

Sixth Circuit Federal Judicial Selection

Carl Tobias*

TABLE OF CONTENTS

I. HISTORICAL BACKGROUND	723
A. <i>Introduction</i>	723
B. <i>National Developments</i>	724
1. The Persistent Vacancies Problem	725
a. The Early History	725
b. History Since 1950	726
2. The Current Impasse	728
a. General Overview of the Current Impasse	728
b. Specific Analysis of the Current Impasse	731
(1) Nomination Process	731
(2) ABA Committee	734
(3) Confirmation Process	734
(4) Nomination and Confirmation	737
(5) Prospects for Change	739
(6) Effects of the Current Impasse	740
C. <i>Sixth Circuit Developments</i>	741
D. <i>A Word About State-Specific Developments</i>	745
II. ANALYSIS OF PREFERABLE SOLUTIONS	747
A. <i>The Executive Branch and the Senate</i>	747
B. <i>The Executive Branch</i>	748
C. <i>The Senate</i>	751
D. <i>The Judicial Branch</i>	753
CONCLUSION	754

* Beckley Singleton Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. I wish to thank Peggy Sanner and Rod Smith for valuable suggestions, G. Schloss for processing the piece, and Beckley Singleton and James E. Rogers for generous, continuing support. Errors that remain are mine.

Many of the 179 active federal appeals court judgeships authorized by Congress have remained vacant for protracted times. Over the last dozen years, the appellate system has experienced numerous openings, which have generally comprised ten percent of those seats. Particular tribunals' situations have been worse. At various times since 1996, the United States Courts of Appeals for the Second, Fourth, and Ninth Circuits operated without a third of their judges. However, the most egregious and recent illustration is the United States Court of Appeals for the Sixth Circuit. Almost half of that court's positions are now empty, while a number of its seats have been unfilled for extensive periods.

Judicial appointments to the Sixth Circuit have proven highly controversial, eliciting accusations and countercharges among Senate members who represent states located in that circuit. For example, Senator Spencer Abraham (R-MI) prevented Senate Judiciary Committee hearings for years on two Michigan women whom President Bill Clinton nominated. This delay required that Judge Helene White wait longer than any person in American history without receiving Senate consideration. Michigan Democratic Senators Carl Levin and Debbie Stabenow responded to the delay first by requesting hearings on the Clinton nominees or the creation of a bipartisan judicial selection commission. When President George W. Bush rebuffed these overtures by submitting four Michigan nominees, Levin and Stabenow then blocked their Senate consideration. Democrats in the upper chamber also apparently found both Ohioans whom the chief executive proposed on May 9, 2001 so conservative that the Judiciary Committee in the 107th Congress accorded neither individual a hearing.

Political phenomena substantially explain these machinations. For instance, the court's active judges comprise similar numbers of Republican and Democratic appointees, who frequently split along party lines when addressing disputed public policy issues, such as abortion and religious freedom. Moreover, Grand Old Party (GOP) politicians may well view the tribunal's vacancies as an opportunity to have Republican presidents name a majority of its members. The propositions in this paragraph received public expression in the opinions resolving the University of Michigan affirmative action case, *Grutter v. Bollinger*, which included stinging allegations of procedural manipulation to influence the substantive result and equally vociferous denials.¹

¹ *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir.), *cert. granted*, 123 S. Ct. 617 (2002).

Six of the Sixth Circuit's sixteen positions are currently open. The Judicial Conference, the federal courts' policymaking arm, has suggested that Congress approve two new seats for the tribunal. Empirical data on dockets and workloads substantiate these recommendations. Chief Judge Boyce F. Martin, Jr. has correspondingly asserted to the Senate Judiciary Subcommittee on Administrative Oversight and the Courts that the Sixth Circuit caseload warrants additional positions. Nonetheless, Senator Charles Grassley (R-IA), the subcommittee's then-chair, authored a 1999 report which contended that the appeals court functions well using its present judicial complement.

However, there is evidence that the tribunal performs less efficaciously than some of the twelve regional circuits. For example, most appellate courts provide greater percentages of published opinions than does the Sixth Circuit. Moreover, no tribunal relies so heavily on visiting judges to constitute panels. The Sixth Circuit also decides appeals more slowly than any other appellate court except the one with the largest docket. Sixth Circuit vacancies have even necessitated cancellation of oral arguments, which imposes unnecessary expense and delay on the tribunal, judges, counsel, and parties.

