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Postpartisan Federal Judicial Selection

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POSTPARTISAN FEDERAL JUDICIAL SELECTION

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Abstract: The problem of numerous, persistent vacancies in the federal judiciary continues to undermine expeditious, inexpensive, and fair case resolution. As the Obama administration is still in its early stages, the process for nominating and securing the confirmation of federal judges merits consideration. This Essay chronicles the origins and development of the appointments conundrum. Although enhanced federal jurisdiction and growing caseloads are partially to blame, partisan politics has also prevented swift nomination and confirmation for over twenty years. The Essay then describes the processes employed by the Obama administration during its nascency. Finally, the Essay offers suggestions to facilitate the judicial selection process, targeted at both the Obama administration and the Senate.

Introduction

President Barack Obama campaigned on a vow to restore bipartisanship.[1] Few areas so desperately need postpartisan approaches, or have more importance, than judicial selection. The President nominates and, with Senate advice and consent, appoints life-tenured judges who exercise the vast power of the state and resolve disputes over constitutional rights.[2] Democratic and Republican allegations and countercharges, divisive gamesmanship, and incessant paybacks have riven selection for over twenty years.[3] There are 858 appellate and district court judgeships, but 100 were vacant at the beginning of the current year.[4]

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[1] *See* Michael Cooper, *Republicans Focus on Obama as Fall Opponent*, N.Y. Times, May 8, 2008, at A34.

[2] *See* U.S. Const. art. II, § 2, cl. 2.

[3] *See infra* notes 28–37 and accompanying text.

[4] U.S. Courts, Vacancies in the Federal Judiciary (Jan. 1, 2010), http://www.uscourts.gov/judicialvac.cfm.

Operating without eleven percent of the jurists undermines the swift, economical, and fair disposition of cases, as well as public respect for appointments and the government.[5] Selection during a presidency's nascency and the initial session of a new Congress can also establish the future tenor. All these ideas mean that the process for choosing judges in the early stage of the Obama administration and 111th Congress deserves review. This Essay undertakes that task.

Part I chronicles the origins and development of the appointments conundrum.[6] The assessment reveals that the dilemma principally results from mounting partisanship and an escalating caseload, which necessitates additional judgeships. The latter phenomenon magnifies the number and frequency of openings, and confounds attempts to seat judges. Part II descriptively and critically evaluates the selection process in the nascent Obama administration and 111th Congress.[7] Finding that the President and the Senate have instituted measures that should rectify the appointments problem, Part III proffers suggestions for expeditiously naming judges, so that the courts may promptly, inexpensively, and equitably address lawsuits.[8]

I. The Origins and Development of the Conundrum

A. *Introduction*

The background of selection difficulty warrants limited consideration here, as it has been analyzed elsewhere and modern circumstances have greatest relevance.[9] Nonetheless, some treatment might improve appreciation of concerns expressed about the process and the current situation. The problem has two salient components.[10] The first is the *persistent*, or structural, dilemma that emanates from burgeoning federal jurisdiction and caseloads across the past half century; Congress increased the magnitude of the judiciary, expanding the quantity and occurrence of vacancies and frustrating timely appointments.[11] The

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[5] *See infra* notes 13–15, 45–49 and accompanying text.

[6] *See infra* notes 9–49 and accompanying text.

[7] *See infra* notes 50–91 and accompanying text.

[8] *See infra* notes 92–143 and accompanying text.

[9] *See, e.g.*, Miller Ctr. Comm'n No. 7, Report of the Commission on the Selection of Federal Judges 3–6 (1996); Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 Miss. C. L. Rev. 319, 320–33 (1994). In this Essay, I rely on these sources, as well as Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 Emory L.J. 527 (1998).

[10] *See* Tobias, *supra* note 9, at 529–52.

[11] *See id.* at 529–40.

second is the *contemporary* dilemma, which is essentially political and mostly results from varying White House and Senate party control after the 1970s.[12]

B. *The Persistent Vacancies Dilemma*

Congress has substantially enhanced federal jurisdiction over the last six decades.[13] Because it recognized many new criminal and civil actions,[14] district court filings rose 300% yearly between 1950 and 1990.[15] Lawmakers have responded to this growth by markedly enlarging the bench to 179 appellate court and 679 district court judgeships.[16] A 1995 review showed that the duration of the appointment process had greatly increased and that most delay occurred from the time when a vacancy materialized until the President acted.[17] Nominations required more than twelve months and confirmations three months, and each time period had increased dramatically.[18] The situation continued to deteriorate after this time. For example, around the century's turn, encompassing both the first year of President Bill Clin-

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[12] *See* Carl Tobias, *The Federal Appellate Court Appointments Conundrum*, 2005 UTAH L. REV. 743, 749–62. I stress this component, which best informs major issues, but address the persistent dilemma because it enhances appreciation of the modern complication. It merits less attention, as certain delay is inherent, defies easy resolution, and has already been analyzed. *See generally* Bermant et al., *supra* note 9; Sarah Binder & Forrest Maltzman, *Advice and Consent During the Bush Years: The Politics of Confirming Federal Judges*, 92 JUDICATURE 320 (2009); COMM. ON FED. 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); Victor Williams, *Solutions to Federal Judicial Gridlock*, 76 JUDICATURE 185 (1993).

[13] *See* MILLER CTR. COMM'N NO. 7, *supra* note 9, at 3; *see also* Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1268–70 (1996). *See generally* Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 23–24, 26–27.

[14] *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327; *see also* William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 720 (1995) (finding that there have been 202 new laws created by Congress in the past twenty years, adding to the workload of the federal courts).

[15] *See* MILLER CTR. COMM'N NO. 7, *supra* note 9, at 3; *cf.* Bermant et al., *supra* note 9, at 327–28.

[16] 28 U.S.C. §§ 44, 133 (2006); *see also* S. 1653, 111th Cong. (2009) (providing legislation that would authorize additional circuit and district court judges).

[17] *See* JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 103 (1995). Similarly, a study found that between 1970 and 1992 vacancy rates almost doubled in the circuit courts and more than doubled in the district courts. Bermant et al., *supra* note 9, at 323.

[18] *See* MILLER CTR. COMM'N NO. 7, *supra* note 9, at 3; David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1893 (2008); *see also* JUDICIAL CONFERENCE OF THE U.S., *supra* note 17, at 102–03.

ton's second administration and the first year of President George W. Bush's initial term, nominations consumed approximately twenty months and appointments took six months.[19] The first years of those administrations were thus similar. These years merit emphasis here, as they resemble 2009, the first year of the Obama administration.

Some delay is intrinsic.[20] The President typically consults home-state elected officials, who often use attorney panels to recommend designees.[21] The Federal Bureau of Investigation ("FBI") undertakes "background checks."[22] The American Bar Association ("ABA") Standing Committee on the Federal Judiciary examines prospects' qualifications and assigns ratings.[23] The Department of Justice ("DOJ"), primarily through its Office of Legal Policy ("OLP"), scrutinizes candidates and helps nominees prepare for Senate consideration.[24] The Judiciary Committee[25] must evaluate the nominees, conduct hearings, and vote.[26] Those nominees approved by the Committee receive floor debates, if needed, and votes by the full Senate.[27]

C. *The Contemporary Dilemma*

Article II of the Constitution and contemporaneous writings indicate that the Framers apparently intended for the Senate to check presidential selection.[28] Politics has suffused nominations ever since.[29]

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[19] *See* Binder & Maltzman, *supra* note 12, at 322–25; *see also* Viveca Novak, *Empty-Bench Syndrome*, TIME, May 26, 1997, at 37 (stating that that the average number of days from nomination to confirmation is 183); *cf.* Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 904–08 (2005).

[20] *See, e.g.*, Bermant et al., *supra* note 9, at 321–22; Sheldon Goldman, *Obama and the Federal Judiciary: Great Expectations but Will He Have a Dickens of a Time Living Up to Them?*, 7 FORUM 1, 9–12 (2009) (outlining the selection and nomination process); Tobias, *supra* note 12 at 743, 746–49.

[21] *See* Goldman, *supra* note 20, at 10.

[22] *See id.*

[23] *See* AM. BAR ASS'N, STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 1–8 (1983); *see also* MILLER CTR. COMM'N NO. 7, *supra* note 9, at 4–5; Sheldon Goldman et al., *W. Bush's Judicial Legacy*, 92 JUDICATURE 258, 273–75 (2009).

[24] *See* Goldman, *supra* note 20, at 9.

[25] Unless otherwise indicated, "Judiciary Committee" in this Essay refers to the Senate Judiciary Committee.

[26] *See* United States Senate Committee on the Judiciary, Judicial Nominations and Confirmations, http://judiciary.senate.gov/nominations/judicial.cfm (last visited May 19, 2010).

[27] *See id.*

[28] *See* U.S. CONST. art. II, § 2, cl. 2; THE FEDERALIST NO. 76, at 513 (Alexander Hamilton) (J. E. Cooke ed., 1961).

[29] *See* CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENT PROCESS 124–43 (2007); MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 28 (2000); SHELDON GOLDMAN,

Politicization, however, has multiplied since President Richard Nixon appointed "strict constructionists."[30] One modern aspect of this politicization evolved in part from the 1987 U.S. Supreme Court nomination of Judge Robert Bork by President Ronald Reagan.[31] After that, partisan sniping became endemic, as the government was increasingly divided. The opposition's perennial hope that it might recapture the White House—and thus choose judges—provided significant incentives to delay. Presidents, Senate and Judiciary Committee leaders, and certain other senators were primarily responsible.

Slow nomination may also explain the dearth of appointments. In 1997 and 2001, Presidents Clinton and George W. Bush[32] submitted relatively few nominees, most of whom the other party did not support.[33] Both erratically tendered more nominees, frequently in large packages as the Senate recessed, which complicated the Judiciary Committee's analysis.[34] Elected officials who proposed candidates fos-

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PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 5–6 (1997). *See generally* JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007).

[30] *See* DAVID M. O'BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 20 (1988); Roger E. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees*, 80 JUDICATURE 274, 274 (1997); Elliot Slotnick, *Appellate Judicial Selection During the Bush Administration*, 48 ARIZ. L. REV. 225, 228 (2006); *cf.* GOLDMAN, *supra* note 29, at 205–08, 234.

