestion that the federal courts' policymaking arm based on expert conservative projections and intensively-assembled empirical data related to case and workloads.⁷¹

Somewhat analogous considerations accompanied the process over 2001. For instance, a mere three of the eleven circuit nominees whom President Bush submitted in May were appointed that year.⁷² Senator Leahy and a few Democrats, including Senator Charles Schumer (N.Y.), announced that the body would promptly confirm able, centrist attorneys.⁷³ Illustrations were the easy Senate confirmation of Judges Roger Gregory and Barrington Parker, whom President Clinton had first appointed.⁷⁴

Certain activity by officials, whose party was not in control of the White House, suggested that politics underlay less expeditious analysis and the modern difficulty, namely concerns about the candidates' ostensible ideological views. Examples include the appellate court vacancies that legislators regard as more significant than district positions because the tiny number of appeals that the Supreme Court hears and appellate opinions'

70. There were 25 vacancies in August of 1997. ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (August 1, 1997), available at http://www.uscourts.gov/vacancies/archives_1997.html; see, e.g., *On Verge of Recess, Congress Acts on Judgeships*, THE THIRD BRANCH, Aug. 1997, at 5, available at <http://www.uscourts.gov/ttb/aug97ttb/august.htm#e>. For appeals data, see POSNER, *supra* note 30, at 58–64; LONG RANGE PLAN, *supra* note 19, at 10; ADMIN. OFFICE OF THE U.S. COURTS, 2008 ANN. REP. OF THE DIRECTOR: JUD. BUS. OF THE U.S. COURTS 83.

71. See Tobias, *supra* note 54, at 753 (evaluating the recommendations and their premises); The Circuit Court of Appeals Restructuring and Modernization Act of 2007, S. 525, 110th Cong. (2007) (providing a judgeships bill); Federal Judgeship Act of 2009, S. 1653, 111th Cong. (2009) (same); 143 CONG. REC. S2538, S2540 (daily ed. Mar. 19, 1997) (statement of Sen. Biden) (asserting that the Conference demonstrated the need to fill openings and for more positions but the GOP urged decreasing judgeships).

72. See, e.g., Jonathan Groner, *Privilege Fight Looms Over Estrada*, LEGAL TIMES, June 3, 2002, at 1; Lewis 2001, *supra* note 44, at A22; see also *supra* note 40 and accompanying text. But see *infra* notes 74, 150 and accompanying text.

73. See, e.g., Neil A. Lewis, *More Battles Loom Over Bush's Nominees for Judgeships*, N.Y. TIMES, Apr. 7, 2002, at 24; sources cited *supra* note 55; see also *infra* notes 98–99 and accompanying text.

74. See Mark 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; see also *infra* note 159 and accompanying text. Clinton had accorded Judge Gregory a recess appointment to the Fourth Circuit. See Allison Mitchell, *Senators Confirm 3 Judges, Including Once-Stalled Black*, N.Y. TIMES, July 21, 2001, at A16; see also *infra* note 169 and accompanying text.

multistate force demonstrate the tribunals are courts of last resort for these jurisdictions.⁷⁵

e. The Possibility of Change

Insofar as the political phenomena that attended confirmation proceedings in 1997 and 2001 and animated the existing conundrum are inherent, the phenomena may defy felicitous resolution. The assessment of the permanent vacancies dilemma explained that concepts that increase resources and efficiency will only influence delay, which is not attributable to politics. However, the evaluation of political considerations, which recently affected the current difficulty, indicated that elected figures might remedy or ameliorate the circumstances if they have enough political will. It was only politics that apparently stopped the Clinton and Bush Administrations from swiftly choosing additional distinguished individuals with centrist viewpoints, and the Senate from rapidly approving them.

f. Impacts of the Present Conundrum

The present and longstanding dilemmas underlie numerous concerns, quite a few of which are similar.⁷⁶ For example, the modern conundrum has imposed pressures on appellate and trial judges, lawyers, and parties, effects witnessed in factors, such as case and work loads. Accelerating criminal actions, a number of which are complex, prevent some judges from trying any civil matters, while they require numerous districts to address huge civil backlogs and make individuals and entities wait lengthy periods for trials.⁷⁷ Increased filings and empty judgeships in 1997 meant the Ninth Circuit postponed 600 oral arguments and caused another tribunal's cancellation of 60.⁷⁸ In July 1997, the purported difficulties attributed to the myriad openings and to the attendant ramifications, such as growing criminal prosecutions and delayed trials of civil actions, which accompany slowed confirmation, led national bar associations to urge that President Clinton and Senator Lott move appointments.⁷⁹ At the end of 1997 and 2001, Chief

75. *Supra* note 30 and accompanying text; *see supra* notes 29, 33–38 and accompanying text.

76. *Supra* notes 25–26 and accompanying text; *see infra* notes 77–80 and accompanying text.

77. *See Gest & Lord, supra* note 61; *see also* Schmidt, *supra* note 25.

78. Novak, *supra* note 22; *Chronic Federal Judge Shortage Puts Lives, Justice On Hold*, LAS VEGAS REV.-J., Aug. 13, 1997, at 9A; *see id.* (documenting Sixth Circuit postponements); Bill Kisliuk, *Judges' Conference Slams Circuit-Splitting, Vacancies*, THE RECORDER, Aug. 19, 1997, at 1 (same as to Ninth Circuit).

79. Letter from Lee Cooper, *supra* note 25.

Justice William H. Rehnquist similarly admonished that the White House and Senate, controlled by opposite parties, address the confirmation impasse.⁸⁰ To the extent the public views the judicial appointments process as illustrative of egregious, divisive infighting, this conduct may erode respect for the government branches.

In sum, the above investigation of the permanent vacancies dilemma and the existing complication reveals that the facets alone and together impaired the judicial selection process and, thus, undermined the delivery of justice by the regional circuits over the last two decades. The next section, accordingly, examines how President Bush tendered prospects and how senators confirmed appeals court judges after 2001.

II. SUBSEQUENT APPEALS COURT APPOINTMENTS

A few ideas explicate why recent circuit appointments are critical. First, this aspect of naming judges is most immediate. The White House and the Senate also could not argue efficaciously that inexperience with choosing the jurists or each other led to the difficulties which the administration and the chamber faced. Moreover, selection across this time resembled the process during 1997 and 2001 in multiple respects, namely vis-à-vis comparatively slow designee investigation and approval, as well as contentions, retorts, and acrimony between Democrats and Republicans. These dynamics persisted, and might have worsened, over the Bush years.

In 2002, certain features of the nomination process may have improved. President Bush steadily recommended numerous trial court nominees, many of whom were able, ethical, and centrist, while this pace and the lawyers' talents, integrity, and viewpoints appeared to foster chamber analysis.⁸¹ By way of contrast, the appeals court regime essentially deteriorated. Over 2002, the President submitted three new lawyers.⁸² The whole year, five appellate vacancies, which had been open since the administration's

80. Rehnquist, *supra* note 25; William H. Rehnquist, 2001 Year-End Report on the Federal Judiciary, THE THIRD BRANCH, Jan. 2002, available at <http://www.uscourts.gov/ttb/jan02ttb/jan02.html>; see Slotnick, *supra* note 7, at 233; Linda Greenhouse, *Rehnquist Sees a Loss of Prospective Judges*, N.Y. TIMES, Jan. 1, 2002, at A16. For similar ABA resolutions, see Harvey Saferstein, *American Bar Ass'n Standing Comm. on Fed. Judicial Improvements* 2008 A.B.A. REP. 118; Editorial, *ABA Plots a Judicial Coup*, WALL ST. J., Aug. 14, 2008, at A12; Alfred P. Carlton Jr., *More and Faster-Now*, 89 A.B.A. J., Apr. 2003, at 8.

81. See ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (2002), http://www.uscourts.gov/vacancies/archives_2002.html [hereinafter VACANCIES 2002]; see also *supra* notes 40–44 and accompanying text; *infra* note 83 and accompanying text.

82. VACANCIES 2002, *supra* note 81.

beginning, lacked nominees.⁸³ Some of the empty positions included those in California, Maryland, and North Carolina.⁸⁴

The ABA continued evaluating the qualifications of, and ranking, attorneys designated by the White House.⁸⁵ The Standing Committee on Judiciary highly rated most nominees and seemed to discharge this responsibility in a professional, expeditious manner, which apparently dispelled concerns that Bar Association contributions were inefficacious.⁸⁶ Notwithstanding the ABA work, President Bush effectively failed to reassess his discontinuance of the Standing Committee's advance participation, and this choice actually slowed review when Democrats insisted on the entity's involvement before Judiciary Committee votes.⁸⁷

The process of approving candidates was better in several respects, analogous in others, and worse in a few. The Judiciary panel granted each district nominee a hearing that spring and was current almost the entire year, while it held twice as many sessions for circuit nominees by the August recess as the committee had offered throughout 2001.⁸⁸ Appellate consideration improved, largely because eight people testified in February, April, May, and June, yet one candidate appeared at hearings during numerous other months.⁸⁹ Some in the first Bush package never received a hearing, and the chamber undertook limited action on two District of Columbia and multiple Sixth Circuit nominees across the 107th Congress.⁹⁰ Attorneys proposed for the latter court's Michigan vacancies were not

83. *Id.*; see *supra* notes 40, 45 and accompanying text. *But see infra* note 101 and accompanying text. Bush may have found it fruitless and, thus, a waste of scarce resources to send more nominees when so many were pending. See *supra* note 45 and accompanying text.

84. VACANCIES 2002, *supra* note 81.

85. I rely mainly in this paragraph on Goldman et al., *supra* note 53, at 254–55; Groner, *supra* note 72; see also Jonathan Groner, *Judge Fight Within ABA*, LEGAL TIMES, Aug. 12, 2002, at 1; *Ashcroft: Speed up Judge Approvals*, NEWSDAY, Aug. 8, 2001, at A15. See generally *supra* notes 51–53 and accompanying text; *infra* note 158 and accompanying text.

86. See *supra* note 51 and accompanying text; see also *supra* note 81 and accompanying text.

87. See *supra* note 53 and accompanying text; see also *supra* note 52 and accompanying text.

88. *Supra* note 55 and accompanying text; see *supra* notes 40, 60, 81 and accompanying text.

89. See U.S. Senate Comm. on the Judiciary, Nominations to U.S. Courts of Appeals (2002), available at <http://judiciary.senate.gov/nominations/107thCongress-old.cfm> [hereinafter Nominations - U.S. Courts of Appeals]. See generally *supra* notes 45, 54–55 and accompanying text.