All of the above ideas suggest that federal judicial appointments to the Sixth Circuit have grown increasingly controversial and deserve analysis, which this essay undertakes. Part One explores the origins and development of the problems that have accompanied Sixth Circuit judicial selection. Part Two evaluates numerous potential remedies for the difficulties affecting appointments which the first segment identifies.

I. HISTORICAL BACKGROUND

A. Introduction

The historical background of the complications in Sixth Circuit federal judicial selection seems to require somewhat limited assessment here because the existing circumstances appear most important. Nevertheless, considerable examination is appropriate, as it can improve understanding of the Sixth Circuit and of the problems related to its appointments. Moreover, analyzing only the background which directly involves the Sixth Circuit may seem most relevant. However, developments in this court cannot be separated from those elsewhere, so that evaluating national phenomena helps clarify the Sixth Circuit's situation. For instance, the ongoing Michigan dispute resembles one which is continuing in North Carolina. Four North Carolinians

nominated by Clinton never received Judiciary Committee hearings. Moreover, North Carolina's Democratic senator has precluded consideration of a Bush appeals court nominee from North Carolina. The Second, Fourth, Sixth and Ninth Circuits have had many vacancies at different times since the mid-1990s. Republican Senate members also might have considered several Clinton designees for the Ninth Circuit too liberal just as Democratic senators could find some Bush nominees for the Fourth and Sixth Circuits overly conservative. Therefore, the Sixth Circuit may not be typical, but attempts to appoint judges for the tribunal have encountered difficulties that resemble those in other courts.

B. National Developments

National developments implicating Sixth Circuit judicial selection are subtle and complex. It might appear that these developments need relatively little treatment here because they have received rather comprehensive analysis elsewhere.² Nonetheless, comparatively thorough assessment can enhance understanding. The national problem involving appointments has two major components. The first is the persistent vacancies dilemma, which resulted from Congress' enlargement of federal court jurisdiction and the dramatic increase in appeals over the last few decades. This situation promoted the appellate bench's growth, which increased the number and frequency of empty seats and frustrated efforts to fill them. The second is the present dilemma. Its principal sources are political and derive substantially from control of the White House and the Senate by opposing political parties since the late 1980s. I emphasize this concept, particularly the feature's political dimension, because those notions better explain the difficulties that have beset Sixth Circuit selection. However, the permanent complication warrants some consideration. This analysis should improve understanding, particularly of the historical developments which contributed to the current problem.³

² See, e.g., MILLER CENTER COMMISSION NUMBER 7, REPORT OF THE COMMISSION ON THE SELECTION OF FEDERAL JUDGES (1996) [hereinafter MILLER REPORT]; Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. COL. L. REV. 319 (1994). I rely in this essay on Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527 (1998). Many ideas in that article remain relevant.

³ It warrants less because much delay is inherent and, thus, defies treatment; political factors underlie less the persistent dilemma than the current problem; and it has been assessed elsewhere. See, e.g., Bermant et al., *supra* note 2 (examining problem of judicial vacancies); The Committee on Federal Courts, *Remedying the Permanent Vacancy Problem in*

1. The Persistent Vacancies Problem

The persistent dilemma comprises multiple constituents, certain of which can be traced to this country's origins and Article II of the United States Constitution. Nevertheless, I emphasize the dilemma's modern aspects, whose primary causes have been expanded federal court jurisdiction and mounting appeals. These phenomena have led Congress to authorize many new positions, thus increasing the number and frequency of vacancies as well as the difficulty of confirming judges.

a. The Early History

Article II's appointments clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" judges.⁴ Founders envisioned that the Senate would serve as an effective check on the chief executive's potential for favoritism and would restrict the president's possible choice of unfit individuals while affording considerable stability.⁵ The Framers explicitly recognized, and consciously anticipated, that politics would be instrumental to judicial appointments.

Senators have actively participated in selection since the nation was founded, and they have a substantial stake in affecting, or appearing to influence, the process.⁶ Complicated political accommodations between the chamber and the chief executive during the system's early phases have facilitated its operation.⁷ Moreover, senators have conventionally helped identify nominees, especially for the federal district courts.