[31] *See* Binder & Maltzman, *supra* note 12, at 321; David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1057–72 (2008) (reviewing BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES (2006) and CRAWFORD GREENBERG, *supra* note 29); Tobin Harshaw, *Kennedy, Bork and the Politics of Judicial Destruction*, N.Y. Times Opinionator: Blog, Aug. 28, 2008, http://opinionator.blogs.nytimes.com/2009/08/28/weekend-opinionator-kennedy-bork-and-the-politics-of-judicial-destruction/; *see also* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 18–19 (2007). *See generally* MARK GITENSTEIN, MATTERS OF PRINCIPLE (1992).

[32] Unless otherwise indicated, "Bush" in this Essay refers to the forty-third President, George W. Bush.

[33] *President Clinton Nominates 22 to the Federal Bench*, U.S. NEWSWIRE, Jan. 7, 1997; Press Release, White House, Remarks by the President During Federal Judicial Appointees Announcement (May 9, 2001). Opposition led to the omission of Rep. Chris Cox (R-Cal.), Peter Keisler, and Judge Carolyn Kuhl as nominees, although Bush did nominate Kuhl later. *See* Slotnick, *supra* note 30, at 243; *infra* note 36 and accompanying text.

[34] *Compare* U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (Apr. 2, 2001) http://www.uscourts.gov/judicialvac.cfm (Bush submitting no new nominees in April), *and* U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (Mar. 1, 1997) http://www.uscourts.gov/judicialvac.cfm (Clinton submitting nominations in large packages in January and February), *with* U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (June 11, 2001) http://www.uscourts.gov/judicialvac.cfm (Bush submitting 17 nominees in the month of May), *and* U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (Apr. 23, 1997) http://www.uscourts.gov/judicialvac.cfm (Clinton submitting no new nominees in April). Neither President Clinton nor President Bush submitted nominations for all vacancies in an effort to pressure the Sen-

tered delay. In jurisdictions lacking senators of the same party as the White House, or with one senator from each party, identifying the selection officers and answering participation requests consumed a significant amount of time.[35] Bush's nominal consultation with the Senate delayed the expeditious appointment of his nominees,[36] while the minimal review granted to nominees of President Clinton triggered paybacks.[37]

Disputes involving the ABA also roiled efforts. In 1997, Senator Orrin Hatch (R-Utah), the chair of the Senate Judiciary Committee, suspended formal bar participation, in its scrutiny of nominees, although President Clinton continued to use the rankings during his presidency.[38] Beginning in March of 2001, President Bush eschewed ABA ratings before nominations. Bush's rejection of advance rankings stalled the processing of nominees because Democrats insisted on the evaluations.[39]

The Judiciary Committee often shared responsibility for the delays by failing to analyze, stage hearings for, and vote on more judicial pros-

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ate. Tapping more nominees, however, than the committee chairs had indicated they would be willing to process, may have been fruitless. The presidents also calibrated speed with scrutiny, as controversial nominees or those lacking skills or ethics would have eroded credibility and delayed selection.

[35] *See* Peter Callaghan, *Senators Agree on Selecting Judges*, Tacoma News Trib., Aug. 12, 1997, at B1. The Republicans demanded to participate and even sent President Clinton a list of prospects. *See* Neil A. Lewis, *Clinton Has a Chance To Shape the Courts*, N.Y. Times, Feb. 9, 1997, at A1; *see also* 143 Cong. Rec. S2538, S2541 (daily ed. Mar. 19, 1997) (statement of Sen. Biden).

[36] *See* Slotnick, *supra* note 30, at 234; David L. Greene & Thomas Healy, *Bush Sends Judge List to Senate*, Balt. Sun, May 10, 2001, at A1; Jean O. Pasco & Henry Weinstein, *Cox Gives Up Shot at Judgeship*, L.A. Times, May 26, 2001, at A1; Henry Weinstein & Faye Fiore, *Rep. Cox Called Likely Judicial Nominee*, L.A. Times, Apr. 5, 2001, at A3; *see also* Stras & Scott, *supra* note 18, at 1901–02; *supra* note 33 and accompanying text.

[37] *See* Neil A. Lewis, *Party Leaders Clash in Capitol over Pace of Filling Judgeships*, N.Y. Times, May 10, 2002, at A33; *see also* Tobias, *supra* note 12, at 764; Paul A. Gigot, *How Feinstein Is Repaying Bush on Judges*, Wall St. J., May 9, 2001, at A26.

[38] *See, e.g.*, Terry Carter, *A Conservative Juggernaut: Judicial Attacks Push Debate to Right, Put Hatch in Middle*, A.B.A. J., June 1997, at 32, 32; Mary L. Clark, *Judges Judging Judicial Candidates: Should Currently Serving Judges Participate in Commissions To Screen and Recommend Article III Candidates Below the Supreme Court Level?*, 114 Penn St. L. Rev. 49, 79 n.128 (2009); *see also* N. Lee Cooper, *Standing Up to Critical Scrutiny: Our Federal Judiciary Will Not Be Undermined by Dubious Attacks*, A.B.A. J., April 1997, at 6, 6; Editorial, *The ABA Plots a Judicial Coup*, Wall St. J., Aug. 14, 2008, at A12.

[39] Letter from Alberto Gonzales, Counsel to the President, to Martha W. Barnett, President of the American Bar Association (Mar. 22, 2001), http://www.presidency.ucsb.edu/ws/index.php?pid=78756; *see* Sheldon Goldman et al., *W. Bush's Judiciary: The First Term Record*, 88 Judicature 244, 254–55 (2005). *See generally* Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready To Give up on the Lawyers?*, 10 Wm. & Mary Bill Rts. J. 37 (2001).

pects.[40] It generally scheduled a hearing for one court of appeals and several district court nominees during each month that the Senate was in session.[41] In 1997 and 2001, however, the body approved few circuit judges, mainly because of resource deficiencies and political factors, such as concerns about ideology.[42] Additional factors, such as other pressing business and the requirement of unanimous consent to have a vote on a nominee—which allows one senator to preclude votes—also explain slow Senate consideration of nominees.[43]

This investigation of the persistent dilemma shows that greater resources and efficiency will not influence the delay that is attributed to politics. Yet, this analysis also indicates that elected officials may remedy or temper the situation if they have enough political will. Politics alone seemed to prevent Presidents Clinton and Bush from expeditiously submitting additional qualified nominees with moderate outlooks and the Senate from quickly approving them.[44]

The persistent and modern concerns with selection and confirmation impose several disadvantages. Both concerns exert pressure on tribunals and frustrate attorneys and litigants, who must compete for scarce judicial resources.[45] Complex and growing criminal prosecutions—amplified by the requirements of the Speedy Trial Act[46]—demand that many parties wait interminably for civil trials, and a number of districts are left to address enormous civil backlogs.[47] In 1997, esca-

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[40] *See* Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 744–45 (1997).

[41] *See id.* at 744. Senator Joseph Biden (D-Del.), who served as the committee chair from 1987 until 1994, observed that his panel conducted two hearings every month, with five nominees considered at each hearing. 143 CONG. REC. S2538, S2539 (daily ed. Mar. 19, 1997) (Statement of Sen. Biden).

[42] *See* Tobias, *supra* note 12, at 756–58; Editorial, *Judicial Nominations Scorecard*, WASH. POST, Aug. 9, 2002, at A22; Neil A. Lewis, *Bush and Democrats in Senate Trade Blame for Judge Shortage*, N.Y. TIMES, May 4, 2002, at A9. Judicial nominees, who will enjoy life tenure and wield much power as judges, require scrutiny to insure that they are qualified. Both parties assiduously reviewed nominees, especially when the opposition was nominating, and this factor was frequently responsible for delay.

[43] *See* Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331, 349 (2005) (discussing the use of unanimous consent).

[44] *See supra* note 33 and accompanying text.

[45] *See* COMM. ON FED. COURTS, *supra* note 12, at 374. From 1970 to 1992, the number of vacancies had a statistically significant effect on average district and circuit workloads of ten and nine percent, respectively. Bermant et al., *supra* note 9, at 327.

[46] *See* 18 U.S.C. § 3161 (2006).

[47] *See* Ted Gest et al., *The GOP's Judicial Freeze: A Fight To See Who Rules over the Law*, U.S. NEWS & WORLD REP., May 26, 1997, at 23; Robert Schmidt, *The Costs of Judicial Delay*, LEGAL TIMES, Apr. 28, 1997, at 6. By June of 1994, the civil case backlog in the U.S. District Court for the Southern District of New York had grown so immense that the judges announced

lating appeals and multiple openings required the U.S. Courts of Appeals for the Sixth and Ninth Circuits to postpone arguments.[48] Vacancies grew so dire in both 1997 and 2001 that Chief Justice William Rehnquist admonished both the White House and Senate—controlled by opposite parties—to solve the impasses.[49]

II. Nascent Obama Administration Judicial Selection

A. *Descriptive Analysis*

Before President Obama won the 2008 election, he started planning for judicial appointments.[50] Obama quickly installed Gregory Craig, a respected attorney with much pertinent expertise, as White House Counsel, and Craig immediately enlisted several talented lawyers to identify designees.[51] The administration capitalized on Vice President Joseph Biden's four-decade Judiciary Committee experience by requesting his input.[52] The selection group anticipated and carefully

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an initiative whereby some four hundred trial-ready cases, which had been pending for at least four years, would all be assigned to the court's newest judges. *See* Deborah Pines, *New Judges To Attack Federal Civil Backlog*, N.Y. L.J., June 23, 1994, at 1.

[48] *See, e.g.*, Bill Kisliuk, *Judges' Conference Slams Circuit-Splitting, Vacancies*, Recorder (S.F.), Aug. 19, 1997, at 1; *Chronic Federal Judge Shortage Puts Lives, Justice On Hold*, Las Vegas Rev.-J., Aug. 13, 1997, at 9A.