90. See VACANCIES 2002, *supra* note 81; see also *supra* notes 40, 73–74 and accompanying text; *infra* notes 91, 93–94, 106, 131, 140, 164–67, 188–89 and accompanying text.

afforded hearings any time in the Congress, although President Bush forwarded three candidates in 2001 and another the subsequent June.⁹¹

The Majority Leader was responsible for little delay regarding the confirmation process throughout 2002. Senator Daschle rather expeditiously scheduled floor votes and debates, when needed, for many trials, and for a number of appellate court, possibilities after learning that the Judiciary Committee had recommended approval, while the Senate promptly voted on them.⁹²

Certain attorneys denied hearings were for court of appeals openings, and this limited assessment mirrored the treatment which the GOP-controlled Senate accorded to candidates designated by the Clinton Administration. Therefore, the idea of payback may explain inaction on the Bush nominees. Helpful examples include two Sixth Circuit Michigan vacancies and another in Ohio; a pair of Fourth Circuit unfilled judgeships assigned to North Carolina; and two D.C. Circuit openings. The activities in Michigan and North Carolina are informative. The GOP had a Michigan state judge wait longer than anyone to receive a hearing that never materialized, while the chamber avoided votes on several persons President Clinton recommended for the empty North Carolina appeals court seats.⁹³ Democrats failed to review most individuals proposed for these seven and numerous additional vacancies because the nominees engendered much controversy, which frequently involved their political views. The Ohio attorney, as well as lawyers and judges, recommended to serve on the Fourth, Ninth, and D.C. Circuits provoked strong, effective opposition from appellate court interest and advocacy groups.⁹⁴

Circuit selection was also marked by deleterious allegations and countercharges that appeared especially vituperative when controversial nominees sought approval. For instance, the Judiciary Committee rejected

91. See VACANCIES 2001, *supra* note 41; VACANCIES 2002, *supra* note 81; see also Nominations to U.S. Courts of Appeals, *supra* note 89; Byron York, *Much More Democratic Obstruction*, NAT'L REV. ONLINE, Mar. 20, 2003, available at <http://article.nationalreview.com/?q=OTUyZWVjZjdiNDUwMTA1OGMwMDA5MzNlMTEzNmElZjQ=>. See generally *supra* note 12; *infra* notes 93–94, 131, 140, 161–66, 188–89 and accompanying text.

92. See Nominations to U.S. Courts of Appeals, *supra* note 89; see also *supra* note 62 and accompanying text. See generally *infra* notes 98, 178 and accompanying text.

93. For Michigan, see sources cited *supra* notes 12, 91 and *infra* notes 94, 131, 140, 164–66, 188–89. For North Carolina, see Mark Hansen, *Logjam*, 94 A.B.A. J. 38 (June 2008); sources cited *supra* note 13. Nine people whom President Clinton nominated for the seven openings never received Judiciary panel hearings.

94. The Fourth, Ninth, and D.C. Circuit nominees were Judges Boyle, Kuhl, and John Roberts, respectively. Jonathan Groner, *Placing Bets on Bush Bench*, LEGAL TIMES, May 13, 2002, at 1; Savage, *supra* note 43.

the appointments of Judge Owen and Judge Pickering to the Fifth Circuit on 10-9 party-line ballots after extremely divisive hearings and rancorous committee interchange, although the Senate might have confirmed both jurists.⁹⁵ When the panel voted against Judge Owen, the Chief Executive asserted this was “bad for the country” and bad for the courts, while American citizens and the Chief Executive did not “appreciate it one bit.”⁹⁶ The committee accorded Third Circuit Judge Brooks Smith rather analogous treatment, yet he eventually won a panel ballot 12-7 and confirmation 64-35.⁹⁷

Democratic legislators reiterated public announcements that the chamber would quickly approve designees who had superb qualifications and centrist viewpoints, and the lawmakers honored this pledge across 2002. Illustrative of this point were Judges Richard Clifton, Julia Gibbons, Jeffrey Howard, Terrence O’Brien, and Reena Raggi, who felicitously secured appointment.⁹⁸

Despite the considerable energy that the Senate and the administration committed to appellate selection, the process marginally improved throughout 2002. At the end of the 107th Congress and Bush’s initial half term, empty seats were almost as ubiquitous as they had been prior to this Congress and the Bush Administration.⁹⁹

When the next Senate commenced in early 2003, Republicans held a thin 51-48-1 majority.¹⁰⁰ On January 7, President Bush nominated once more the lawyers tendered for appellate vacancies during his first two years and

95. Albert 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 CHARLES PICKERING, A PRICE TOO HIGH: THE JUDICIARY IN JEOPARDY (2007); 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, 696 (2003).

96. Dewar, *supra* note 3; see also Charles Hurt, *Senate Panel OKs Owen for Judgeship*, WASH. TIMES, Mar. 28, 2003, at A6.

97. See, e.g., 148 CONG. REC. S7651 (2002); Audrey Hudson, *Senate Confirms Nominee to Court, Bush Gets Delay on Other Bench Pick*, WASH. TIMES, Aug. 1, 2002, at A3; see also Jack Newfield, *The Right’s Judicial Juggernaut*, THE NATION, Oct. 7, 2002, at 11; Neil A. Lewis, *Panel Approves Bush Appeals Court Pick*, N.Y. TIMES, May 24, 2002, at A19. See generally *infra* note 191 and accompanying text.

98. See Nominations to U.S. Courts of Appeals, *supra* note 89; see also *supra* notes 73–74 and accompanying text; *infra* notes 143, 159, 161 and accompanying text.

99. Nominations to U.S. Courts of Appeals, *supra* note 89; ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (December 1, 2002), <http://www.uscourts.gov/vacancies/archives/02-1201/list.pdf>; *supra* note 37 and accompanying text; see *supra* notes 33–34 and accompanying text.

100. U.S. Senate Historical Office, Party Division in the Senate, 1789–Present, http://senate.gov/pagelayout/history/one_item_and_tasers/partydiv.htm (last visited Oct. 5, 2009).

suggested no prospects for certain unoccupied judgeships, yet in March only seven lacked nominees.¹⁰¹ Appointments remained highly partisan and bitterly contested, even as the GOP adopted changes meant to improve the process. For example, Senator Hatch, who assumed the Judiciary chairmanship after a nineteen-month interlude, promptly conducted appeals court hearings, while Senator Bill Frist (R-Tenn.), the new Majority Leader, effectuated procedures to accelerate floor votes and debates, when required.¹⁰² The speed at which the Chair afforded hearings precipitated vociferous Democratic charges about the little time for reviewing nominees. Instructive of this practice was the January provision of a single hearing for three controversial attorneys whom the earlier Congress had minimally analyzed, behavior of the Chair that triggered Democrats' vehement objections, resulting in a ten-hour session.¹⁰³ The panel also granted others whom that Senate neglected to assess hearings and votes.¹⁰⁴

The filibuster which prevented Miguel Estrada's D.C. Circuit appointment, however, stalled ballots and debates on the floor. The controversy about naming him to this court of appeals, which is considered the second most important American tribunal because of the essential national questions that it resolves,¹⁰⁵ continued across 2003. The dispute's mix of judicial politics, selection norms, chamber traditions, and race, as well as high stakes—which implicated the D.C. Circuit, whose active members constituted equal numbers of Democratic and Republican appointees, and an ostensible High Court vacancy—slowed the appellate

101. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 38; see also Jonathan Groner, *Judiciary Battles Start Anew*, LEGAL TIMES, Jan. 15, 2003, at 10. After the GOP's 2002 Senate win, the Democrats, to keep goodwill, confirmed controversial Fourth and Tenth Circuit Judges Dennis Shedd and Michael McConnell. See, e.g., Richard Simon, *Senate OKs Long-Delayed Appeals Court Nomination*, L.A. TIMES, Nov. 20, 2002, at A22; *Full Senate Approves Appeals Court Nominee*, L.A. TIMES, Nov. 16, 2002, at A14.

102. Helen Dewar & Mike Allen, *Frist Seeks to End Nominees Impasse; Majority Leader's Plan Would Limit Tactics Used in Senate to Block Judicial Picks*, WASH. POST, May 9, 2003, at A12, available at http://infoweb.newsbank.com.ezproxy1.lib.asu.edu/iw-search/we/InfoWeb?p_product=AWNB&p_theme=aggregated5&p_action=doc&p_docid=0FAEE4AE624309A8&p_docnum=41&p_queryname=2.

103. See, e.g., Helen Dewar, *Republicans Push Speedy Action on Court Picks*, WASH. POST, Jan. 30, 2003, at A7; Jonathan Groner, *Hatch Off to a Fast Start on Judges*, LEGAL TIMES, Feb. 3, 2003, at 14; Neil A. Lewis, *G.O.P. Links Judicial Nominees to Thwart Opponents*, N.Y. TIMES, Jan. 30, 2003, at A21.

104. Illustrative are Ninth Circuit appointee Jay Bybee and Tenth Circuit appointee Timothy Tymkovich. See Henry Weinstein, *Conservative Confirmed as Ninth Circuit Judge*, L.A. TIMES, Mar. 14, 2003, at B6; Editorial, *Judge Tymkovich*, DENVER POST, Apr. 3, 2003, at B6; see also Bruce Ackerman, *Impeach Jay Bybee*, SLATE, Jan. 13, 2009, <http://www.slate.com/id/2208517>; *infra* note 175 and accompanying text.

105. John G. Roberts, Jr., *What Makes the D.C. Circuit Different?: A Historical View*, 92 VA. L. REV. 375, 386–87 (2006).

process.¹⁰⁶ Democrats filibustered more candidates, including Owen, Pickering, and Pryor, and the tactic yielded analogous effects.¹⁰⁷ Thus, with the late 2003 recess of the 108th Congress's initial session, the appeals courts had somewhat fewer vacancies than at its onset.¹⁰⁸

Numerous elements which accompanied circuit selection this year persisted through 2004. In January, the Bush Administration determined that a valuable course of action could be to recess appoint Pickering and Pryor.¹⁰⁹ Dependence on that rarely-invoked technique exacerbated the circumstances, infuriating Democrats. One response that Democrats deployed was additional filibusters which may ultimately have led Estrada to withdraw.¹¹⁰ A small number of judges might have received confirmation in 2004 because it was a presidential election year when action on judicial nominees customarily slows and then halts after the party conventions.¹¹¹

106. See Press Release, Office of the Press Secretary, President Bush Says Senate Filibuster Decision a "Disgrace" (Mar. 6, 2003), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030306.html>; see also 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. See generally JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* (2007); Samahon, *supra* note 7, at 784; Editorial, *Judges and Justice Delayed*, WASH. POST, Apr. 15, 2008, at A14.

107. See Helen Dewar, *Nomination of Tex. Judge is Blocked*, WASH. POST, May 2, 2003, at A2; 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 109, 185.

108. ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (Jan. 8, 2003), <http://www.uscourts.gov/vacancies/archives/03-0108/list.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (Dec. 1, 2003), <http://www.uscourts.gov/vacancies/archives/03-1201/list.pdf>; see also Goldman et al., *supra* note 53.

109. Julie Hirschfeld Davis, *Bush Defies Democrats in Senate, Installs Judge*, CHI. TRIB., Jan. 17, 2004, at 1; Neil A. Lewis, *Bypassing Senate for Second Time, Bush Seats Judge*, N.Y. TIMES, Feb. 21, 2004, at A1; see *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (holding that Pryor's appointment was valid under Recess Appointments Clause), *cert. denied*, 544 U.S. 942 (2005); William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMMENT. 515, 516 (2004). See generally *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); Thomas A. Curtis, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758 (1984).