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] (proposing possible solutions to problem of judicial vacancies); Victor Williams, *Solutions to Federal Judicial Gridlock*, 76 JUDICATURE 185 (1993) (discussing solutions to federal judicial gridlock).

⁴ See U.S. CONST. art. II, § 2, cl. 2. The Constitution accords the President and the Senate much greater responsibility than the House and the judiciary. The President includes Executive Branch officials, such as lawyers in the White House Counsel Office and the Department of Justice, who help the President. The Senate includes the Judiciary Committee, which has primary responsibility for the confirmation process, and its chair, Senator Orrin Hatch (R-UT); the Majority Leader, Senator William Frist (R-TN); and individual Senate members.

⁵ See *The Federalist* No. 76, at 513 (Alexander Hamilton) (J. E. Cooke ed., 1961); see also MICHAEL GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 28 (2000); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997); Albert P. Melone, *The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality*, 75 JUDICATURE 68, 69 (1991).

⁶ See HAROLD W. CHASE, *FEDERAL JUDGES, THE APPOINTING PROCESS* 7 (1972).

⁷ See Bermant et al., *supra* note 2, at 321; see also GERHARDT, *supra* note 5, at 29-34; Melone, *supra* note 5.

Senators, or senior elected officials of the president's political party, from the state in which the judge will be stationed have normally recommended candidates whom the chief executive has subsequently nominated.⁸

Politics, therefore, pervade appointments. If the president and senators disagree, they may act strategically to gain benefit and to control nomination and confirmation, even employing delay for tactical purposes.⁹ Examples of these ideas include Senator Abraham's successful efforts in blocking Senate consideration of Clinton nominees from Michigan and attempts by Senators Levin and Stabenow to prevent Senate Judiciary Committee hearings for Bush's Michigan designees.¹⁰ Tension between the chief executive and chamber members will persist, as long as Senate advice and consent is required for confirmation.¹¹

In short, the president and senators have always shared responsibility for selecting judges in a process that has been politicized since the republic was created. However, significant numbers of openings, which could remain vacant for an extended time, only became a potential complication during the 1970s. Indeed, for almost 200 years after Congress passed the Judiciary Act of 1789, the complement of appeals and district court judgeships slowly increased to 300. The few empty seats and their comparative infrequency meant that open positions were easily filled, thus preventing the dilemma which ultimately arose.¹²

b. History Since 1950

Federal court jurisdiction greatly expanded over the second half of the twentieth century.¹³ Congress federalized much criminal activity and prescribed many new civil causes of actions, which prompted a 300

⁸ President Dwight Eisenhower named few judges home-state senators opposed. 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 2, at 4 (stating Robert Kennedy's view as Senate appointment with president's advice and consent).

⁹ See CHASE, *supra* note 6, at 14, 40; Bermant et al., *supra* note 2, at 321; see also Melone, *supra* note 5.

¹⁰ See *supra* notes 1,5, *infra* notes 98-101 and accompanying text.

¹¹ There are apparently two means for addressing that constitutional command. "One requires constitutional interpretation, the other constitutional amendment." Bermant et al., *supra* note 2, at 322.

¹² See, e.g., Tobias, *supra* note 2, at 531; MILLER REPORT, *supra* note 2, at 3.

¹³ See MILLER REPORT, *supra* note 2, at 3; see also Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1270 (1996) (noting congressional passage of statutes that expanded federal jurisdiction). See generally Martha Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts of Appeals*, 1996 WIS. L. REV. 12.

percent annual increase in district court filings since the 1960s.¹⁴ Lawmakers responded to caseload growth by enlarging the number of federal judges; therefore, Congress has now authorized 844 active appellate and district court positions.¹⁵

The Committee on Long Range Planning of the United States Judicial Conference, in a comprehensive 1995 assessment of the federal courts' future, predicted that docket increases would necessitate 2,300 active judges by 2010 and 4,170 by 2020.¹⁶ Although expanding the judiciary remains controversial,¹⁷ the bench will continue to grow, in part because Congress will apparently not limit civil or criminal jurisdiction.¹⁸ The Committee also ascertained that the period required to fill openings had lengthened.¹⁹ From 1980 until 1995, nominations on average consumed a year and confirmations three months, and the time for each component increased.²⁰ A Federal Judicial Center (FJC) study determined that vacancy rates between 1970 and 1992 almost doubled in the federal districts and were more than twice as high in the appeals courts, while most delay occurred from the time of an opening until nomination.²¹

The persistent dilemma has imposed numerous disadvantages. For example, vacancies have impeded the judiciary's efforts to decide cases promptly, while they have placed unwarranted pressure on sitting judges and posed difficulties for parties and attorneys who must

¹⁴ See, e.g., Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 42 U.S.C. §§ 13701-14223 (1995)); Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (1994)). See generally William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719 (1995) (discussing problems with expansion of federal power); MILLER REPORT, *supra* note 2, at 3 (reporting problem of judicial vacancies).