[49] William H. Rehnquist, The 1997 Year-End Report on the Federal Judiciary: The Third Branch, Jan. 1998, *available at* http://www.uscourts.gov/ttb/jan98ttb/january.htm; William H. Rehnquist, The 2001 Year-End Report on the Federal Judiciary, Jan. 1, 2002, *available at* http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html; *see* Slotnick, *supra* note 30, at 233; *see also* Linda Greenhouse, *Rehnquist Sees a Loss of Prospective Judges*, N.Y. Times, Jan. 1, 2002, at A16. For similar sentiments, see Standing Comm. on Fed. Judicial Improvements, Am. Bar Ass'n, Resolution 118, at 2 (2008) and Alfred P. Carlton, Jr., *More and Faster—Now: The Crisis in the Federal Judiciary*, A.B.A. J., Apr. 2003, at 8.

[50] *See* Jeffrey Toobin, *Bench Press*, New Yorker, Sept. 21, 2009, at 42.

[51] *See* Anne E. Kornblut, *For Obama, a Trusted Voice Who Knows the Terrain*, Wash. Post, Feb. 6, 2009, at A1; Marisa McQuilken & Joe Palazzolo, *Will Counsel's Office Expand Policy Role?*, Nat'l L.J., Feb. 10, 2009; Jon Ward, *White House Beefs Up Legal Staff*, Wash. Times, July 21, 2009, at B1; *see also* Letter from Gregory Craig, Counsel to the President, to Barack Obama, President of the United States of America (Nov. 13, 2009), http://abcnews.go.com/images/Politics/Letter%20from%20Greg%20Craig.PDF (discussing his work with the legal team on judicial nominations). I rely in this subsection on Christine L. Nemacheck, Strategic Selection (2007); Peter Baker & Adam Nagourney, *Tight Lid Defined Process in Selecting a New Justice: Using Past Battles To Avert Pitfalls*, N.Y. Times, May 28, 2009, at A1; and Toobin, *supra* note 50, at 42.

[52] *See* Keith Koffler, *Biden's Staff To Play Key Role in Sotomayor Confirmation*, Roll Call, May 26, 2009, *available at* http://www.rollcall.com/news/35256-1.html; *see also* Peter Baker & Jeff Zeleny, *Obama Chooses Hispanic Judge for Supreme Court Seat*, N.Y. Times, May 27, 2009,

addressed contingencies that might arise when choosing judges.[53] The nascent efforts to facilitate the appointment of a Supreme Court Justice—if such a vacancy arose—were illustrative. Obama, Craig, Biden, and their aides discussed qualifications and began compiling "short lists" of qualified prospects. The Obama White House, like many recent ones, controlled the area of Supreme Court appointments, centralized appellate selection in the White House Counsel's Office, and accorded the Counsel's Office partial responsibility for the district court nominations. This White House, like most before it, assigned the DOJ some recruitment duties and the lead role for nominee preparation. Obama also reinstituted ABA scrutiny *prior to* making official nominations, a regimen President Bush had discontinued.[54] Obama ascertained that the ABA, which has evaluated and ranked prospective nominees for one-half century, furnishes a valuable service and that advance review may detect concerns, thus helping the administration and candidates avoid embarrassment and resource loss.[55]

Obama has intentionally emphasized bipartisan outreach, particularly through consultation with senators, by soliciting the advice, *before* final nominations of Democratic *and* Republican Judiciary Committee members and high-level party officials from the states where vacancies arise.[56] Many lawmakers use bipartisan panels that submit promising candidates to the legislators, individuals whom they later suggest to Obama and whom he nominates.[57] Most prospects are well-qualified, in addition to being diverse, vis-à-vis ethnicity, gender, and ideology.[58] Es-

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at A1. *See generally* GITENSTEIN, *supra* note 31, at 11–17, 28–38, 53–67 (discussing Senator Biden's role on the Judiciary Committee during the Bork confirmation process).

[53] *See* Toobin, *supra* note 50, at 43–44.

[54] *See supra* note 39 and accompanying text; *see also* Goldman, *supra* note 20, at 10.

[55] *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, 62–63; Editorial, *The A.B.A. and Judicial Nominees*, N.Y. TIMES, Apr. 14, 2009, at A22; *see also* Toobin, *supra* note 50, at 44; *infra* note 104 and accompanying text. Moreover, the White House prefers that the FBI expeditiously conduct "background checks" on candidates.

[56] *See infra* note 106 and accompanying text.

[57] *See, e.g.*, Bob Egelko, *Feinstein Taps Bipartisan Panels To Pick Judge Candidates*, S.F. CHRON., Jan. 5, 2009, at B1; Press Release, Sen. Kay Hagan, Hagan Announces Recommendations For Key Federal Appointments in North Carolina, July 10, 2009, http://hagan.senate.gov/?p=press_release&id=229; *cf.* Goldman, *supra* note 20, at 10–11 (predicting that Obama will consult senators from both parties, many of whom will use selection panels).

[58] *See, e.g.*, Carol J. Williams, *Obama Appoints Four New Federal Judges for California*, L.A. TIMES, Aug. 7, 2009, at A37; *see also* Tricia Bishop, *City Judge Nominated for Court of Appeals*, BALT. SUN, Apr. 3, 2009, at A3; Press Release, Sen. Kay Hagan, *supra* note 57; Michael Rispoli, *President Barack Obama Nominates Federal Judge in Newark to U.S. Appeals Court*, Star-

tablishing the commissions, interviewing and reporting on possibilities, and effectively digesting all the input have consumed scarce resources of the administration and the Senate. The administration expended considerable time delineating a senior Democratic officer to consult in jurisdictions represented by two Republican senators. Moreover, it sought guidance from numerous Republicans, some of whom asked to participate directly and even recommended prospective nominees.[59]

The Obama White House has retained control over selection of appellate nominees because the tribunals comprise multiple states and have fewer openings. These vacancies are deemed more critical, as the regional circuits are the courts of last resort in ninety-nine percent of appeals and often decide controversial issues.[60] Because of the importance of these circuit court judgeships, the President traditionally requests several prospective candidates from lawmakers. The President may occasionally select none of the persons suggested, or may choose a person from outside the state with the vacancy. Furthermore, the President often defers less on the selection of these nominees than on trial level possibilities. Obama has gradually, but steadily, nominated judges, using press releases to simultaneously proffer a few;[61] this approach

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Ledger Court News Blog, http://www.nj.com/news/index.ssf/2009/06/president_barack_obama_nominat.html (Jun. 19, 2009, 19:59 EST); *infra* notes 74–78, 109–115 and accompanying text.

[59] Senators Kay Bailey Hutchison (R-Tx.) and John Cornyn (R-Tx.) maintained the Bush panel and suggested names. *See* Todd J. Gillman, *Texas Democratic Delegation Wins Right To Screen Judicial Nominees Under Obama*, Dallas Morning News, Mar. 26, 2009; Gary Martin, *Texas Dems Release List of Judicial Candidates*, San Antonio Express-News, Oct. 8, 2009, at B1; Gary Martin, *Judicial Vacancies Might Be Filled While Truce Holds Democrats, State's Senators Play Ball for Now*, Houston Chron., Aug. 4, 2009, at B3.

[60] *See* Jennifer Koons, *Obama Nominees Could Reshape Industry-Friendly Judiciary*, N.Y. Times, Aug. 20, 2009, http://www.nytimes.com/gwire/2009/08/20/20greenwire-obama-nominees-could-reshape-industry-friendly-68829.html?emc=eta1; Neil A. Lewis, *Move To Limit Clinton's Judicial Choices Fails*, N.Y. Times, Apr. 30, 1997, at D22; Jeffrey Rosen, *Obstruction of Judges*, N.Y. Times, Aug. 11, 2002, *available at* http://www.nytimes.com/2002/08/11/magazine/11JUDGES.html; *see also* Richard A. Posner, The Federal Courts: Challenge and Reform 80–81 (1996); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 Sup. Ct. Rev. 403, 404; Stras, *supra* note 31, at 1069, 1071.

[61] *See, e.g.*, Press Release, White House, President Obama Nominates Charlene Honeywell and Jeffrey Viken to Serve on the Federal District Court Bench, June 25, 2009, http://www.whitehouse.gov/the_press_office/President-Obama-Nominates-Charlene-Honeywell-and-Jeffrey-Viken-to-Serve-on-the-Federal-District-Court-Bench/; Press Release, White House, President Obama Nominates Abdul K. Kallon and Jacqueline H. Nguyen to Serve on the District Court Bench, July 31, 2009, http://www.whitehouse.gov/the_press_office/President-Obama-Nominates-Abdul-K-Kallon-and-Jacqueline-H-Nguyen-to-Serve-on-the-District-Court-Bench/.

compares favorably with earlier administrations' sporadic behavior.[62] He also intended to depoliticize the process. For example, Judge Sonia Sotomayor was the lone nominee whom Obama personally introduced, as befits a Supreme Court appointment;[63] his practices sharply contrast with the Bush Administration, which used the White House for a ceremony introducing, in person, its first eleven appellate nominees.[64]

Often before nominations—and invariably following them—the administration and senators, especially the leadership and Judiciary Committee members, have cooperated. To facilitate approval, the White House and DOJ worked closely with Senators Patrick Leahy (D-Vt.), the current chair of the Judiciary Committee, who schedules hearings and votes, and Harry Reid (D-Nev.), the Senate Majority Leader, who arranges floor consideration, as well as their Republican analogues, Senators Jeff Sessions (R-Ala.) and Mitch McConnell (R-Ky.). The committee expeditiously assessed nominees with thorough questionnaires and hearings. Leahy convened hearings so fast that Republican members complained that they lacked preparation time. Senator Leahy responded directly with another session for a nominee.[65]

By the August 7, 2009 recess, President Obama had nominated seven appellate and nine district court candidates, while the Judiciary Committee had approved three circuit possibilities and granted hearings for two nominees, one for the appellate court and one for the district court.[66] Full Senate action proceeded slowly with no votes on lower court possibilities before September.[67] This dearth appeared to result

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[62] *See supra* note 34 and accompanying text. Steady nominations of small numbers of candidates facilitate Senate processing.

[63] *See* Shailagh Murray & Michael D. Shear, *First Latina Picked for Supreme Court: Republicans Offer Measured Response*, WASH. POST, May 27, 2009, at A01; Sheryl Gay Stolberg, *A Trail Blazer and a Dreamer*, N.Y. TIMES, May 27, 2009, at A1; *see also* President Barack Obama and Justice Sonia Sotomayor, Remarks by the President and Supreme Court Justice Sonia Sotomayor at Reception in Her Honor (Aug. 12, 2009) http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-and-Justice-Sotomayor-at-reception-in-her-honor/.