110. See Helen Dewar, *GOP Escalates Push for Nominees*, WASH. POST, July 26, 2003, at A6, available at http://infoweb.newsbank.com.ezproxy1.lib.asu.edu/iw-search/we/InfoWeb?p_product=AWNB&p_theme=aggregated5&p_action=doc&p_docid=0FC89691048AE3A4&p_docnum=1&p_queryname=5; Helen Dewar, *Estrada Abandons Court Bid*, WASH. POST, Sept. 5, 2003, at A1, http://infoweb.newsbank.com.ezproxy1.lib.asu.edu/iw-search/we/InfoWeb?p_product=AWNB&p_theme=aggregated5&p_action=doc&p_docid=0FD6263611085DF4&p_docnum=2&p_queryname=6.

111. See Binder & Maltzman, *supra* note 6, at 195; Goldman, *supra* note 39, at 893; ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY – 108TH CONGRESS

Despite this limited appointments success, President Bush captured another term, partly by highlighting vacant judgeships, and the GOP chamber majority increased to 55-45.¹¹²

Therefore, when the 109th Senate began the ensuing year, the Republicans appeared poised to confirm numerous appeals court judges. Most of the troubling dynamics which plagued selection in the first administration, nonetheless, continued across the last term. For example, President Bush infrequently consulted senators, even from his own party, or assessed, much less tapped, consensus nominees, and he renominated attorneys whom Senate members, including a few GOP lawmakers, opposed.¹¹³ This behavior led Democrats to respond with heavier dependence on filibusters. The tactic's use increasingly frustrated Republicans, who developed the "nuclear option," meant to eliminate reliance on filibusters when blocking judicial nominees.¹¹⁴ In May, the "Gang of 14," comprising numerically identical Democratic and Republican moderate senators, averted the nuclear option's detonation by crafting an agreement that restricted filibuster use to "extraordinary circumstances."¹¹⁵

(Dec. 1, 2004), http://www.uscourts.gov/vacancies/archives/200412/current_vacancy_list.pdf; Editorial, *Bench Mark*, L.A. TIMES, Apr. 12, 2008, at A20. For comprehensive analysis of judicial selection in the 108th Congress, see Goldman et al., *supra* note 53.

112. See Carl Hulse, *Abortion Remark by G.O.P. Senator Puts Heat on Peers*, N.Y. TIMES, Nov. 6, 2004 (noting that "Democratic resistance to Mr. Bush's judicial nominees was a key element of Republican election campaigns"), http://infoweb.newsbank.com.ezproxy1.lib.asu.edu/iw-search/we/InfoWeb?p_product=AWNB&p_theme=aggregated5&p_action=doc&p_docid=1063275370850FF3&p_docnum=1&p_queryname=7; Neil A. Lewis, *Bush Tries Again on Court Choices Stalled in Senate*, N.Y. TIMES, Dec. 24, 2004 (noting increased Republican representation in the Senate and that re-nomination was "in line with what had been a principal campaign theme for [Mr. Bush] and Vice President Dick Cheney, namely that Mr. Bush would battle Democratic opposition to his judicial choices."), available at http://infoweb.newsbank.com.ezproxy1.lib.asu.edu/iw-search/we/InfoWeb?p_product=AWNB&p_theme=aggregated5&p_action=doc&p_docid=1073378B553F8368&p_docnum=1&p_queryname=8.

113. See Lewis, *supra* note 112; see also Michael A. Fletcher & Helen Dewar, *Bush Will Renominate 20 Judges – Fights in Senate Likely Over Blocked Choices*, WASH. POST, Dec. 24, 2004, at A1.

114. See *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied its Right to Consent: Hearing Before the Subcommittee on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 108th Cong. (2003), available at <http://www.access.gpo.gov/congress/senate/pdf/108hr/90460.pdf>. See generally Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445 (2004); Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J. L. & PUB. POL'Y 205 (2004).

115. *Text of Senate Compromise on Nominations of Judges*, N.Y. TIMES, May 24, 2005, at A18; see Connie Bruck, *McCain's Party*, NEW YORKER, May 30, 2005, at 58; Goldman et al., *supra* note

Defusing this alternative guaranteed circuit appointment for three very controversial judges, Owen, Pryor and Janice Rogers Brown, and preserved the Senate institutionally. The Memorandum of Understanding, which the Gang drafted, also enabled the body to confirm numerous individuals whose perspectives resemble those of the three jurists.¹¹⁶

However, finding nominees for the vacancies that arose with the July 2005 resignation of Justice Sandra Day O'Connor and Chief Justice Rehnquist's September death monopolized resources that would otherwise have been devoted to filling empty appeals court positions.¹¹⁷ The actions in confirming John Roberts and Samuel Alito and nominating Harriet Miers correspondingly demanded a number of months when little appellate selection transpired.¹¹⁸

The circuit process, accordingly, was only reactivated the following February. During most of that year, continued White House aversion to consulting, analyzing consensus designees, and relenting on its dogmatic selection views apparently blocked certain nominees' approval. Indeed, the penchant for renominating a few candidates, such as Boyle and Haynes, whom even GOP legislators opposed, delayed appointments and could have alienated potential supporters.¹¹⁹ Confirmation was also rather inexpedient over 2006 because that was an election year, albeit a mid-term one, during which Republicans lost the chamber.¹²⁰ In the end, the need to approve

12, at 264–65; Hendrik Hertzberg, *Filibluster*, NEW YORKER, June 13, 2005, at 63; Samahon, *supra* note 7, at 799.

116. *Text of Senate Compromise on Nominations of Judges*, *supra* note 115; see Goldman et al., *supra* note 12, at 261.

117. See, e.g., Richard W. Stevenson, *O'Connor To Retire, Touching Off Battle Over Court*, N.Y. TIMES, July 2, 2005, at A1; Linda Greenhouse, *William H. Rehnquist, Architect of Conservative Court, Dies at 80*, N.Y. TIMES, Sept. 5, 2005, at A1; Samahon, *supra* note 7, at 786–800.

118. The Senate confirmed few circuit judges during 2005–2006, when Roberts, Alito, and Miers were being considered. ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (2005), http://www.uscourts.gov/vacancies/archives_2005.html; ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (2006), http://www.uscourts.gov/vacancies/archives_2006.html; see GREENBURG, *supra* note 8, at 308; TOOBIN, *supra* note 8; GOLDMAN et al., *supra* note 12, at 271–73.

119. Hansen, *supra* note 93; Carl Tobias, *Go for Consensus Choices*, NAT'L L.J., Mar. 17, 2008, at Vol. 27, Col. 30. See Markon, *supra* note 4.

120. See Christine Hauser, *Concession in Virginia Race Tips Balance*, N.Y. TIMES, Nov. 9, 2006, at A1, available at http://www.nytimes.com/2006/11/09/us/politics/10virginiacnd.html?_r=1&scp=1&sq=november%202006%20balance%20virginia&st=cse; Neil A. Lewis, *New Democratic Majority Throws Bush's Judicial Nominations into Uncertainty*, N.Y. TIMES, Nov. 12, 2006, § 1, at 26; Michael D. Shear & Alec MacGillis, *Democrats Take Control of Senate as Allen Concedes to Webb in Va.*, WASH. POST, Nov. 10, 2006, at A1; see also Binder & Maltzman, *supra* note 6, at 195; ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY – 109TH CONGRESS

Supreme Court Justices may well have diverted the attention that circuit nominations and appointments received.

With the January 2007 beginning of the 110th Congress, Democrats assumed a slim 51-49 chamber majority.¹²¹ The White House refused to nominate again three people whom it had submitted multiple times, and observers viewed this development as a conciliatory action.¹²² Nevertheless, President Bush consulted minimally, proposed few attorneys who were consensus nominees, and inflexibly addressed selection of judges.

Virginia Fourth Circuit openings aptly epitomize these phenomena.¹²³ When the 110th Congress assembled, John Warner (R-Va.) and Jim Webb (D-Va.), the Commonwealth's U.S. senators, implemented a bipartisan process for recommending able candidates to President Bush. The lawmakers expeditiously identified a dozen prospects whom numerous Virginia bar organizations were requested to assess.¹²⁴ Those evaluated were intelligent, diligent, ethical, and independent and had a balanced temperament. Senators Warner and Webb expended considerable time analyzing and personally interviewing the candidates, which resulted in the June suggestion of five nominees they asserted were "eminently qualified": a U.S. District Judge, two Virginia Supreme Court Justices, a law professor, and an attorney. Both legislators were "fully prepared to strongly support" and recommend for Judiciary Committee assessment and Senate confirmation any on the list who might be nominated.¹²⁵ Despite this rare, cooperative initiative, President Bush tapped Duncan Getchell, who was *not* among the five candidates the senators proposed, three months later.¹²⁶ By

(Dec. 1, 2006), http://www.uscourts.gov/vacancies/archives/200612/current_vacancy_list.pdf; *Bench Mark*, *supra* note 111; Goldman et al., *supra* note 53. For a thorough analysis of judicial selection in the 109th Congress, see generally Goldman et al., *supra* note 12.

121. See John M. Broder, *Democrats Take Senate*, N.Y. TIMES, Nov. 10, 2006, at A1; Shear & MacGillis, *supra* note 120.

122. Neil A. Lewis, *Bush Drops Plans to Resubmit 3 Judicial Nominees*, N.Y. TIMES, Jan. 10, 2007, at A18; Goldman et al., *supra* note 12, at 261; *see also* VACANCIES IN THE FEDERAL JUDICIARY (2006), *supra* note 118.

123. Hansen, *supra* note 93; Markon, *supra* note 4; Tobias, *supra* note 119.

124. Letter to President George W. Bush from U.S. Senators John Warner and Jim Webb (June 12, 2007), *available at* <http://webb.senate.gov/newsroom/record.cfm?id=290857&>; *see also* Carl Tobias, *Baffling Vacancy on Federal Bench*, BALT. SUN, Jan. 18, 2008, at 21A.

125. Tobias, *supra* note 124.

126. Press Release, The White House, Office of the Press Sec'y, Nominations Sent to the Senate (Sept. 6, 2007), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/09/20070906-5.html>; Hansen, *supra* note 93, at 42; Peter Hardin, *Bush Federal Judge Pick Criticized: Getchell Was Not on Joint List of Nominees Favored by Sens. Warner, Webb*, RICH. TIMES-DISPATCH, Sept. 7, 2007, at B2; Jerry Markon, *Bush's Picks for Court Spur Criticism by Warner, Webb*, WASH. POST, Sept. 7, 2007, at B5; *see also* Shannon P. Duffy, *Five Tapped for Federal Bench Openings in Pennsylvania*,

January, Getchell had asked to withdraw, surmising that chamber approval was unlikely.¹²⁷ Finally, the White House nominated a very qualified judge from the group whom the lawmakers had compiled in the spring, and the jurist easily won appointment a couple of months thereafter.¹²⁸

Additional vacancies reflect similar phenomena. The nomination to a Maryland Fourth Circuit opening yields helpful insights. When the jurisdiction's senators discovered President Bush was evaluating U.S. Attorney Rod Rosenstein, they chose to apprise the White House that both preferred he continue as U.S. Attorney; however, the legislators communicated the acceptability of several district judges whom GOP presidents had chosen, including a few Bush appointees.¹²⁹ Notwithstanding the Maryland overture, the Chief Executive nominated Rosenstein, and the Senate failed to process him.¹³⁰ President Bush analogously designated counsel who might assume First, Third, and Sixth Circuit vacancies in Rhode Island, New Jersey, and Michigan.¹³¹ He appeared to consult

LEGAL INTELLIGENCER, July 25, 2008, available at <http://www.law.com/jsp/article.jsp?id=1202423251503> (describing similar Third Circuit action).