¹⁵ See 28 U.S.C. §§ 44, 133 (1994); see also VACANCIES IN THE FEDERAL JUDICIARY (2002), available at <http://www.uscourts.gov/vacancies/judgevacancy.htm>.

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

¹⁷ 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.

¹⁸ See MILLER REPORT, *supra* note 2, at 3. See generally William L. Reynolds & William M. Richman, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996) (discussing changes in appellate courts to accommodate growth in dockets).

¹⁹ See LONG RANGE PLAN, *supra* note 16, at 103.

²⁰ See *id.* at 3-4.

²¹ See Bermant et al., *supra* note 2, at 323.

compete for scarce court resources.²² Moreover, in the 22 years after 1970, empty seats had a statistically significant impact on average judicial workloads for appeals and district judges of nine and ten percent respectively.²³

This exploration demonstrated that politics have long attended judicial selection.²⁴ However, some observers of the process assert that politicization has increased since the 1960s, beginning in the administration of President Richard Nixon, who pledged to reestablish "law and order" by naming conservative jurists and "strict constructionists."²⁵ A more contemporary strain originated with the Senate rejection of Circuit Judge Robert Bork, whom President Ronald Reagan had nominated for the Supreme Court in 1987.

2. The Current Impasse

Political factors appear more relevant to the present dilemma than the persistent one, but politics permeate each, thus obscuring their exact relationship. These notions indicate that political phenomena underlie the current problem, and both seem responsible for recent Sixth Circuit appointments. The existing difficulty, therefore, warrants some treatment, even though closeness in time frustrates comprehension of precisely what transpired.

a. General Overview of the Current Impasse

Over the last decade and a half, distrust, partisan wrangling, divisiveness and paybacks have often characterized the judicial selection process. For virtually this entire period, judicial selection proceeded in a milieu of divided government, with one party controlling the White House, which has nomination and appointment powers, and the other party having a Senate majority, which must give its advice and consent for confirmation.

Several reasons explain why greater controversy has accompanied judicial selection for the regional circuits. First, there have been few Supreme Court vacancies in the last decade and those that arose have

²² See N.Y. City Bar, *supra* note 3, at 374.

²³ See Bermant et al., *supra* note 2, at 327.

²⁴ See *supra* notes 4-12 and accompanying text.

²⁵ See, e.g., DAVID M. O'BRIEN, JUDICIAL ROULETTE 20 (1988) (discussing judgeships as symbol of presidential power); Roger E. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees*, 80 JUDICATURE 274, 274 (1997) (commenting on increased attention and scrutiny of appointment of lower federal court judges).

not been sharply contested. After the tumultuous appointment of Justice Clarence Thomas,²⁶ chief executives have nominated, and the Senate has approved, individuals who appeared to possess moderate political views. Second, district court openings have traditionally been, and essentially remain, the prerogative of senators who represent the areas in which vacancies occur. Notions of senatorial courtesy and respect and the idea that trial court seats constitute perhaps the last remaining vestige of unalloyed political patronage mean they are rarely controversial. Third, the regional circuits are increasingly perceived as the courts of last resort which resolve critical public policy issues, such as religious freedom and federalism, partly because the Supreme Court hears so few appeals.²⁷

These ideas do not suggest that the process has inexorably spiraled downward for a decade and a half; there have been periods when appeals court selection functioned rather smoothly. For example, President George H.W. Bush and Republican and Democratic senators seemingly attempted to cooperate after the confirmation battle over Justice Thomas. This development fostered Justice David Souter's relatively non-controversial appointment and comparatively effective lower court selection in the early 1990s. Nevertheless, at the conclusion of the Bush presidency, 100 appeals and district court positions remained open. Democratic senators claimed the vacancies resulted from the chief executive's failure to nominate steadily qualified persons whom Democrats deemed acceptable.²⁸ Republicans ascribed the unfilled seats

²⁶ See, e.g., JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994) (discussing appointment of Clarence Thomas to United States Supreme Court); TIMOTHY PHELPS & HELEN WINTERNITZ, *CAPITOL GAMES* (1997) (discussing appointment of Clarence Thomas to United States Supreme Court).