[64] Neil A. Lewis, *Bush Appeals for Peace on His Picks for the Bench*, N.Y. TIMES, May 10, 2001, at A29; Charlie Savage, *Obama Backers Fear Opportunities To Reshape Judiciary Are Slipping Away*, N.Y. TIMES, Nov. 15, 2009, at A20; *see* Sheldon Goldman et al., *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 282, 296 (2003).

[65] *See* Maureen Groppe, *No Sparks Fly at Hearing*, INDIANAPOLIS STAR, Apr. 30, 2009, at A3; *infra* note 97 and accompanying text.

[66] *See* Office of Legal Policy, U.S. Department of Justice, Judicial Nominations, http://www.justice.gov/olp/judicialnominations111.htm (last visited Mar. 31, 2010); United States Senate, Committee on the Judiciary, Judicial Nomination Materials: 111th Congress, http://judiciary.senate.gov/nominations/111thCongressJudicialNominations/Materials111thCongress.cfm (last visited Apr. 16, 2010) [hereinafter Judicial Nomination Materials].

[67] *Cf.* Editorial, *Obama's Judicial Nominations*, N.Y. TIMES, Nov. 17, 2009, at A32.

primarily from Republican insistence on deferring floor consideration until *after* the Supreme Court process, as the Senate recessed.[68] Even if Democrats had invoked cloture for earlier votes, the Republicans would have received thirty hours of debate, thus precluding other nominations from coming to a vote.[69]

By the first session's recess, President Obama had nominated twelve appellate and twenty-one district court candidates.[70] The Senate had confirmed three appellate and nine district judges, while the Judiciary Committee had approved six circuit and four district court nominees and conducted hearings for three appellate court nominees.[71] The Senate confirmed Judge Sotomayor to replace Justice David Souter—who retired at the end of the Supreme Court's 2009 Term[72]—and Judge Sotomayor's expeditious appointment was made the first priority by the Obama White House.[73] Seven of the 2009 Obama court of appeals nominees are well-qualified district court judges who were first appointed by President Clinton.[74] Moreover, four district court nominees are magistrate judges and six are state jurists, factors which

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[68] *See* Alex Leary, *Supreme Court Seat Not Only One Empty*, St. Petersburg Times, Aug. 6, 2009. *See generally* Koons, *supra* note 60 (noting that hearings are not scheduled expediently).

[69] *See* United States Senate, Committee on Rules & Administration, Rules of the Senate XXII, Precedence of Motions, http://rules.senate.gov/public/index.cfm?p=RuleXXII (last visited May 13, 2010).

[70] Office of Legal Policy, *supra* note 66.

[71] *See* Office of Legal Policy, *supra* note 66; Judicial Nomination Materials, *supra* note 66.

[72] Peter Baker & Jeff Zeleny, *Souter Said To Have Plans To Leave Court in June*, N.Y. Times, May 1, 2009, at A1.

[73] The critical need to have all justices for the new Term was exacerbated, as the Court had scheduled a September 9, 2010 argument on a major campaign finance law appeal, *Citizens United v. FEC*. *See* 130 S. Ct. 876 (2010); Robert Barnes, *Reversal of Precedents at Issue: Campaign Case Touches on Justices' Stance on Earlier Rulings*, Wash. Post, Sept. 8, 2009, at A2; Adam Liptak, *Justices To Revisit "Hillary" Documentary, and Corporate Cash in Politics*, N.Y. Times, Aug. 30, 2009, at A1; David G. Savage, *Hillary: The Law Changer: Unusual Pre-Term Hearing May Reshape Campaign Finance Laws*, A.B.A. J., Sept. 2009, at 24, 24–25.

[74] *See* Judicial Nomination Materials, *supra* note 66; U.S. Courts, Vacancies in the Federal Judiciary (Apr. 1, 2000) (Clinton nominating Martin); U.S. Courts, Vacancies in the Federal Judiciary (Mar. 1, 2000) (Clinton nominating Lynch); U.S. Courts, Vacancies in the Federal Judiciary (Dec. 1, 1995) (Clinton nominating Greenaway); U.S. Courts, Vacancies in the Federal Judiciary (June 1, 1995) (Clinton nominating Davis); U.S. Courts, Vacancies in the Federal Judiciary (July 1, 1994) (Clinton nominating Hamilton); U.S. Courts, Vacancies in the Federal Judiciary (Apr. 1, 1994) (Clinton nominating Chin); U.S. Courts, Vacancies in the Federal Judiciary (Feb. 1, 1994) (Clinton nominating Vanaskie). The reports of these nominations can all be found at http://www.uscourts.gov/judicialvac.cfm.

ostensibly portend recognition of a career judiciary.[75] Elevating district judges is a venerable notion, as the Senate has already confirmed these jurists, and both these jurists and magistrate judges will secure prompt FBI and ABA analyses and have compiled records that senators can access easily.[76] The district nominees are quite talented and hold rather centrist views.[77] Moreover, the prospects are diverse; for instance, four African-Americans, one Latino, one Asian-American, and four women comprise the 2009 appellate possibilities.[78]

B. *Critical Analysis*

President Obama's confirmation process quantitatively resembles—and his nominees' qualifications are similar to—those of most recent presidents. By August of 1993, President Clinton had appointed Justice Ruth Bader Ginsburg to the Supreme Court and had sent one court of appeals prospect and four district court nominees to the Sen-

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[75] *See* Judicial Nomination Materials, *supra* note 66; Press Release, White House, President Obama Announces His Intent to Nominate Christina Reiss to the U.S. District Court for the District of Vermont (Oct. 9, 2009); Press Release, White House, President Obama Nominates Edward Milton Chen, Dolly Gee, and Richard Seeborg to Serve on the District Court Bench (Aug. 7, 2009); Press Release, White House, President Obama Nominates Abdul K. Kallon and Jacqueline H. Nguyen to Serve on the District Court Bench (July 31, 2009); Press Release, White House, President Obama Nominates Irene Berger, Roberto Lange to Serve on the District Court Bench (July 8, 2009); Press Release, White House, President Obama Nominates Charlene Honeywell and Jeffrey Viken to Serve on the Federal District Court Bench (June 25, 2009); U.S. District Court, Southern District of Ohio, Magistrate Judge Timothy S. Black, http://www.ohsd.uscourts.gov/judges/jblack.htm (last visited Apr. 16, 2010); South Carolina, Judicial Department, Judge J. Michelle Childs, http://www.judicial.state.sc.us/circuitCourt/displaycirjudge.cfm?judgeid=2146 (last visited Apr. 16, 2010); Arkansas Judiciary, Judge D.P. Marshall, http://courts.state.ar.us/popup/marshall_pop.html (last visited Apr. 16, 2010); U.S. District Court, Northern District of Ohio, Magistrate Judge Benita Y. Pearson, http://www.ohnd.uscourts.gov/Judges/Magistrate/Pearson__Benita_Y_/pearson__benita_y_.html (last visited Apr. 16, 2010). For instructive analyses of the career judiciary notion, see Goldman et al., *supra* note 64, at 305 and Russell Wheeler, *The Changing Face of the Federal Judiciary*, Brookings Inst., Aug. 2009, at 7–9.

[76] *See, e.g.*, Tobias, *supra* note 40, at 752; Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. Times, Apr. 10, 1990, at A1; Ruth Marcus, *Bush Quietly Fosters Conservative Trend*, Wash. Post, Feb. 18, 1991, at A1. *But see* David Fontana & Micah Schwartzman, *Old World: Why Isn't Obama Appointing Young Judges to the Circuit Courts?*, New Republic, July 17, 2009, *available at* http://www.tnr.com/article/politics/old-world (discussing the merits of nominating younger, presumably less experienced, judges).

[77] *See* Judicial Nomination Materials, *supra* note 66 (listing nominees' ABA ratings); Toobin, *supra* note 50, at 42.

[78] *See* Judicial Nomination Materials, *supra* note 66; *cf.* Robert Barnes, *Who's on the Federal Bench*, Wash. Post, Aug. 26, 2009, at A19. The average age of appeals court nominees is fifty-five, but district court picks are younger. *See* Fontana & Schwartzman, *supra* note 76; Judicial Nomination Materials, *supra* note 66.

ate for review. During a similar time period, the Senate received twenty-two circuit court and twenty-two district court possibilities from President Bush.[79] Yet several matters—over which the new Obama administration and the Senate lacked power—may explain their lackluster record in filling vacancies promptly. The first was the different nature of the first Supreme Court vacancy.[80] On May 1, 2009, Justice Souter announced his retirement, a decision the jurist had recently disclosed to President Obama. This resignation demanded immediate and constant attention,[81] even though he had already fully considered such a possibility and created a "short list" of possible nominees.[82] The President's assistants quickly reexamined the group, collected more names and analyzed them, consulted many senators about the process and designees, winnowed the candidates through assessments and interviews, and helped President Obama screen the finalists and choose and introduce the nominee.[83] This activity consumed three weeks.[84] Considerable effort was devoted to having Judge Sonia Sotomayor—then sit-

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[79] Office of Legal Policy, U.S. Dep't of Justice, Judicial Nominations, 107th Congress, http://www.justice.gov/archive/olp/nominations107.htm (last visited Apr. 16, 2010); U.S. Courts, Vacancies in the Federal Judiciary (Nov. 1, 1993) http://www.uscourts.gov/judicialvac.cfm; *see* Jerry Crimmins, *Ashcroft Prods ABA To Quickly Vet Judge Nominees*, Chi. Daily L. Bul., Aug. 7, 2001, at 1 (noting that President Ronald Reagan nominated thirteen judges and George H.W. Bush nominated eight by August of their first years in office); Linda Greenhouse, *Senate, 96–3, Easily Affirms Judge Ginsburg as a Justice*, N.Y. Times, Aug. 4, 1993, at B8. Obama's lower court appointees, however, were the fewest in a half century. *See* Press Release, Sen. Patrick Leahy, Statement on the Nomination of Joseph A. Greenaway to the United States Court of Appeals for the Third Circuit (Feb. 9, 2010). Moreover, in 1997, President Clinton submitted twenty-one circuit court nominees, seven of whom were confirmed, while in 2001, President George W. Bush tapped twenty-nine circuit nominees, six of whom were confirmed in that same year. The Library of Congress, THOMAS, Presidential Nominations, http://thomas.loc.gov/home/nomis.html (select 107th, Civilian, Referred to Committee, Judiciary, enter date range of 1/1/2001 to 12/31/2001, keyword "circuit") (Bush confirmations) (select 105th, Civilian, Referred to Committee, Judiciary, enter date range of 1/1/1997 to 12/31/1997, keyword "circuit") (Clinton nominations and confirmations); Office of Legal Policy, *supra* (Bush nominations).