127. See Letter from E. Duncan Getchell, Jr. to President George W. Bush (Jan. 17, 2008); Manu Raju, *Judicial Nominee Withdraws Amid Democratic Criticism*, THE HILL, Jan. 18, 2008, available at <http://thehill.com/homenews/news/14091-judicial-nominee-withdraws-amid-democratic-criticism>; see also Frank Green, *Getchell Pulls Nomination as Federal Judge: Bush Selection for 4th Circuit Cited Long Odds He'd Get Senate Hearing*, RICH. TIMES-DISPATCH, Jan. 19, 2008, at B3; Jerry Markon, *4th Circuit Nominee Withdraws Name*, WASH. POST, Jan. 19, 2008, at A12.

128. See Jerry Markon, *U.S. Appeals Court Gets New Judge*, WASH. POST, Aug. 3, 2008, at PW8; see also Jerry Markon, *The Politics of the Federal Bench*, WASH. POST, Dec. 8, 2008, at A1; Mike Scarcella, *Obama Poised to Shift 4th Circuit to the Left*, LEGAL INTELLIGENCER, Dec. 22, 2008 (originally published in LEGAL TIMES).

129. Bishop, *supra* note 48; Eric Rich, *White House May Name Rosenstein to Appeals Court*, WASH. POST, Sept. 13, 2007, at B6.

130. Matthew Dolan, *Bush Picks U.S. Attorney for Md. for 4th Circuit*, BALT. SUN, Nov. 16, 2007, at A1. See generally J. Harvie Wilkinson III, *Storming the 4th Circuit*, WASH. POST, Jan. 23, 2009, at A15.

131. See, e.g., John E. Mulligan, *Bumpy Ride Awaits U.S. Court Nominee*, PROVIDENCE J.-BULL., Dec. 10, 2007, at A1; Lisa Brennan, *Bush Makes 3rd Circuit Pick*, LEGAL TIMES, July 23, 2007, at 8; *Court Choices Offered Again*, GRAND RAPIDS PRESS, Mar. 20, 2007, at B1; see also Abramowitz, *supra* note 2; Erin P. Billings & John Stanton, *Reid's Pledge to Move Three Before Recess Fails to Appease Minority*, ROLL CALL, May 14, 2008, available at http://www.rollcall.com/issues/53_137/news/23603-1.html [hereinafter *Reid's Pledge*]; Pam MacLean, *Senate Approval of Three Circuit Court Nominees in Pipeline*, NAT'L L.J., May 2, 2008, available at http://quest.law.com/Search/Search.do?Ntt=%22%22Senate+to+Approve+Three+Circuit+Court+Nominees%22%22&x=0&y=0&Nty=1&N=8357&Ntk=SI_All&cx=0&sortVar=1; Erin P. Billings & John Stanton, *A Nominations Morass*, ROLL CALL, May 20, 2008, available at http://www.rollcall.com/issues/53_140/news/25252-1.html [hereinafter *Nominations*]; Neil A. Lewis, *Deadlock on Appeals Court Judges Ends*, N.Y. TIMES, June 13, 2008, at A19; Keith

nominally with lawmakers from those jurisdictions, essentially ignored well-qualified attorneys the legislators suggested, and eventually forwarded people who inspired minimal consensus.

Judge Leslie Southwick's appointment to the Fifth Circuit also exemplifies the difficulties which confounded the process.¹³² The jurist was nominated at Senator Lott's behest, although opponents claimed he was insensitive to matters of race and sexual orientation. After contentious arguments and numerous false starts, two Democratic committee members approved the nominee and the Senate easily confirmed him.

Across 2007 and most of the next year, the controversy related to U.S. Attorney firings preoccupied the Department of Justice (DOJ), the White House Counsel Office, and the Senate Judiciary Committee, which have important selection responsibilities, and distracted the entities from their appointments responsibilities.¹³³ The battle regarding the Department's politicization, which ultimately evolved into a constitutional stand-off between the administration and lawmakers, required much time of DOJ, the White House Counsel, and the Judiciary Committee, efforts that invariably were not devoted to appointments.¹³⁴ More particularly, a number of chamber members and staff expended resources investigating the dispute, gathering applicable facts, researching the law, procuring documents, eliciting testimony, and issuing subpoenas, as required. Numerous Department and White House officials committed months to those requests

Perine, *Republican Concern over Nominee Threatens Truce on Circuit Court Choices*, CQ TODAY, May 7, 2008.

132. I rely in this paragraph on 153 CONG. REC. S13,273 et seq. (daily ed. Oct. 24, 2007). See also Peter Canellos, *Fury at Vote Reflects a Politicized Process*, BOSTON GLOBE, Oct. 30, 2007, at 2A; David Stout, *Senate Backs Disputed Judicial Nomination*, N.Y. TIMES, Oct. 25, 2007, at A21.

133. IGLESIAS, *supra* note 37. Alberto Gonzales's White House Counsel experience should have facilitated selection, but his apparent inability to distinguish being the President's lawyer from the chief U.S. law enforcement officer impeded it. Philip Shenon & David Johnston, *A Defender of Bush's Power, Gonzales Resigns*, N.Y. TIMES, Aug. 28, 2007, at A1; see Goldman et al., *supra* note 12, at 254–58 (showing White House and DOJ roles).

134. Judiciary Comm. v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008); Amy Goldstein & Dan Eggen, *Number of Fired Prosecutors Grows*, WASH. POST, May 10, 2007, at A1; Carrie Johnson, *At Justice, New Pressure to Release Documents*, WASH. POST, Apr. 8, 2008, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/story/2008/04/07/ST2008040702926.html>; Joe Palazzolo, *Court Grants Obama (Another) Extension in Subpoena Case*, THE BLOG OF LEGAL TIMES, Feb. 23, 2009; David Stout, *White House Aides Can Be Subpoenaed*, N.Y. TIMES, Aug. 1, 2008, available at <http://www.nytimes.com/2008/08/01/washington/01SUBPOENA.html>.

and negotiations over them, and a multitude of upper-level Department and White House appointees resigned.¹³⁵

In the 2008 presidential election year, some conventions obtained. Illustrative was appointments' comparatively lethargic pace before the voting. As is traditional, the Chief Executive designated rather few attorneys for chamber investigation, while the Judiciary panel offered dwindling numbers of hearings.¹³⁶ Several lawyers received approval, but the comparison with additional presidential election years was vigorously disputed.¹³⁷ Republicans threatened to impede Senate business and even halt operations.¹³⁸ Indicative of those machinations was a pact between chamber leaders that the Senate would approve three appellate court nominees before the Memorial Day recess.¹³⁹ When they differed about the concord's specifics, it nearly unraveled, and party relations gradually deteriorated, a phenomenon acutely revealed with Democrats' resort to pro forma sessions that denied candidates recess appointments.¹⁴⁰ Thus, courts of appeals had considerably more judges by the administration's conclusion than when it opened, although confirmations necessitated the most time historically.¹⁴¹

135. Eggen, *supra* note 37; Johnson, *supra* note 134; Shenon & Johnston, *supra* note 133; see Blumenthal, *supra* note 53.

136. ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (2008), http://www.uscourts.gov/vacancies/archives_2008.html; *Judges and Justice Delayed*, *supra* note 106.

137. Compare 154 CONG. REC. S6892-01 (daily ed. July 17, 2008) (statement of Sen. Leahy) with *id.* at S6895-02 (statement of Sen. Specter), available at 2008 WL 2775967.

138. Chris Casteel, *Coburn Criticizes Court Vacancies*, DAILY OKLAHOMAN, Apr. 10, 2008, at 9A; Keith Perine, *GOP Senators Threaten Blockade*, CQ. TODAY, Apr. 10, 2008; Alex Bolton, *Under Fire from Conservatives, McConnell Hassles Democrats*, THE HILL, June 19, 2008, <http://thehill.com/leading-the-news/under-fire-from-conservatives-mcconnell-hassles-democrats-2008-06-19.html>.

139. See Abramowitz, *supra* note 1; Billings & Stanton, *supra* note 131; MacLean, *supra* note 131.

140. See *Nominations*, *supra* note 131; Lewis, *supra* note 131; Perine, *supra* note 131.

141. ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (2009), <http://www.uscourts.gov/vacancies/archives.cfm> [hereinafter VACANCIES 2009]; VACANCIES 2001, *supra* note 41; Denis Rutkus & Maureen Bearden, *Nominations to Article III Lower Courts by President George W. Bush During the 110th Congress* (CRS 2008); see Pedro Ruz Gutierrez & Carrie Levine, *Stalemate over Judicial Nominations Dampens Bush Legacy*, LEGAL TIMES, Mar. 14, 2008, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=900005560752&slreturn=1&hbxlogin=1>; Al Kamen, *Judge, Not*, WASH. POST, Aug. 6, 2008, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/05/AR2008080502895.html?nav=emailpage>; R. Jeffrey Smith, *A Bench More White, Male and Conservative*, WASH. POST, Dec. 8, 2008, at A6, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/07/AR2008120702425.html>; see also *supra* notes 37, 99, 108, 111, 137 and accompanying text.

In sum, this analysis of circuit appointments finds that the persistent vacancies conundrum and the existing dilemma apparently continued to restrict appellate justice and these problems warrant careful treatment. The last segment, accordingly, canvasses numerous practices which the branches may use when they address the selection concerns.

III. RECOMMENDATIONS FOR THE FUTURE

A. *The Executive Branch and the Senate*

President Obama, as well as Democratic and GOP senators need to institute and apply concepts that enhance appointments.¹⁴² For instance, the Chief Executive, aides who recruit judges, chamber members, and the body's personnel ought to streamline the duties they fulfill while assiduously calculating thorough investigation of attorney qualifications with expeditious consideration.

The administration and senators must frontally combat, and undertake initiatives that will reduce, growing politicization and appreciate that its limitation will be very controversial and difficult to achieve. Executive and chamber officers should work together, reconcile disparate viewpoints, anticipate a number of polarizing conflicts before they surface, and adopt constructive responses to disputes which in fact arise. The Republican and Democratic parties must also end or curtail specific actions, namely intimating that the opposition's members are uncooperative, which could be perceived as gamesmanship or ways of securing near-term advantage. To the extent that politicization can impair appointments and motivate federal officials to elevate immediate partisan benefit over the welfare of the courts and the nation, the activity might undercut citizen respect for those having selection duties and even judges.