[80] *See infra* note 89 and accompanying text.

[81] *See, e.g.*, Baker & Zeleny, *supra* note 72, at A1; Robert Barnes, *Souter Reportedly Planning To Retire from High Court: Justice Might Stay Until Nominee Confirmed*, Wash. Post, May 1, 2009, at A1; *see also* Baker & Nagourney, *supra* note 51; Linda Greenhouse, *Justice Unbound*, N.Y. Times, May 3, 2009, at WK1; Toobin, *supra* note 50, at 44.

[82] *See* Christi Parsons & Tom Hamburger, *Obama To Take Lead in Pick: All Sides Ramping Up for Battle over High Court Nominee*, Chi. Trib., May 2, 2009, at 9.

[83] *See* Baker & Nagourney, *supra* note 51; Robert Barnes & Shailagh Murray, *High Court Buzz Centers on Chicago Judge and Solicitor General*, Wash. Post, May 21, 2009, at A3; David G. Savage & James Oliphant, *A Friend of Obama's Court: Potential Justice Has Strong Ties to White House*, Chi. Trib., May 14, 2009; *cf.* Peter Baker, *Favorites of the Left Don't Make Obama's Court List*, N.Y. Times, May 26, 2009, at A12.

[84] *See supra* note 63 and accompanying text; *see also* Toobin, *supra* note 50, at 44.

ting on the U.S. Court of Appeals for the Second Circuit—meet with numerous members of the Senate and answer inquiries, formulate questionnaire responses, compile applicable documents, prepare for intensive Judiciary Committee hearings, address follow-up queries, and convince uncertain senators ahead of the votes of the Judiciary Committee and the entire Senate.[85]

The Senate and the Judiciary Committee also expended huge resources. Practically every senator privately interviewed Judge Sotomayor, and a dozen lawmakers did so multiple times.[86] Staff members extensively investigated the nominee's judicial record, particularly by dissecting thousands of her judicial opinions. They scrutinized the jurist's questionnaire responses and pursued clarification, as warranted. The staff members also prepared for the Committee hearings (which entailed four days of testimony by Judge Sotomayor and thirty witnesses), crafted follow-up questions, and reviewed the answers.[87]

The White House, DOJ, and Senate initiatives devoured considerable resources.[88] Officials involved in the appointment process committed three months almost exclusively to the Supreme Court confirmation process, time which was not invested on appellate and district court selection. Although this is akin to President Clinton's first year, when he responded to the retirement of Justice Byron White, Judge Ginsburg's appointment was uncontroversial and demanded significantly less time.[89]

The "start up" expenses for instituting a new government also help to explain some delay because Cabinet appointments consumed substantial amounts of time. By the August 2009 recess, the Senate had neither approved many prospects for upper-echelon DOJ offices nor confirmed a quarter of the ninety-three U.S. Attorney nominees.[90] A third

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[85] *See* Robert Barnes et al., *Sotomayor Girds for Hill Showdown*, WASH. POST, July 11, 2009, at A1; Michael A. Fletcher & Shailagh Murray, *Sotomayor Prepares To Meet with Key Senators*, WASH. POST, June 2, 2009, at A3.

[86] *See* Barnes et al., *supra* note 85.

[87] Editorial, *Confirm Sonia Sotomayor*, WASH. POST, July 19, 2009, at A20; Paul Kane et al., *Senate Republicans Won't Block Vote on Sotomayor*, WASH. POST, July 17, 2009, at A1.

[88] *See* Savage, *supra* note 64.

[89] *See* Linda Greenhouse, *The Supreme Court: White Announces He'll Step Down from High Court*, N.Y. TIMES, Mar. 20, 1993, at 1; *The Supreme Court: Transcript of President's Announcement and Judge Ginsburg's Remarks*, N.Y. TIMES, June 15, 1993, at A24; *see also* ORRIN HATCH, SQUARE PEG: CONFESSIONS OF A CITIZEN SENATOR 179–80 (2002); Stras & Scott, *supra* note 18, at 1902; Greenhouse, *supra* note 79.

[90] *See* Peter Baker, *Obama Team Lacking Most of Top Players*, N.Y. TIMES, Aug. 24, 2009, at A1; Ruth Marcus, *Advise and Stall: Senate Republicans Are Holding Up Key Nominees*, WASH. POST, Oct. 7, 2009, at A25; Posting of David Ingram to The BLT: The Blog of Legal Times, http://legaltimes.typepad.com/blt/, (July 29, 2009, 11:36 AM). As late as the intersession recess, the Senate had not confirmed several Assistant Attorneys General or a majority of the U.S. At-

matter that contributed to delay was the pressing need to resolve myriad, intractable complications left by earlier administrations, such as the deep, continuing recession, a reexamination of the detention policy for suspected terrorists, the possible closure of the Guantanamo detention facility, the Iraq and Afghanistan conflicts, and America's eroding global reputation.[91]

In sum, this canvass of the process for naming judges during the early Obama administration and 111th Senate finds that the White House and both parties implemented multiple practices which should have yielded the expeditious approval of numerous qualified jurists. The foregoing review suggests, however, that individual nominees should be confirmed with greater alacrity, particularly because eleven percent of the judgeships currently lack occupants. Thus, the next Part posits recommendations for swiftly filling these vacancies.

III. Suggestions for the Future

A. *The Administration and the Senate*

President Obama, as well as Democratic and Republican legislators, have adopted various approaches that are meant to improve the appointments process.[92] The President, lawmakers, and staff involved with the confirmation process have streamlined their responsibilities and have precisely matched thorough scrutiny of nominee qualifications with prompt confirmation. Nonetheless, all participants must continue applying these approaches—as well as other effective methods—to specific court of appeals and district court openings to ensure that current judicial vacancies are promptly filled.

President Obama and some legislators have directly addressed the politicization of the appointment process. For example, the White

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torneys. *See* Ed O'Keefe, *Top Spots Vacant as Key Nominees Await Senate: Obama Lags Behind Previous Presidents in Filling Judgeships*, Wash. Post, Dec. 31, 2009, at A15.

[91] *See, e.g.*, Peter Baker, *L.B.J. All the Way?*, N.Y. Times, Aug. 23, 2009 (discussing the conflict in Afghanistan); John F. Burns, *Obama Promises the World a Renewed America*, N.Y. Times, Jan. 21, 2009, at P24; Thomas L. Friedman, *Finishing Our Work*, N.Y. Times, Nov. 5, 2008, at A35; Eric Schmitt, *U.S. Will Expand Detainee Review in Afghan Prison*, N.Y. Times, Sept. 13, 2009, at A1.

[92] The best remedy may be authorizing enough new seats so that the Senate would confirm all of the judges now authorized, thus avoiding theoretical, practical, and legal questions. *See* Tobias, *supra* note 9, at 569–70. Other ideas may only limit irreducible time restraints. *See* Tobias, *supra* note 9, at 552–73; *see also* Tuan Samahon, *The Judicial Vesting Option: Opting out of Nomination and Advice and Consent*, 67 Ohio St. L.J. 783, 824–47 (2006) (proposing a strategy to vest judicial selection in the federal judiciary).

House has limited the visibility of selection and has treated it more apolitically.[93] Executive and congressional officials have attempted to cooperate, reconcile differing perspectives, anticipate conflicts, and felicitously resolve those that do arise. For instance, when the Senators from Texas retained the selection commission established during the Bush administration to suggest candidates, the Obama administration clarified that the Democratic House members would assume the lead in proposing names.[94] Republicans and Democrats have terminated or cabined less productive behavior, namely accusing their critics of uncooperative activity, which may be gamesmanship. For example, when Republican senators challenged one hearing's quick arrangement, Senator Patrick Leahy promptly conducted another.[95] Senate Majority Leader Harry Reid, Senate Minority Leader Mitch McConnell, and Senators Leahy and Jeff Sessions collegially addressed particular controversies involving Judge Sotomayor, but the jurist was the lone appointee prior to September 2009.[96] The White House has cooperated with a number of politicians, especially via consultation, which apparently moved Republican Senators Richard Lugar of Indiana as well as Johnny Isakson and Saxby Chambliss of Georgia to promote appellate nominees.[97] To solidify the positive trends, selection officers must lucidly and fully communicate before and after nominations.

Lawmakers from states that experienced persistent vacancies have worked closely with the President and one another on central issues, such as who should have assumed primary responsibility for suggesting

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[93] *See supra* notes 54–64 and accompanying text (discussing Obama's approach to judicial nominations and comparing nomination practices of Obama and Bush).

[94] *See supra* note 59 and accompanying text; *cf.* H. Thomas Wells, Jr., *No Time for Tension, No Room for Rancor: Bipartisan Advisory Commissions Can Aid in Selection of Federal Judicial Nominees*, A.B.A. J., Nov. 2008, at 17, 17 (advocating use of bipartisan advisory commissions).

[95] *See supra* note 65 and accompanying text. *See generally* Jessica Brady, *Senate Judiciary Committee Getting Back to Business*, ROLL CALL, Sept. 2, 2009.

[96] *See supra* notes 70–78 and accompanying text. Insofar as politicization undercuts selection and indicates that officers elevate partisan benefit over the judiciary's needs, public regard for the process and judges might be eroded.

[97] They were David Hamilton and Beverly Martin, nominees for the U.S. Courts of Appeals for the Seventh and Eleventh Circuits, respectively. *See* Michael A. Fletcher, *Obama Names Judge to Appeals Court: President Praises David Hamilton of Indiana as a Moderate*, WASH. POST, Mar. 18, 2009, at A4; Bill Rankin, *Appeals Court Nominee Advances: District Court Judge Backed by Isakson, Chambliss, Group*, ATLANTA J.-CONST., Sept. 13, 2009, at A13. Bush's consultations with senators fostered many confirmations; in contrast, limiting or discounting offers of advice delayed or ended many candidates' prospects. *See* Tobias, *supra* note 12, at 768.

candidates.[98] When openings arose, most legislators proposed several competent, diverse possibilities, including the first appellate nominees whom President Obama ultimately tapped.[99] Many lawmakers established commissions to recommend names, but their institution has delayed selection, although this may be a fixed expense of changing administrations and congressional representation. Thus, legislators might investigate similar techniques applied earlier and, if these devices are instructive, recalibrate their efforts. One paradigm is the model that California senators deployed during the Bush years, when Democratic Senators Dianne Feinstein and Barbara Boxer established a recommendation commission, which they have since retained.[100] The use of these methods may improve selection in appeals courts with numerous vacancies and break logjams, as these commissions essentially increase consensus. Should those and related practices fail to ameliorate the dilemma, the Executive and the Senate must redouble initiatives to solve deadlocks on nominations for all tribunals, and even assess less conventional ideas such as compromises and "trades."[101]

B. *The Executive Branch*

Presidents Clinton, George W. Bush, and Obama bear similar, partial responsibility for the existing situation.[102] The Obama administration has instituted clear, thorough goals and devised effective ways to attain them and should continue to do so.[103] For instance, President

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[98] *See supra* notes 57–59 and accompanying text (discussing the use of bipartisan panels and commissions); *supra* note 94 and accompanying text (discussing the role of minority senators and who should assume primary responsibility).

[99] *See supra* note 74 and accompanying text (discussing Obama's circuit court nominees); *see also supra* notes 57–58, 97 and accompanying text (discussing the diversity and qualifications of the candidates).

[100] *See* Egelko, *supra* note 57; Henry Weinstein, *Process of Judge Selection Set Up*, L.A. Times, May 30, 2001, at B1. Virginia's analogous endeavor, which uses state bar groups to screen applicants from whom the senators choose prospects to recommend, is also informative. *See* Mark Hansen, *Logjam*, A.B.A. J., June 2008, at 39, 42. A selection commission like President Jimmy Carter's may merit review. *See* Larry C. Berkson & Susan B. Carbon, The United States Circuit Judge Nominating Commission: Its Members, Procedures and Candidates 1 (1980); *see also* Goldman, *supra* note 29, at 238–50.

[101] *See, e.g.*, Slotnick, *supra* note 30, at 242; *see also infra* notes 120, 122 and accompanying text.

[102] *See supra* notes 32–49 and accompanying text. President Obama may be well served to solicit advice from former selection officials. *See* Carl Tobias, Essay, *Dear President Bush: Leaving a Legacy on the Federal Bench*, 42 U. Rich. L. Rev. 1041, 1051 n.43 (2008).

[103] The administration, however, has yet to announce the objectives applied in a national venue, which might enhance transparency and inform both those working on selection and the citizenry. *See* Tobias, *supra* note 102, at 1049.

Obama has regarded merit as the keystone, nominating highly qualified centrists. The President has streamlined the appointments process by restoring early ABA input, which helps screen qualified nominees.[104] His White House, like recent ones, has controlled all Supreme Court—and numerous appellate—nominations, but has usually deferred to local political officials on trial court level vacancies. Obama has formulated Supreme Court "short lists" and might analogously treat numerous open circuit court positions.[105] The administration has capitalized on home state lawmakers' advice and pursued the Republican senators likely to cooperate with Democrats, phenomena witnessed in the votes of nine Republican senators, including George Voinovich (R-Ohio), Lindsey Graham (R-S.C.), and Richard Lugar (R-Ind.) for Judge Sotomayor.[106] The President has forwarded a sufficient number of able and diverse nominees, whom the Judiciary Committee may process at a rate that will apparently expedite full Senate scrutiny.[107] The administration has persistently cultivated Senate Majority Leader Harry Reid and Senator Patrick Leahy, who facilitate pertinent scheduling and negotiate over matters, namely particular temporal allotments, with their Republican counterparts.[108]

President Obama has acted in a measured way and should continue to proceed this way, as early missteps will affect his credibility and delay selection. He has appropriately invoked cooperative practices because they generally seem efficacious. The first nominees, whose talent, centrist outlooks, and diversity mean they have actually provoked little controversy, are illustrative of this cooperation. If this approach is not effective, Obama might use it to support rather confrontational activity later.

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[104] *See supra* note 55 and accompanying text (discussing the benefits of the ABA's services).

[105] *See supra* notes 50–55 and accompanying text. Supreme Court vacancies can dilute resources for lower court openings.

[106] David Stout, *Sotomayor Gets 9 G.O.P. Votes*, The Caucus: The Politics and Government Blog of the New York Times, http://thecaucus.blogs.nytimes.com/2009/08/06/sotomayor-gets-9-gop-votes/ (Aug. 6, 2009, 12:56 EST). The President should continue his beneficial consulting with home state elected officials, which has been essentially cost free. *See supra* notes 36–37, 56, 83, 97 and accompanying text (discussing consultation and cooperation during the selection and nomination process).

[107] *See* Carl Tobias, *With Obama Proceeding Reasonably To Fill Federal Judgeships, the Bottleneck Is the Senate*, FINDLAW, Oct. 30, 2009, *available at* http://writ.news.findlaw.com/commentary/20091030_tobias.html. *But see* Michael A. Fletcher, *Obama Criticized as Too Cautious, Slow on Judicial Posts*, WASH. POST, Oct. 16, 2009, at A1; Savage, *supra* note 64.

[108] *See supra* notes 64–65 and accompanying text (discussing the administration's work with Senate leadership to facilitate nominations).

The President has implemented efforts to improve diversity, and this has been reflected in nominations. Obama has contacted less traditional entities, such as minority and women's groups that know a multitude of putative nominees, and minority and female legislators, who have identified diverse candidates and helped them navigate the selection process, while searching for, evaluating, and tendering many women and people of color.[109] The initiatives appear efficacious, but the President could also review innovative actions taken earlier.[110] Increasing diversity yields multiple benefits. Minority and female judges help their colleagues appreciate and correctly resolve difficult questions relating to various legal issues, such as discrimination and abortion, and reduce bias in the court system.[111] Jurists who essentially resemble America inspire greater public confidence.[112] President Obama's nominees may also expand ideological diversity, as a number appear to have rather broad perspectives on the Constitution, favor the notion of empathy, or support the idea of a "living Constitution."[113] The administration can defend this approach because, for

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[109] Lawmakers and President Obama have proposed many diverse nominees. *See* Goldman, *supra* note 20, at 1–6 (offering Presidents' records since Nixon); *supra* notes 58, 78 and accompanying text.

[110] President Carter used nominating commissions; and Presidents George H.W. Bush and Clinton asked that senators designate many women. *See* Berkson & Carbon, *supra* note 100 (discussing Carter's nomination panels); Carl Tobias, *More Women Named Federal Judges*, 43 Fla. L. Rev. 477, 479 (1991) (discussing George H.W. Bush's request for female recommendations); Neil A. Lewis, *Unmaking the G.O.P. Court Legacy*, N.Y. Times, Aug. 23, 1993, at A10 (discussing Clinton's request for female recommendations).

[111] *See, e.g.*, 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) (explaining how diverse viewpoints help in resolving complex legal questions); Tracey E. George, *Court Fixing*, 43 Ariz. L. Rev. 9, 18–25 (2001) (same). *See generally* Ninth Circuit Task Force on Racial, Religious & Ethnic Fairness, Final Report (1997); Report of the Federal Courts Study Committee 169 (1990) (noting judicial system bias).

[112] *See, e.g.*, Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 Judicature 246, 253 (1978); Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 Ind. L.J. 1423, 1442 (2008). *See generally* Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash. & Lee L. Rev. 405 (2000).

[113] *See* Toobin, *supra* note 50, at 43; *see also* Stephen Breyer, Active Liberty 21–34 (2005) (discussing these ideologically diverse perspectives); Jeffrey Rosen, The Supreme Court: The Personalities and Rivalries that Defined America 181, 201, 236–40 (2007) (same); Cass R. Sunstein, Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America 23–78 (2005) (same); Lynne N. Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574, 1578–87 (1987) (same); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. Chi. L. Rev. 859, 862–64 (2009) (same). *But see* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 37–47 (1997); Curt Levey, *Living Constitution, R.I.P.*, Nat'l Rev., Sept. 30, 2005, http://old.nationalreview.com/comment/levey200509301609.asp.

example, Republicans tapped originalists and judicial conservatives for their nominees, and Republican appointees constitute majorities on nearly all courts of appeals.[114] Moreover, Obama appears to think the political branches ought to have greater responsibility for social change than the unelected judiciary. Furthermore, he has addressed concerns about the prospective nominees' ideology. To the extent their views spark interest group criticism or aspersions like those each party cast at the other's White Houses—lengthening selection and promoting a few rejections—the administration might scrutinize less ideological designees or be pragmatic about how this opposition can affect the confirmation process.[115]

Another constructive strategy would be proffering additional nominees whom Republicans would support. For instance, President Obama picked Judge Beverly Martin, whom Georgia's senators favored.[116] Elevation also continues to hold promise because numerous district judges smoothly win appellate confirmation.[117] Moreover, the administration has chosen Republican appointees and qualified counsel with Republican affiliations.[118] This may be efficacious for courts that have prolonged openings, huge dockets, or include jurisdictions—namely Alabama, Texas, and Utah—with Republican senators.[119] For circuits with several protracted vacancies and that encompass states where officials participating in nominations disagree, the White House

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[114] *See* Goldman, *supra* note 20, at 6–8; Russell Wheeler, *How Might the Obama Administration Affect the Composition of the U.S. Courts of Appeals?*, Brookings Inst., Mar. 18, 2009, http://www.brookings.edu/opinions/2009/0318_courts_wheeler.aspx. Thus, President Obama's electoral success was ostensibly a mandate to restore balance.