These notions apply to the circuit system and individual appellate tribunals. For example, the President must increase cooperation with elected officers in all regions. A useful idea on which the Chief Executive should always depend is consultation — that is, requesting informally the officials' guidance before actual nomination. Explicit consultation or similar actions which implicated members from California, Hawaii, and New York may

142. *See supra* note 7. The perennial dilemma's best remedy may be approving enough new seats to grant the courts all judgeships that are authorized today. This would avoid some theoretical, pragmatic, and legal issues. Tobias, *supra* note 5, at 569–70. Other ideas may only limit basically irreducible time restraints. For many relevant concepts, see *id.* at 552–73. For a provocative approach, see Samahon, *supra* note 7.

have accelerated chamber approval for Ninth and Second Circuit judges,¹⁴³ even while President Bush's abbreviated consultation, or discounting the advice received, might have slowed or terminated the nomination or confirmation of a few designees.¹⁴⁴ The unfilled appellate court judgeships at the close of the Bush Administration also constitute a great opportunity to seek this help. Therefore, appointments officers must clearly and thoroughly communicate before and after nominations.

Lawmakers who come from the states in all courts of appeals ought to cooperate with the President and one another regarding significant matters, namely whether legislators will honor the conventions that appellate judges should have practiced and lived where vacancies originate and maintain chambers there.¹⁴⁵ When a seat becomes empty, the jurisdictions' lawmakers need to propose multiple, highly qualified designees for the administration. Closely related to this idea is delineating talented attorneys for intractable or lengthy openings, such as those which remained during George W. Bush's presidency and exist in the Fourth Circuit. The new administration and senators concomitantly ought to explore assembling intrastate merit selection panels that resemble the Circuit Judge Nominating Commission adopted by President Jimmy Carter,¹⁴⁶ the analogous entity that Michigan legislators broached in 2001,¹⁴⁷ or the district panel that

143. Carlos Bea and Richard Clifton were the Ninth, and Reena Raggi and Richard Wesley the Second Circuit judges. David G. Savage, *Bush Court Nominee is Voted Down*, L.A. TIMES, Sept. 6, 2002, at A17; *District Judge Raggi Gets Big Promotion*, NEWSDAY, Sept. 21, 2002, at A12; *Politics Hinders Senate Confirmation Process*, HONOLULU STAR-BULL., May 12, 2002, at B6; *supra* notes 98–99 and accompanying text.

144. Peter Keisler for the Fourth, and former Rep. Christopher Cox (R-Cal.) for the Ninth, Circuit illustrate designees Bush failed to nominate. *See supra* note 49 and accompanying text; *see also infra* note 163 and accompanying text. The factors in the text might explicate Senate delay on a number of Bush's Michigan Sixth Circuit nominees and several Fourth Circuit nominees. *See supra* notes 12–13, 91, 123–28 and accompanying text; *infra* notes 158, 165–66, 188–89 and accompanying text.

145. Chamber opposition to Fourth Circuit nominees Claude Allen and Rod Rosenstein illustrates this. *See* Mike Allen, *Virginian Picked for 4th Circuit Judgeship*, WASH. POST, Apr. 29, 2003, at B1; Letter from Alberto Gonzales, White House Counsel, to Sen. Barbara Mikulski (D-Md.) & Sen. Paul Sarbanes (D-Md.) (July 17, 2003) (on file with author); Letter from Sens. Mikulski & Sarbanes to Sen. Orrin Hatch (R-Utah) & Sen. Patrick Leahy (D-Vt.) (July 11, 2003) (on file with author); *supra* notes 129–30, 144 and accompanying text.

146. *See, e.g.,* LARRY C. BERKSON & SUSAN B. CARBON, THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBER, PROCEDURES AND CANDIDATES (1980); Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136, 140 (1987); *see also* GERHARDT, *supra* note 8, at 9, 119–20, 146–47; GOLDMAN, *supra* note 8, at 238–50, 260–61, 267–68, 270, 274, 290. *See generally supra* note 80 (affording a new ABA suggestion for panels).

147. Sens. Carl Levin & Debbie Stabenow, *Bipartisanship Can End Judge Stalemate*, GRAND RAPIDS PRESS, Dec. 5, 2001, at A15; Editorial, *Empty Chairs on the Bench*, GRAND

President Bush and the California senators effectuated that year and relied on for his administration's duration.¹⁴⁸ This kind of group would improve Fourth Circuit appointments and has the potential to rectify stalemates because the entity increases consensus and Democrats essentially possess a somewhat narrow majority. The relatively similar initiative assembled by the Virginia lawmakers is a constructive paradigm that warrants serious exploration.¹⁴⁹ Finally, if these and other ideas do not ameliorate the selection conundrum, the administration and the chamber must redouble attempts to break logjams on the Fourth Circuit and additional tribunals and could even investigate provocative approaches which decrease the confirmation stakes by altering judicial life tenure.¹⁵⁰

B. The Executive Branch

Presidents Bill Clinton and George W. Bush share analogous, partial responsibility for today's circumstances.¹⁵¹ The Obama Administration should enunciate lucid, comprehensive goals, and devise salutary means for realizing the objectives, as well as announce the concepts at a national venue to inform appointments' participants and citizens. For example, merit should be the touchstone, yielding nominees who are intelligent, diligent,

RAPIDS PRESS, Nov. 27, 2001, at A12; see John Wagner, *Panel Would Suggest Nominees*, RALEIGH NEWS & OBSERVER, June 19, 2002, at B5 (assessing a North Carolina Bar Association proposal to create a similar entity); York, *supra* note 91.

148. Carla Marinucci, *Feinstein, Boxer Given a Say Over Judges Bush Forms 1st Bipartisan Panel to Fill U.S. Court Seats in State*, S.F. CHRON., Apr. 27, 2001, at A3, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2001/04/27/MN112069.DTL>; Henry Weinstein, *Process of Judge Selection for Courts*, L.A. TIMES, May 30, 2001, at B1; see Bob Egelko, *Feinstein Taps Bipartisan Panels to Pick Judges*, S.F. CHRON., Jan. 5, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/01/04/BA9N152UDJ.DTL>.

149. *Supra* notes 123–28 and accompanying text; see *infra* note 152 (analyzing Hatch's efforts).

150. Were tenure changes constitutional, their detriments, namely for judicial independence, may outweigh the benefits. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2006); Roger C. Cramton, *Reforming the Supreme Court*, 95 CAL. L. REV. 1313 (2007); Robert Barnes, *Legal Experts Propose Limiting Justices' Powers, Terms*, WASH. POST, Feb. 23, 2009, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/22/AR2009022201863.html>. Less conventional notions, including "trades," might be warranted. See Slotnick, *supra* note 7, at 242; *supra* notes 139–41; *infra* notes 185–89 and accompanying text.

151. In early 1997 and 2001, Clinton and Bush sent few nominees; many apparently were talented centrists, but Hatch and Leahy claimed that some were not. See *supra* notes 40–44, 47–49 and accompanying text. At the outset, the President might solicit advice of former appointments officials. See Carl Tobias, *Dear President Bush: Leaving a Legacy on the Federal Bench*, 42 U. RICH. L. REV. 1041, 1051 n.43 (2008).

ethical, independent, and who have balanced temperament. The President must also recognize and explain White House and DOJ staff duties and explain how to use the input on prospects by legislators from states that experience vacant positions. For instance, recent administrations' White Houses jealously safeguarded their constitutional prerogatives to name all Supreme Court and many appellate nominees while deferring to particular senators on most trial court openings because consultation with home-state lawmakers is valuable, as it facilitates approval.

The Chief Executive needs to proffer sufficient able, centrist attorneys for the district bench whom the Judiciary panel may scrutinize, and nominate capable individuals for the appeals courts at a pace that will expedite Senate analysis. Cultivation of the leadership will be imperative because the Judiciary Chair assumes responsibility for panel evaluations, hearings, and votes and the Majority Leader controls floor access, while both negotiate over critical questions, including filibuster deployment and time allocation with the GOP leadership.

President Obama should be cautious, as missteps early in the nascent administration's tenure will erode credibility, impede selection, and perhaps jeopardize appointments. If the circuits operate with accomplished members and no vacancies, the bench will fairly and expeditiously treat the growing and increasingly complex criminal actions, reduce the civil backlogs of district courts and promptly terminate appeals.

The Chief Executive should first assess and institute conciliatory measures because those remedies are generally efficacious and, if the practices are not effective, selection officials can depend on their application to justify implementing confrontational approaches later. The President could employ mechanisms that streamline the performance of administration responsibilities. A cogent illustration is assembling (1) designees for each court of appeals and High Court vacancy, which drains limited appellate resources, particularly for openings like Fourth Circuit seats that will engender paybacks over the restricted analysis given President Bush's nominees, and (2) GOP senators who have cooperated with Democrats, a phenomenon manifested by the Hatch proposals for justices and the nominees' appointment in the Clinton Administration.¹⁵²

152. ORRIN HATCH, SQUARE PEG: CONFESSIONS OF A CITIZEN SENATOR 129 (2002); see Senate Judiciary Comm. Exec. Business Mtg. (June 12, 2008) (showing Hatch was lone GOP panel member favoring Judge White); Tobias, *supra* note 151, at 1049 (analyzing High Court "short list"); *supra* text accompanying notes 123–28 (assessing Fourth Circuit seats); *supra* notes 144–46 and accompanying text (urging the President to improve process by consulting panel and senators and using merit selection group).

The Chief Executive should initiate actions that will enhance gender, ethnic, and ideological diversity. Fruitful concepts which other presidents adopted offer helpful beginnings. For example, President Carter applied merit selection panels, while Presidents George H.W. Bush and Bill Clinton requested that senators identify numbers of very able female designees.¹⁵³ The Chief Executive ought to approach less conventional groups, such as political organizations for women and minorities, that are knowledgeable about candidates. Moreover, the President ought to rely on female and minority lawmakers, who should ask their colleagues to delineate, and help confirm, additional women and people of color. Increasing gender and ethnic diversity will offer several benefits. Numerous female and minority appointees will help other jurists understand and efficaciously resolve complicated issues, namely discrimination and abortion,¹⁵⁴ which are issues the courts must face while limiting gender and racial bias in the justice system.¹⁵⁵ The public also has greater confidence in appellate and district judges who reflect the nation's composition.¹⁵⁶

The Obama Administration as well might evaluate nominating individuals who may expand political diversity. The administration should search for nominees with minimalist perspectives on the Constitution and statutory interpretation and even seek out attorneys who could appreciate the notion of a "living Constitution."¹⁵⁷ The President might justify this

153. See Tobias, *supra* note 33, at 479–80 (assessing Bush's request); Neil A. Lewis, *Unmaking the G.O.P. Court Legacy*, N.Y. TIMES, Aug. 23, 1993, at A10, available at <http://www.nytimes.com/1993/08/23/us/unmaking-the-gop-court-legacy.html> (assessing Clinton's request); see also sources cited *supra* note 146 (assessing Carter's panels).