[115] This happened to both Presidents Bush and Reagan. *See* Goldman, *supra* note 29, at 310; Neil A. Lewis, *Bush Judicial Choice Imperiled by Refusal To Release Papers*, N.Y. Times, Sept. 27, 2002, at A28; *see also* Gerhardt, *supra* note 29, at 217–29; Nancy Scherer, Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process 4–8 (2005).

[116] *See supra* note 97 and accompanying text (discussing White House cooperation and consultation with Republican legislators).

[117] *See supra* note 76 and accompanying text (discussing the advantages of nominating district court judges for circuit court vacancies).

[118] *See* Tobias, *supra* note 12, at 770. The classic example is Justice Sotomayor, whom George H.W. Bush first selected for the U.S. District Court for the Southern District of New York. *See* Neil A. Lewis, *After Delay, Senate Approves Judge for Court in New York*, N.Y. Times, Oct. 3, 1998, at B2.

[119] This would also enable the Republicans to designate a few possibilities. Empty judgeships on the U.S. Court of Appeals for the Fourth Circuit illustrate such lengthy open seats. *See* Carl Tobias, *The Bush Administration and Appeals Court Nominees*, 10 Wm. & Mary Bill Rts. J. 103, 110 (2001); Carl Tobias, *Federal Judicial Selection in the Fourth Circuit*, 80 N.C. L. Rev. 2001, 2002–03 (2002).

could assess compromises or "trades."[120] Emblematic is the opening on the U.S. Court of Appeals for the Fourth Circuit in South Carolina; the jurisdiction's Republican senators might propose a qualified centrist whom Democrats favor[121] or support a prospective Obama administration nominee in exchange for someone they prefer when the next vacancy occurs.[122]

The Judicial Conference recently ascertained that gigantic filing increases since 1990, when Congress last adopted a comprehensive judgeships bill, also warrant forty-seven new, permanent appellate and district judgeships.[123] The White House may trade a law for Republican suggestions of candidates and, thus, essentially inaugurate a bipartisan judiciary, which could alter the current judicial selection dynamics.[124] It is still early in the administration, however, and Democrats possess a sufficiently large majority that notions like this and other similiar "compromises" ought to be reserved for egregious situations.

The Obama administration, whose touchstone is bipartisanship, has emphasized conciliatory measures. Only when they actually prove

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[120] In 1997, Senator Joseph Biden (D-Del.) said that the Republicans broached a similar "informal agreement" that violated a 200-year tradition. *See* 143 Cong. Rec. S2538, S2541 (daily ed. Mar. 19, 1997) (statement of Sen. Biden). In 2008, President Bush and the Michigan senators implemented an analogous idea. *See* Paul Egan & Gordon Trowbridge, *Bush, Mich. Senators End Fed Judge Fight*, Detroit News, Apr. 16, 2008, at 1A. "Trades" are controversial. *See* Slotnick, *supra* note 30, at 242.

[121] *See* Rick Brundrett, *Dreams and Doubts in the Federalist Society: Federalist Society Hopes Obama Picks Moderate Judge*, State (S.C), Jan. 18, 2009, at B; Josh White & Jerry Markon, *Diagnosis of Early Alzheimer's Forces Chief Judge To Retire*, Wash. Post, July 10, 2009, at B3.

[122] Machinations in the confirmation process for the U.S. Court of Appeals for the Sixth Circuit in Michigan illustrate both ideas. *See supra* note 120 and accompanying text.

[123] *See* Judicial Conf. of the U.S., Report of the Proceedings of the Judicial Conf. of the U.S. 22 (Mar. 17, 2009); *see also* Federal Judgeship Act of 2009, S.1653, 111th Cong. (2009). The courts' policymaking arm, which premises proposals on conservative estimates of case and work loads, should also calibrate optimal court size by asking judges to reevaluate whether the current number of judicial posts allows them to deliver justice and how many jurists are needed. It currently defers to judges, who vigorously differ about the ideal size. *See* Gordon Bermant et al., Imposing a Moratorium on the Number of Federal Judges: Analysis of Arguments 1 (Federal Judicial Center 1993). The creation of new seats will have limited impact, if the Senate cannot expeditiously approve judges to fill them. *See* Tobias, *supra* note 12, at 748.

[124] *See* Tobias, *supra* note 102, at 1052; *cf.* Goldman et al., *supra* note 39, at 271; Tobias, *supra* note 102, at 1045 n.21, 1052 nn.49–52 (case and work load data). The President may even agree with Senate Judiciary Committee leaders on the nominees to be approved every session or "logroll." Richard L. Hasen, *Vote Buying*, 88 Cal. L. Rev. 1323, 1338–48 (2000). Variations include senators' provision of nominees who meet presidential criteria or alternating proposals in states with both parties' senators. *See* Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. Davis L. Rev. 667, 688 (2003). Although I do not urge adoption of these ideas, President Obama may analyze them and decide if filling vacancies is less crucial than naming the type of jurists he prefers.

ineffective because, for example, the Republicans do not cooperate, might Obama analyze confrontational techniques. For instance, should Republicans persist in slowing full Senate votes on nominees, the President may deploy the bully pulpit to embarrass and criticize them, or force the selection question by taking it directly to the voters, thereby making vacancies an election issue, a tactic which the Republicans have previously mastered.[125] Similar tactics include nominations for all present openings and wider use of recess appointments, endeavors that leverage the opposition by publicizing or sharply dramatizing how protracted vacancies erode justice.[126] The President, however, must rely on the latter device sparingly, as it creates so many political, legal, and pragmatic questions that only four judges have received recess appointments since 1964.[127] Bush capitalized on—or threatened employment of—analogous concepts, mostly to pressure allegedly recalcitrant Democrats. Several of these ideas, however, lacked efficacy, as the Fourth Circuit machinations reflect.[128]

C. *The Senate*

The Senate needs to designate and apply cooperative practices, as it shares responsibility with the last three White Houses for the present dynamics and the current excess of openings. Republican lawmakers should remember that when their party held the Executive, Senate Democrats approved more judges.[129] The public could also blame Re-

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[125] *See, e.g.*, Stras & Scott, *supra* note 18, at 1902–06; Tobias, *supra* note 12, at 772; *see also* Toobin, *supra* note 50.

[126] *See* U.S. Const. art. II, § 2, cl. 3.

[127] *See* Evans v. Stephens, 387 F.3d 1220, 1221–22 (11th Cir. 2004); United States v. Woodley, 751 F.2d 1008, 1009 (9th Cir. 1985); William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 Const. Comm. 515, 515–21 (2003–04); Stras & Scott, *supra* note 18, at 1907; Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 Colum. L. Rev. 1758, 1758–60 (1984); *supra* note 34 and accompanying text.

[128] *See, e.g.*, Tobias, *supra* note 102, at 1052–54; Lewis, *supra* note 64; Press Release, White House, *supra* note 33. President Bush unsuccessfully designated or nominated attorneys who had not practiced law in Maryland for a vacancy on the U.S. Court of Appeals for the Fourth Circuit in that state, although President Clinton did appoint a Virginia lawyer to a North Carolina seat. *See* Tobias, *supra* note 102, at 1052 (discussing Judge Gregory); Greene & Healy, *supra* note 36; Stewart Verdery, *By George: Senator Allen's Record on Race Has Been Misrepresented*, Nat'l Rev. Oct. 26, 2006, http://article.nationalreview.com/295385/by-george/stewart-verdery. Obama should minimize divisive actions which foment deleterious paybacks, such as renominating attorneys whom he knows many senators have already opposed. Tobias, *supra* note 102, at 1054; *cf.* Toobin, *supra* note 50 (discussing judges to whom senators have already registered objections).

[129] *See* Tobias, *supra* note 12, at 756–57.

publicans for the complications which long vacancies impose.[130] Republicans, thus, ought to adopt conciliatory approaches. They should provide candid, informative advice when consulted; accept comprehensive nominee debates as effective filibuster replacements; swiftly approve well-qualified, consensus nominees, including Bush appointees that President Obama might elevate; and tender superior candidates when the President's candidates are not acceptable.[131]

Senate Judiciary Committee review has yet to delay confirmation. If that materializes, senators have numerous avenues for expediting the process. They may increase hearings and votes with truncated consideration—a strategy Senator Orrin Hatch (R-Utah) applied in 2003—or eliminate perfunctory sessions for uncontroversial nominees.[132] Venerable norms and much recent practice suggest that nominees deserve hearings and votes by the full Senate, although concerns over ideology have prolonged selection.[133] Restricted floor debates and votes best explain the low number of appointments thus far. The Majority Leader, therefore, could promote additional chamber scrutiny by, for instance, arranging full Senate evaluation rapidly after Judiciary Committee approval. Insofar as disputes over particular nominees slow confirmation, Majority Leader Reid might afford greater debates and full Senate votes, primarily as filibuster substitutes.[134] To the extent that limited floor con-

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[130] *See supra* notes 30, 33–35 and accompanying text; *see also* Jack Newfield, *The Right's Judicial Juggernaut*, NATION, Oct. 7, 2002, at 11. Senate Majority Leader Reid must also work with Leahy, as well as Senators Sessions and McConnell to resolve disputes that arise during the confirmation process.

[131] President Bush and others have proposed ideas to expedite selection; but a few ideas, such as requiring judges to give earlier notice of intent to assume senior status and rigid dates for specific phases, are impractical or violate traditions. *See, e.g.*, Exec. Order No. 13,300, 68 Fed. Reg. 25,807 (May 13, 2003); Bermant et al., *supra* note 9, at 333–44; Mike Allen & Amy Goldstein, *Bush Has Plan To Speed Judicial Confirmations*, WASH. POST, Oct. 31, 2002, at A21. Later commentators have suggested similar ideas. *See* S. Res. 327, 108th Cong. (2004); Charles W. Pickering, Sr. & Bradley S. Clanton, *A Proposal: Codification by Statute of the Judicial Confirmation Process*, 14 WM. & MARY BILL RTS. J. 807, 816–19 (2006); *see also* Editorial, *The Confirmation Game: It Remains, as Tony Lake Once Said, "Nasty and Brutish Without Being Short,"* WASH. POST, Aug. 30, 2009, at A22. Moreover, home state senators can block nominees, unanimous consent allows a lone senator to delay floor action, and cloture requires sixty votes. *See* Tobias, *supra* note 102, at 1049.