154. See, e.g., Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 19–21, 25–27, 31–33 (2001); Marion Zenn Goldberg, *Carter-Appointed Judges Perspectives on Gender*, TRIAL, Apr. 1990, at 108; see also Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 599–600, 610–17 (2003); Sheldon Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488, 491 (1979).

155. See, e.g., NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS AND ETHNIC FAIRNESS, FINAL REPORT (1997); FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169–70 (1990). See generally Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 ARIZ. ST. L.J. 237, 238 (1989).

156. See, e.g., Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 253 (1978); Editorial, *The O'Connor Court*, WASH. POST, July 2, 2005, at A28. But see Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000).

157. See, e.g., STEPHEN BREYER, ACTIVE LIBERTY (2005); CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005); ROSEN, *supra* note 106; sources cited *supra* note 8. But see Antonin Scalia, *A Matter of Interpretation*, in A MATTER OF INTERPRETATION (Amy Gutmann, ed., 1997); Curt Levey, *Living Constitution*, R.I.P., NAT'L REV. ONLINE, Sept. 30, 2005, <http://article.nationalreview.com/?q=ZDhmNjBIOTk1NDk0NDJjOGEzOWE1YjY5MjdkZTA0>

selection approach because, for instance, his predecessor essentially named strict constructionists, originalists, and ideological conservatives while GOP appointees comprise majorities on virtually all circuits. Therefore, the election arguably gave the new leader a mandate to rectify imbalance and non-diverse viewpoints. However, unduly emphasizing ideology may provoke criticisms like the aspersions which Republicans and Democrats cast on each other's administrations.

President Obama reassessed and reversed President Bush's decision to delete ABA review in advance of nominations, as eliminating the group's input at that phase has slowed confirmation, while this examination often improves appointments through detection of potentially embarrassing information that the White House can lack.¹⁵⁸ Another useful option would be selecting more counsel whom Republicans will deem acceptable. For example, President Bush recommended Circuit Judge Parker, who was initially appointed by President Clinton to the Southern District of New York, and the jurist was felicitously approved.¹⁵⁹ Elevation is correspondingly a productive remedy because most district judges who are submitted for appeals court vacancies prompt little opposition.¹⁶⁰ President Reagan actually named to the trial bench Julia Gibbons, who was the first individual President Bush placed on the Sixth Circuit, which had long addressed confirmation difficulties.¹⁶¹

Yjc=. Bush also emphasized youth, so the new President may wish to as well. Goldman, *supra* note 12, at 260.

158. See, e.g., Terry Carter, *Do-Over: After an Eight-Year Pause, the ABA is Again Vetting Possible Federal Bench Nominees*, A.B.A. J., May 2009, at 62, available at <http://www.abajournal.com/magazine/do-over/>; Editorial, *supra* note 52; see also David Ingram, *What Role Will ABA Have in Judicial Nominations?*, THE BLOG OF LEGAL TIMES, Feb. 20, 2009, available at http://www.brennancenter.org/content/elert/what_role_will_aba_have_in_judicial_nominations/; Leahy Statement, *supra* note 53. See generally *supra* notes 52–53 and accompanying text.

159. Parker easily won confirmation, as he was appointed once, had Democratic support, and had been a district judge, which informed Senate review. Parker's elevation resembled that by Clinton of Judge Sonia Sotomayor whom Bush's father chose. See Neil A. Lewis, *After Delay, Senate Approves Judge for Court in New York*, N.Y. TIMES, Oct. 3, 1998, at B23, available at <http://www.nytimes.com/1998/10/03/nyregion/after-delay-senate-approves-judge-for-court-in-new-york.html>; see also *supra* note 74 and accompanying text.

160. Recent presidents used elevation. See, e.g., Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. TIMES, Apr. 10, 1990, at A1, available at <http://www.nytimes.com/1990/04/10/us/bush-picking-the-kind-of-judges-reagan-favored.html>; Ruth Marcus, *Bush Quietly Fosters Conservative Trend*, WASH. POST, Feb. 18, 1991, at A14; Tobias, *supra* note 54, at 752. But see *supra* notes 94–96 and accompanying text.

161. James Brosnan, *Senate Confirms Gibbons 95-0 for Appeals Bench*, MEMPHIS COM. APPEAL, July 30, 2002, at B2; Editorial, *At Last, A Beginning*, CINCINNATI POST, July 31, 2002, at 12A; see also *UK Professor Confirmed to Appeals Court*, LOUISVILLE COURIER-J., Nov. 12, 2002, at 1; *supra* note 49.

The administration could even think about sending capable lawyers with GOP affiliations.¹⁶² This idea might be efficacious for circuits that have protracted openings, resolve large numbers of appeals, or include states where the party that lacks Executive Branch control usually wins. Instructive during the Bush years was Maryland. Maryland lawmakers prevented selection of a Republican designee and a nominee's appointment because the White House failed to consult the legislators and one nominee practiced law minimally in Maryland and the second had not.¹⁶³ Explanations regarding perennial fights between Democrats and Republicans indicate why Michigan Sixth Circuit positions had no judges over a decade.¹⁶⁴ For appellate courts with multiple, lengthy vacancies and numerous appeals — that are in jurisdictions where elected officers, who suggest or may block nominations, cannot agree — the President might consider “trades,” namely allowing Republican designation of some prospects.¹⁶⁵

Illuminating was the proposal by Michigan senators to favor the attorneys the Bush Administration submitted for openings when President Clinton's nominees from Michigan received analysis.¹⁶⁶ The huge caseload growth since 1990, when a thorough judgeships bill last passed, also merits new seats; the President could exchange a judgeship for GOP suggestions of a few candidates, thus instituting a bipartisan judiciary and possibly

162. See *supra* note 43 and accompanying text. See generally *supra* notes 74, 159 and accompanying text; *infra* note 169 and accompanying text.

163. Carl Tobias, *The Bush Administration and Appeals Court Nominees*, 10 WM. & MARY BILL RTS. J. 103, 110, 114 (2001); Lewis, *supra* note 38; see *supra* notes 48, 129–30 and accompanying text.

164. Jonathan Groner & Jonathan Ringel, *Judicial Nominee Horsetrading Heats Up as Confirmation Process Gets Weighed*, AM. LAW. MEDIA, Aug. 31, 2001, available at <http://www.law.com/jsp/article.jsp?id=900005521522>; Jerry Markon, *The Politics of the Federal Bench*, WASH. POST, Dec. 8, 2008, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/07/AR2008120702703.html>; *Senate Nomination Process Needs Repair*, DETROIT NEWS, Mar. 4, 2002, at A8; *The Federal Court Blockade*, GRAND RAPIDS PRESS, May 12, 2002; *supra* notes 12, 91, 140, 147 and accompanying text; *infra* note 166 and accompanying text.

165. In 1997, Senator Biden said that the GOP had earlier mentioned a similar “informal agreement,” yet this idea violated a 200-year tradition. 143 CONG. REC. S2538, S2541 (daily ed. Mar. 19, 1997); see sources cited *supra* note 47. “Horsetrading” judgeships is controversial. See Groner & Ringel, *supra* note 164; see also GERHARDT, *supra* note 8, at 157–63; Slotnick, *supra* note 7, at 242.

166. Levin & Stabenow, *supra* note 147; Egan & Trowbridge, *supra* note 12; sources cited *supra* notes 12, 91, 147. Senator Edwards analogously delayed opposing Judge Boyle, until he could speak with Bush about naming a Clinton nominee. Matthew Cooper & Douglas Waller, *Bush's Judicial Picks Could Be a Battle Boyle*, TIME, May 21, 2001, at 22; see also *supra* notes 13, 49; *infra* note 185 and accompanying text.

correcting the present dynamics.¹⁶⁷ The administration could even reach accords with the Judiciary Committee leaders on a prearranged number of nominees to be approved in a session.¹⁶⁸

The Chief Executive, who has practiced bipartisanship, must initially exhaust all conciliatory notions. Only if they fail should the White House evaluate, and perhaps adopt, rather confrontational tools. For instance, the administration might deploy the office essentially as a bully pulpit to shame or castigate Republican actions, including filibusters of circuit nominees. President Obama may aggressively force the judicial selection question by taking it to the public or considering vacancies an election issue, as the GOP has successfully done. Analogous options include the nomination of counsel for all current empty positions or the selective use of recess appointments, initiatives that help leverage the chamber through publicizing or dramatizing how sustained vacancies undercut appellate justice. President Clinton apparently facilitated Judge Gregory's confirmation by recess appointing the lawyer; however, this situation was exceptional. The jurist was the Fourth Circuit's initial African-American member and no Chief Executive after Carter had invoked the device for bench appointments, while critical political, legal, and practical factors restrict its effectiveness, as shown by the dispute that involved Judge Pickering's elevation.¹⁶⁹ President Bush relied on, or threatened use of, similar ideas mainly when pressuring Democrats but generally applied them with caution and attempted to retain a dignified selection process, although a number of the ideas that he employed were inefficacious and even counterproductive, as reflected in unsuccessful Fourth Circuit appointments.¹⁷⁰

Those concepts examined implicate each appeals court and the appellate system. For instance, consultation has frequently been advantageous and has entailed inconsequential political costs. To the extent its abbreviated

167. Goldman & Slotnick, *supra* note 29, at 271; see Tobias, *supra* note 151, at 1045 n.21, 1052 nn.49–52 (case and work load data). *But see id.* at 1052 n.51; GRASSLEY REPORT, *supra* note 67, at 1–15.

168. Variations on ideas above are senators' provision of lawyers who meet presidential criteria or of alternating suggestions in states with both parties' senators. Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 688 (2003). I am not urging the ideas' adoption, but the President should analyze them and be pragmatic. He may assess how critical openings are and conclude filling them is less crucial than some principles, such as naming the type of jurists he prefers.

169. Putative appointees often decline appointment, while the device inflames opponents and raises constitutional issues, such as the effect of Judge Pickering's service as a recess appointee on cases that he resolved. See sources cited *supra* note 109; see also *supra* notes 74, 140 and accompanying text.

170. See, e.g., President's Remarks, *supra* note 40; Lewis, *supra* note 74; sources cited *supra* notes 55, 123–28; see also *supra* notes 13, 94, 122, 129–30, 166 and accompanying text.

use, or eschewing the guidance furnished, has slowed candidates, the administration should broach counsel with the officers and assign their input greater value. Had President Bush contacted Democratic legislators from specific jurisdictions about possibilities under consideration, he would have anticipated, and could have reduced, the difficulties that arose when the lawmakers objected.¹⁷¹ The Chief Executive should also remember that concerns about the ideological perspectives of these and other candidates, which essentially stalled nomination, analysis, and confirmation. Insofar as their views and those held by additional circuit designees triggered effective interest group opposition, prolonging appointments and fostering occasional rejection, the President might consider less doctrinaire nominees or be realistic about how the entities can affect confirmation.¹⁷² The administration should concomitantly avoid mechanisms which continue and aggravate the detrimental payback cycle. Illustrations include President Bush's 2003 re-nomination of Judge Pickering, although the committee did not favor him the year before, and the jurist's 2004 recess appointment, measures that seemingly prompted Democrats to block his confirmation and that of other nominees with filibusters. The Chief Executive and the chamber analogously treated several Fourth Circuit prospects.

C. *The Senate*

All Senate members need to analyze and institute cooperative approaches, as the body shares responsibility with Presidents Clinton and George W. Bush for appellate openings today. GOP legislators should keep in mind that Democrats approved larger numbers of judges, despite politicized selection, when Republicans occupied the White House;¹⁷³ that citizens may actually blame the GOP for the complications which protracted vacancies impose; and that Democrats again hold the upper chamber.¹⁷⁴

171. *See supra* notes 12–13, 48, 83, 91, 93, 143–45, 163–66; *infra* notes 185–89 and accompanying text.

172. Others were Michigan, Ohio, Fifth, Tenth, and D.C. Circuit nominees. *See* Neil A. Lewis, *Bush Judicial Choice Imperiled by Refusal to Release Papers*, N.Y. TIMES, Sept. 27, 2002, at A28; David Savage, *Despite Own Views, Nominee Would Back "Roe,"* L.A. TIMES, Sept. 19, 2002, at A13; Jonathan Groner, *Abortion Returns to Nominations Stage*, LEGAL TIMES, July 22, 2002, at 1; GERHARDT, *supra* note 8, at 217–29; GOLDMAN, *supra* note 8, at 310–11; *supra* notes 12, 49, 91, 93–96, 152 and accompanying text.

173. *See supra* notes 54, 57–58 and accompanying text; *see also* Hartley & Holmes, *supra* note 28.

174. *See* sources cited *supra* notes 38, 55, 77–80. *See generally* Newfield, *supra* note 97, at 11–16.

Republican senators, accordingly, ought to embrace conciliatory devices. These lawmakers should be responsive if Democrats propose the filibuster's replacement with thorough substantive debate on nominee qualifications. Moreover, the lawmakers should be receptive to administration consultation by proffering frank, instructive advice and should rather quickly confirm President Bush's district appointees whom his successor might elevate and other, talented consensus nominees. GOP legislators should apply a plethora of similar cooperative approaches. For instance, when Republicans believe presidential designees are unpalatable, the lawmakers could recommend attorneys they find to be better.¹⁷⁵ The Senate may correspondingly wish to assess proposals for enhancing various stages in the process that President Bush championed across his first term. Certain ideas, namely making active judges give earlier notice that they intend to become senior jurists and less flexible time periods for many phases, essentially violate longstanding judicial and senatorial conventions or are infeasible.¹⁷⁶

To the extent delayed nominee investigation has allowed prolonged vacancies, the Senate might canvass numerous efficacious ways of facilitating appointments. The Judiciary panel could grant more lawyers hearings and votes with relatively narrow analysis, a technique which Senator Hatch deployed in 2003, while the committee may abolish ceremonial sessions for noncontroversial people. Insofar as legislators might have failed to expedite attorneys because of their ideological outlooks, venerated norms, and recent practice suggest those forwarded deserve committee hearings and votes.¹⁷⁷ The Majority Leader ought to use

175. Washington Senators Slade Gorton (R) and Patty Murray (D) proposed designees in 1997, as have Nevada Senators John Ensign (R) and Harry Reid (D) since 2001 and Virginia Senators since 2007. *See* Callaghan, *supra* note 47; 149 CONG. REC. S3678 et seq. (daily ed. Mar. 13, 2003) (statements of Sens. Ensign & Reid); *supra* notes 123–28 and accompanying text. Senator Reid should resolve disputes and seek help from Senators Jeff Sessions (R-Ala.), the current ranking panel member, and Mitch McConnell (R-Ky.), the current Minority Leader.

176. Exec. Order No. 13,300, 68 Fed. Reg. 25,807 (May 9, 2003); *see* Bermant et al., *supra* note 5, at 334; Mike Allen & Amy Goldstein, *Bush Has Plan to Speed Judicial Confirmations*, WASH. POST, Oct. 31, 2002, at A21 (on file with author); Edwin Chen & Henry Weinstein, *Liberals Bracing for Quick Judicial Action by Bush*, L.A. TIMES, Nov. 7, 2002, at A22, available at <http://8.12.42.31/2002/nov/07/nation/na-judges7>. For later similar ideas, *see* S. Res. 327, 108th Cong. (2004); Charles Pickering, *A Proposal: Codification by Statute of the Judicial Confirmation Process*, 14 WM. & MARY BILL RTS. J. 807 (2006). Executive, FBI, ABA, and Senate scrutiny may slow nomination and confirmation. Home-state lawmakers can also block nominees; unanimous consent allows one senator to delay floor action and cloture requires sixty votes. *See* Tobias, *supra* note 151, at 1048–49.

177. *See supra* notes 54, 85 and accompanying text; *see also supra* notes 40–44 and accompanying text. The 2002 party-line rejections of Judges Owen and Pickering seemingly were “paybacks.” *See supra* notes 95–96 and accompanying text; *see also supra* notes 107–09 and accompanying text.

notions that encourage increased assessment by the whole chamber. For example, Senator Reid may promote balloting on greater numbers of attorneys, if the Majority Leader schedules floor consideration as soon as he learns about positive committee action. To the extent that controversies over individual nominees slow the process, the Democratic leadership should permit additional, robust debates and votes, especially as a filibuster substitute, but ostensible GOP reliance on the procedure complicates these initiatives; accordingly, Democrats could revitalize an entity like the “Gang of 14” that would allow filibusters only in exceptional circumstances.¹⁷⁸

Senators also might calibrate the need for thorough analysis and prompt confirmation of many nominees while approving individuals with the expertise and character to furnish distinguished service. Republicans may ask whether they overemphasize ideology just as the parties could have scuttled the dubious efforts to ascertain if nominees of President Bush and President Clinton would be “judicial activists,” once confirmed.¹⁷⁹ The advice and consent phrasing in Article II contemplates that senators will review designees’ abilities, ethics, and respect for separation of powers,¹⁸⁰ yet the legislators should not stymie candidates based on how putative appointees would decide issues’ merits, as evaluation of those questions seems to compromise judicial independence.¹⁸¹

178. Some judges’ confirmation debates were frank, useful exchanges. 144 CONG. REC. S11872-902 (daily ed. Oct. 8, 1998) (nomination of William Fletcher); 143 CONG. REC. S2515-01 (daily ed. Mar. 19, 1997) (nomination of Merrick Garland); *supra* note 97 (nomination of D. Brooks Smith); *supra* note 132 (nomination of Leslie Southwick); Neil A. Lewis, *After Long Delays, Senate Confirms 2 Judicial Nominees*, N.Y. TIMES, Mar. 10, 2000, at A16, available at <http://www.nytimes.com/2000/03/10/us/after-long-delays-senate-confirms-2-judicial-nominees.html>; Slotnick, *supra* note 7, at 240; see *supra* notes 114–16 and accompanying text (treating filibusters & Gang).

179. See, e.g., *Judicial Nominations 2001: Should Ideology Matter?: Hearings Before the S. Judiciary Subcommittee on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 107th Cong. (2001) [hereinafter 2001 Hearing]; *Judicial Activism: Defining the Problem and its Impact: Hearings Before the Subcommittee on the Constitution, Federalism and Property Rights of the S. Comm. on the Judiciary*, 105th Cong. (1997); 143 CONG. REC. S2515 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch); see also KERMIT ROOSEVELT, *THE MYTH OF JUDICIAL ACTIVISM* (2006); Newfield, *supra* note 97, at 11–16; sources cited *supra* notes 8, 55, 74.

180. See, e.g., 2001 Hearing, *supra* note 179; Douglas Laycock, *Forging Ideological Compromise*, N.Y. TIMES, Sept. 18, 2002, at A31, available at <http://www.nytimes.com/2002/09/18/opinion/18LAYC.html>; see also Albert Alschuler, *Making Ideology an Issue*, CHI. TRIB., Sept. 18, 2002, at 23. See generally Stephen L. Carter, *A Devilish Look at the Confirmation Process*, 50 DRAKE L. REV. 369 (2002).

181. See, e.g., CITIZENS FOR INDEP. COURTS, *UNCERTAIN JUSTICE: POLITICS AND AMERICA’S COURTS* 1–75, 121–71, 205–42 (2000); Symposium, *Judicial Independence and Accountability*, 72 S. CAL. L. REV. 311, 315–809 (1999). Many GOP members found Democrats’ filibuster of Estrada to exemplify these ideas. See sources cited *supra* note 106.

Republicans should confirm nominees who possess qualifications suggesting they would be effective judges; Democrats frequently so acted when the party lacked control of the White House.¹⁸² They are concerned about how the GOP moved few Clinton nominees, while many Republicans have not forgotten Judge Bork's defeat, the imbroglio over appointment of Justice Thomas, and the chilly reception accorded to some people President Bush forwarded, endeavors that the GOP contends were animated by opposition to individual candidates' jurisprudence.¹⁸³ Democrats and Republicans should abjure this pernicious dynamic specifically characterized by accelerating paybacks and forge more consensus or a global accord.¹⁸⁴

These notions pertain to each circuit and the system. For instance, Republicans from areas that have encountered impasses may effectuate compromises or "trades." Illustrative of the first approach are the South Carolina lawmakers and its Fourth Circuit vacancies. They should propose moderate, talented attorneys Democrats would consider acceptable.¹⁸⁵ North Carolina is, and California may be, informative exemplars of nuanced possible trades.¹⁸⁶ Republicans from the jurisdictions might agree to a Democratic appellate candidate, if the administration supports a prospect

182. See *supra* notes 54, 85 and accompanying text. See generally *supra* notes 40–44 and accompanying text.

183. Goldman & Slotnick, *supra* note 29, at 256; Melone, *supra* note 9, at 68; Gest & Lord, *supra* note 61; see MARK GITENSTEIN, MATTERS OF PRINCIPLE (1992); sources cited *supra* note 29; PAUL SIMON, ADVICE & CONSENT (1992). Democrats' actions may be distinguishable, as High Court selection is so critical and they rarely so assessed appellate court nominees. See sources cited *supra* note 66; see also Michael J. Gerhardt, *Supreme Court Selection as War*, 50 DRAKE L. REV. 3, 93 (2002).

184. See, e.g., sources cited *supra* notes 163–68, 179–81; see also *supra* notes 49, 93–97 and accompanying text.

185. Rick Brundrett, *Federalist Society Hopes Obama Picks Moderate Judges*, THE STATE, Jan. 18, 2009 (on file with author); see Rick Brundrett, *Columbia Man Nominated for U.S. 4th Circuit Judge*, THE STATE, July 3, 2007, available at http://www.accessmylibrary.com/coms2/summary_0286-31793537_ITM.