[132] *See* Helen Dewar, *Republicans Push Speedy Action on Court Picks*, WASH. POST, Jan. 30, 2003, at A7; Neil A. Lewis, *G.O.P. Links Judicial Nominees To Thwart Opponents*, N.Y. TIMES, Jan. 30, 2003, at A21; *see also* Tobias, *supra* note 12, at 766, 774.

[133] *See* Tobias, *supra* note 12, at 764–65, 774–75. *See generally* Michael J. Gerhardt, *Merit v. Ideology*, 26 CARDOZO L. REV. 353 (2005).

[134] *See* Slotnick, *supra* note 30, at 233–36. Some debates are frank, helpful exchanges. *See, e.g.*, 148 CONG. REC. S7651–56 (daily ed. July 31, 2002) (discussing the nomination of D. Brooks Smith to be a Circuit Judge for the Third Circuit); 143 CONG. REC. S2515–41

sideration indicates Republican recalcitrance or payback for the August vote on Justice Sotomayor, Democrats could explore the more aggressive, nuanced ideas herein cataloged.[135]

Finally, legislators must balance the need for thorough review with the need to expeditiously fill many vacancies and approve highly competent nominees. Both parties may ask whether they could overemphasize ideology just as each should have abandoned the futile quest to detect whether Bush and Clinton nominees would be "judicial activists" if confirmed.[136] Article II's language envisions that senators will investigate expertise, character, and temperament,[137] yet they ought to refrain from premising delay on how nominees might resolve substantive disputes, as that could affect judicial independence.[138] The confirmation processes for Chief Justice John Roberts, Justice Sonia Sotomayor, and Justice Samuel Alito elucidated these phenomena. Quite a few lawmakers based their positions on concerns—actual or imagined—respecting ideology and how nominees would treat specific questions, while sena-

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(daily ed. Mar. 19, 1997) (discussing the nomination of Merrick B. Garland to be a Circuit Judge for the U.S. Court of Appeals for the District of Columbia Circuit). One filibuster attempt failed when ten Republicans voted for cloture. 155 Cong. Rec. S14421–22 (daily ed. Nov. 17, 2009); *see* Dana Milbank, *Filibusted*, Wash. Post, Nov. 18, 2009, at A2. If the Republicans invoke more filibusters, Democrats could revive an entity, like the "Gang of 14," that restricts the invocation of filibusters. *See Text of Senate Compromise on Nominations of Judges*, N.Y. Times, May 24, 2005, at A18; Stras, *supra* note 31, at 1076.

[135] *See supra* notes 125–128 and accompanying text; *cf.* Stras & Scott, *supra* note 18, at 1896–1910.

[136] *See, e.g.*, *Judicial Nominations 2001: Should Ideology Matter?, Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 107th Cong. 1 (2001) [hereinafter *2001 Hearing*]; Authority for Committees to Meet, 143 Cong. Rec. S7507 (daily ed. July 15, 1997) (statement of Sen. Stevens) (asking unanimous consent that the Subcommittee on Administrative Oversight and the Courts, part of the Senate Judiciary Committee, be authorized to hold a hearing on "Judicial Activism: Assessing the Impact"); 143 Cong. Rec. S2515, S2516 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch). *See generally* Kermit Roosevelt, III, The Myth of Judicial Activism: Making Sense of Supreme Court Decisions (2006).

[137] *See* U.S. Const. art. II, § 2, cl. 2; *cf. 2001 Hearing*, *supra* note 136, at 1; Stephen L. Carter, *A Devilish Look at the Confirmation Process (with Apologies to C.S. Lewis)*, 50 Drake L. Rev. 369 (2002); Gerhardt, *supra* note 133; Albert W. Alschuler, *Making Ideology an Issue*, Chi. Trib., Sept. 18, 2002, at 23; Douglas Laycock, *Forging Ideological Compromise*, N.Y. Times, Sept. 18, 2002, at A31.

[138] *See, e.g.*, Citizens for Independent Courts, Uncertain Justice: Politics and America's Courts, The Reports of the Task Forces of Citizens for Independent Courts 7–30 (2000). For discussion of judicial independence in general, see Citizens for Independent Courts, *supra*, at 121–71, 205–42 and Symposium, *Judicial Independence and Accountability*, 72 S. Cal. L. Rev. 311 (1999). Many Republican senators found that the Democrats' filibuster of Miguel Estrada exemplified these notions. *See* Tobias, *supra* note 12, at 766–67.

tors cast votes along party lines.[139] One solution for those dilemmas is restoring a presumption that extremely qualified nominees with mainstream views deserve confirmation.[140] This idea helps explain the relatively felicitous appointments of Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer, and illuminates why certain Democrats favored Roberts and Alito and why particular Republicans confirmed Sotomayor.[141] Democrats have also not forgotten Republican unwillingness to assess many of President Clinton's nominees. At the same time, the Republicans still find inappropriate the tempestuous proceedings for Judge Robert Bork and Justice Clarence Thomas, as well as the difficulties that Roberts and Alito surmounted—conduct it asserts was driven by opposition to their ideology.[142] Each party should reject these counterproductive dynamics, epitomized by acerbic partisanship and seemingly incessant paybacks, and thereby galvanize significantly increased consensus on judicial nominees.[143]

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[139] *E.g.*, Ronald Dworkin, *Justice Sotomayor: The Unjust Hearings*, N.Y. Rev. Books, Sept. 24, 2009, http://www.nybooks.com/articles/archives/2009/sep/24/justice-sotomayor-the-unjust-hearings/; Charlie Savage, *Senate Confirms Sotomayor for the Supreme Court*, N.Y. Times, Aug. 7, 2009, at A1; *cf.* Robert Barnes, *Newer Justices Could Transform Supreme Court*, Wash. Post, Oct. 2, 2009; http://www.washingtonpost.com/wp-dyn/content/article/2009/10/02/AR2009100203979.html. Some Republicans have voiced concern that then-Senators Obama (D-Ill.) and Biden (D-Del.) voted against Roberts and Alito mainly due to ideology. *See* Sheryl Gay Stolberg, *Frustrated by Roberts, and Unsure How To Vote*, N.Y. Times, Sept. 16, 2005, at A25; Sheryl Gay Stolberg & Neil A. Lewis, *Sotomayor Fends Off Republican Queries on Abortion and Guns*, July 16, 2009; *see also* Barbara A. Perry, *The "Bush Twins?": Roberts, Alito, and the Conservative Agenda*, 92 Judicature 302, 304, 307–08 (2009).

[140] *See* Tobias, *supra* note 12, at 751.

[141] *See* Stras & Scott, *supra* note 18, at 1898–99, 1902; Tobias, *supra* note 9, at 751; Jeffrey Toobin, *Kennedy and the Court*, The New Yorker News Desk: Blog, *http://www.newyorker.com/online/blogs/newsdesk/2009/08/jeffrey-toobin-kennedy-and-the-court.html* (Aug. 26, 2009); *see also* Charlie Savage, *Leahy, in Surprise, Voices Support for Roberts*, Boston Globe, Sept. 22, 2005, at A3; Sheryl Gay Stolberg, *Panel Approves Roberts, 13–5, as 3 of 8 Democrats Back Him*, N.Y. Times, Sept. 23, 2005, at A1; Stout, *supra* note 106.

[142] *See, e.g.*, Goldman et al., *supra* note 39, at 256; Gest et al., *supra* note 47; *see also* Robert Barnes, *For Roberts, Alito, A New Visibility: Their Views on First Amendment Cases May Be Key*, Wash. Post, Oct. 4, 2009, at A3 (examining Chief Justice Roberts and Justice Alito nominations); Editorial, *Judge Alito's Hearings*, Wash. Post, Jan. 13, 2006, at A20; Amy Goldstein & Charles Babington, *Roberts Avoids Specifics on Abortion Issue*, Wash. Post, Sept. 14, 2005, at A1; *supra* notes 31, 139–141 (discussing nomination of Judge Bork); *cf.* Jane Mayer & Jill Abramson, Strange Justice: The Selling of Clarence Thomas 202–350 (1994) (considering the nomination of Justice Clarence Thomas); Paul Simon, *Advise and Consent: The Senate's Role in the Judicial Nomination Process*, 7 St. John's J. Legal Comment. 41, 43–47 (1991) (same).

[143] The judiciary's role is so limited in the selection process that no textual analysis is merited. The judiciary may publicize the serious difficulties that result from long-term vacancies and develop measures that President Obama and senators could adopt. Such actions may increase public support to remedy the conundrum, as well as executive and legislative sensi-

Conclusion

Federal appellate and district court vacancies erode justice. President Obama has adopted special initiatives to reinstitute bipartisanship and limit politicization, especially through consultation with members of both parties and the selection of very able, moderate nominees. Confirmation, however, has still proceeded less swiftly than is ideal. The President may analyze and effectuate policies that facilitate nominations by using comprehensive, transparent communications. At the same time, individual legislators must be amenable to those overtures and cooperate with the administration and their colleagues on both sides of the aisle. The Judiciary Committee should continue to expeditiously investigate, provide hearings for, and vote on nominees. The Majority Leader ought to rapidly schedule floor debates and full Senate votes. If Republicans persist in blocking or slowing the process, Democrats should apply cloture or rely on procedures that will foster debates and votes. If Republicans further obstruct or delay floor action, President Obama could then rely on somewhat confrontational techniques. Both Republicans and Democrats must remember that each party shares responsibility for the current pernicious dynamics and that sacrificing appointments for immediate political benefit will undercut justice, eviscerate citizen regard for the government, and lead the public to hold both parties accountable.

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tivity to expedition. The jurists could also engage in more direct lobbying of the senators to facilitate confirmation, but this tactic has limited use, as it may be overly political and erode judicial independence. *See* Jonathan Groner, *Stars Align for Circuit Nominee*, Legal Times, May 27, 2002; *see also* Lauren Robel, *Impermeable Federalism, Pragmatic Silence, and the Long Range Plan for the Federal Courts*, 71 Ind. L.J. 841, 842 (1996); *supra* note 138.