186. For North Carolina, see *supra* notes 13, 48–49, 166 and accompanying text; *infra* note 197. For California, see Howard Mintz, *Bush Picks Latina for Appeals Court*, SAN JOSE MERCURY NEWS, Feb. 14, 2003, at 19A, available at <http://www.wrnh.org/Issues%20News%20Articles/Hispanic%20Appointments/BUSH%20PICKS%20LATINA%20FOR%20APPEALS%20COURT.htm>; Henry Weinstein, *Conservative State Judge Nominated for Federal Bench*, L.A. TIMES, Feb. 14, 2003, at B8, available at <http://articles.latimes.com/2003/feb/14/local/me-judge14>; Slotnick, *supra* note 7, at 242 (assessing trades); see also 149 CONG. REC. S4604-07 (daily ed. Apr. 1, 2003) (statement of Sen. Leahy); Neil A. Lewis, *Judicial Nominee Distances Herself From Past Positions*, N.Y. TIMES, Apr. 2, 2003, at A16, available at <http://www.nytimes.com/2003/04/02/politics/02JUDG.html>; *supra* notes 143, 148 and accompanying text.

whom they recommend for the next opening.¹⁸⁷ Last year's Sixth Circuit vignette provides another salient example. President Bush and the Michigan legislators broke the deadlock which stopped him and the Clinton Administration from confirming anyone for two vacant positions.¹⁸⁸ Senators Levin and Stabenow had intimated they would favor a Bush nominee, if the White House tapped one lawyer his predecessor had selected.¹⁸⁹

D. The Judiciary

The Constitution restricts Third Branch ability to change the present situation because Article II delegates the President and the Senate lead responsibilities for judicial selection. However, the courts may enhance attempts to publicize openings and the severe difficulties they create¹⁹⁰ while formulating approaches to improve the process that the Chief Executive and the Senate implement. Particular jurists also can specifically request or urge lawmakers to expedite appointments. For instance, when Chief Judge Edward Becker asked that legislators fill Third Circuit vacancies, his personal importuning encouraged Senator Biden to approve a controversial jurist.¹⁹¹ Nevertheless, this device has limited applicability,

187. See *supra* notes 83, 94, 123–28, 148, 171; see also *infra* note 196 and accompanying text.

188. See *supra* notes 12, 49, 91, 93, 145, 147, 161, 164–66 and accompanying text. Pennsylvania is similar. Duffy, *supra* note 126.

189. Smith, *supra* note 141. My ideas rely on the existence of openings, filibusters' invocation, and continuing tensions. See *supra* notes 12, 47–49, 91, 93–94, 140, 145, 147, 164, 171 and accompanying text. For useful ideas, compare *Judicial Nomination, Filibusters and the Constitution, Hearing Before the Senate Judiciary Constitution Subcomm.*, *supra* note 114, with Press Release, U.S. Senate, Schumer Proposes New Confirmation Process for Judicial Nominations (Apr. 30, 2003) (on file with author).

190. The judiciary's adoption of these kinds of initiatives might enhance citizen awareness of, and galvanize public support to remedy, the vacancies conundrum, while the efforts may even heighten executive and legislative officers' sensitivity to the necessity for expediting judicial selection.

191. District Judge D. Brooks Smith was the controversial Bush nominee. See Jonathan Groner, *Stars Align for Circuit Nominee*, LEGAL TIMES, May 27, 2002, at 1, available at http://web2.westlaw.com/result/default.wl?rltdb=CLID_DB4719755313238&srch=TRUE&db=ALLNEWS&sv=Split&service=Search&eq=search&fmqv=s&sskey=CLID_SSSA8822855313238&method=TNC&action=Search&query=%22STARS+ALIGN+FOR+CIRCUIT+NOMINEE%22&mt=208&fn=_top&origin=Search&vr=2.0&rlt=CLID_QRYRLT2021257313238&rp=%2fsearch%2fdefault.wl&cfid=1&rs=WLW7.07; see also sources cited *supra* note 97.

while some might consider the action overly political or think it compromises judicial independence.¹⁹²

The views below relate to the dozen appeals courts and the system. For example, all judges on the tribunals should reassess whether the contingents that lawmakers have granted allow the circuits to dispense justice and, if not, precisely how much augmentation could be warranted. The Judiciary Subcommittee on Administrative Oversight and the Courts argued that no tribunals required positions, while a majority of Third, Fourth, and Eleventh Circuit jurists agreed with this finding.¹⁹³ Nonetheless, a study commission — which legislators instituted over a decade ago to evaluate and posit recommendations for improving the courts — ascertained that members on a considerably larger number of tribunals asserted the judges would function more efficaciously with bigger complements.¹⁹⁴

The notion of optimal magnitude has provoked strong disagreement, particularly among jurists on the courts.¹⁹⁵ For instance, twelve years ago, Chief Judge J. Harvie Wilkinson, III, argued that the Fourth Circuit performed well using a smaller number of active members than Congress had approved,¹⁹⁶ while Senator Helms capitalized on analogous propositions to oppose lawyers whom President Clinton tapped for seats assigned to North Carolina.¹⁹⁷ However, this appeals court's judges favorably responded in the highest percentages when answering commission survey queries about whether tribunal growth could allow the jurists to "correct prejudicial errors, minimize appellate litigation costs, avoid [conflicting

192. See, e.g., sources cited *supra* notes 179–86. See generally Lauren K. Robel, *Impermeable Federalism, Pragmatic Silence, and the Long Range Plan for the Federal Courts*, 71 IND. L.J. 841 (1996).

193. See *supra* notes 67–69 and accompanying text. But see *infra* notes 194, 198, 202 and accompanying text.

194. COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, WORKING PAPERS, 18–21 (1998) [hereinafter WORKING PAPERS]; see COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT (1998). Congress authorized the study in 1997 that was completed in 1998. See MILLER REPORT, *supra* note 5, at 5.

195. See, e.g., sources cited *supra* note 21. See generally Gordon Bermant et al., *Imposing a Moratorium on the Number of Federal Judges: Analysis of Arguments and Implications* (Federal Judicial Center 1993).

196. *Hearings on Conserving Judicial Resources*, *supra* note 68; accord GRASSLEY REPORT, *supra* note 67.

197. David Firestone, *With New Administration, Partisan Battle Resumes Over a Federal Appeals Bench*, N.Y. TIMES, May 21, 2001, at A13, available at <http://www.nytimes.com/2001/05/21/us/with-new-administration-partisan-battle-resumes-over-a-federal-appeals-bench.html>; see *supra* notes 13, 49, 83, 93 and accompanying text. This inconsistency did not preclude Helms from urging Bush to nominate Judge Boyle. See Firestone, *supra*.

determinations and hear sufficient] oral argument.”¹⁹⁸ The circuit’s rather tiny numbers of arguments and published opinions indicate the court would deliver additional justice, if the tribunal were larger or at full strength.¹⁹⁹

Chief Judge Boyce F. Martin, Jr., also found in 1998 that the Sixth Circuit would operate more effectively with new positions.²⁰⁰ A majority of the tribunal’s jurists asked that Congress approve seats,²⁰¹ while the circuit judges affirmatively reacted in the highest percentages to the questions whether enhanced size would help the court decrease a backlog and issue a “statement of reasons for all decisions in nonfrivolous” cases.²⁰² The few published opinions which the tribunal affords and its relatively slow disposition times reveal that the court of appeals could function better with additional positions.²⁰³ Those Sixth Circuit jurists, who opposed growth, accordingly, might consider whether new seats would allow the tribunal to perform more efficaciously.

The Judicial Conference also needs to calibrate the ideal magnitude for each appellate court and the system when gathering data and assembling congressional judgeship recommendations, although it ordinarily honors the preferences of every circuit’s jurists.²⁰⁴ In the end, aggravating the counterproductive Democratic and Republican dynamics, which incessant paybacks now epitomize, and subverting appointments for immediate political gain are mistakes that corrode the nation’s respect for the governmental branches.

198. WORKING PAPERS, *supra* note 194, at 18–19; *see infra* notes 199, 202 and accompanying text.

199. WORKING PAPERS, *supra* note 194, at 93, tbls. 2 & 3; *see* ADMIN. OFFICE OF THE U.S. COURTS, 2008 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE U.S. COURTS, 42, 44 (2008), *available at* <http://www.uscourts.gov/judbus2008/JudicialBusinesspdfversion.pdf>; Carl Tobias, *Fourth Circuit Publication Practices*, 63 WASH. & LEE L. REV. 1733, 1739 (2005); *infra* note 203.

200. Letter from Boyce F. Martin Jr., Sixth Circuit Chief Judge, to Sen. Charles Grassley, Chair, Senate Judiciary Subcommittee on Admin. Oversight & the Courts, (June 19, 1998) (on file with author); *see also supra* note 69 and accompanying text.

201. Some judges did dissent. GRASSLEY REPORT, *supra* note 67, at 1, 4; Tobias, *supra* note 54, at 749.

202. *See* WORKING PAPERS, *supra* note 194, at 18, 21. The conservative estimates on which the Conference bases suggestions indicate the Sixth Circuit requires one new judgeship. *See* S. 525, 110th Cong. (2007); S. 2774, 110th Cong. (2008); S. 1653, 111th Cong. (2009); *see also* Tobias *supra* note 54, at 753. *But see* GRASSLEY REPORT, *supra* note 67, at 2–7. In 1999, the Conference had recommended two new seats. S. 1145, 106th Cong. (1999).

203. WORKING PAPERS, *supra* note 194, at 93, tbl. 2, 95, tbl. 7, 108, tbl. 6a; *see* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 199, at 42, 44.

204. *See supra* notes 176–84 and accompanying text; *see also supra* note 71 and accompanying text. These are sharply disputed, unresolved questions. *See supra* notes 67–69 and accompanying text. Authorizing new seats obviously will have limited impact, if the Senate cannot approve nominees.

CONCLUSION

Appeals court vacancies threaten modern justice. The nascent Obama Administration and Democratic and Republican Senate members have an historic opportunity to improve the contemporary process by depoliticizing appointments. They should reconcile differences, resolve or temper the selection problem, and halt or at least decrease criticism of each other. Top-ranking legal figures, including the new Attorney General, Eric Holder, and White House Counsel, Gregory Craig, as well as the Democratic and Republican Senate leaders, Harry Reid and Mitch McConnell, ought to discharge this profound responsibility.

Earlier administrations and chamber members on both sides of the aisle have introduced, cultivated, and sustained unproductive dynamics. All recent presidents have nominated controversial attorneys multiple times, the Judiciary Committee has not always expedited candidate assessment, and both parties may have slowed floor debates and votes when they lacked control of the White House. The administration and Republican and Democratic senators, thus, ought to jettison or reexamine the use of numerous divisive practices.

Chamber members from jurisdictions in every appellate tribunal should increase communications within their states, among elected colleagues, and with the President. If lawmakers from the states and Executive Branch officials analyze and institute a number of recommendations espoused, they might improve appointments in the legislators' jurisdictions, each circuit, and perhaps the nation.