²⁷ See, e.g., Neil A. Lewis, *Move to Limit Clinton's Judicial Choices Fails*, N.Y. TIMES, Apr. 30, 1997, at D1 (discussing Senate rejection of proposal to give individual senators greater role in appointment of federal appellate judges); *Obstruction of Justice*, THE NEW REPUBLIC, May 19, 1997, at 9 (reporting Republican conference's vote to "respond legislatively to judicial activism"); Jeffrey Rosen, *Obstruction of Judges*, N.Y. TIMES, Aug. 11, 2002, § 6, p. 38 (discussing obstructions in process of appointing judges); see also RICHARD POSNER, *THE FEDERAL COURTS* 80-81, 194-95 (1996) (proposing remedies to problem of federal courts' increased caseload); Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403 (1997) (commenting on reasons why Supreme Court's docket has decreased despite increased volume of cases brought to Court for review).

²⁸ See, e.g., 143 CONG. REC. S2538 (daily ed. Mar. 19, 1997) (statement of Sen. Biden) (commenting on lack of nominations for federal court judges); Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 284 (1993) (discussing whether Bush administration invested sufficient resources in judicial selection). See generally Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477 (1991) (assessing why President George Bush increased percentage of women appointed for federal judgeships during third

to the Senate majority's slowed consideration of Bush nominees because senators controlling the chamber anticipated that a Democratic candidate might capture the White House.²⁹

During the Clinton Administration, there were similarly certain unusual times in which judicial appointments to the appellate courts proceeded relatively well. For example, close cooperation between Clinton and Democrats who held a Senate majority prompted confirmation of more than 100 judges during 1994.³⁰ Sixty nominees correspondingly secured approval four years later when Republican senators had recaptured the body.³¹

From January 1995, when the GOP assumed Senate control, thus reinstituting a divided government, until the Clinton Administration's conclusion, the dynamics of partisanship, divisiveness, and payback generally dominated selection. Thus, upon President Clinton's departure from the White House, there were almost 30 openings on the regional circuits — practically the same number as the time of his inauguration.³² The 2000 elections left Republicans with a one-vote Senate majority and enabled President George W. Bush to lead a government that was not divided. However, this opportunity proved short-lived when Senator James Jeffords (R-VT) became an independent in May 2001,³³ a development which profoundly affected appointments by according the Democrats Senate control.

year of his term and its consequences).

²⁹ See Goldman, *supra* note 28. See generally Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. REV. 1257, 1270-74 (discussing differences between Bush administration's and Reagan administration's approach to federal judicial appointments).

³⁰ See Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 279 (1995); Carl Tobias, *Increasing Balance on the Federal Bench*, 32 HOUS. L. REV. 137, 154 (1995).

³¹ 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). For reasons why this occurred, see *supra* notes 1-4 and accompanying text.

³² See VACANCIES IN THE FEDERAL JUDICIARY (2000), available at <http://www.uscourts.gov/vacancies/12042000/judgevacancy.htm>; see also Carl Tobias, *Dear President Bush*, 67 MO. L. REV. 1, 1 (2002) (suggesting how President Bush might discharge duty to appoint federal judges); Nick Anderson, *Democrats Look to Battles After Ashcroft*, L.A. TIMES, Feb. 1, 2001, at A14 (commenting on vast number of federal judicial positions Bush must fill in term as President).

³³ See Neil A. Lewis, *Washington Talk: Road to Federal Bench Gets Bumpier in Senate*, N.Y. TIMES, June 26, 2001, at A16 [hereinafter Lewis, *Washington Talk*]; David Rogers, *Sen. Jeffords Defects From GOP*, WALL ST. J., May 25, 2001, at A16; Editorial, *True Bipartisanship*, WALL ST. J., May 31, 2001, at A16.

b. Specific Analysis of the Current Impasse

This subsection attempts to recount the current problem accurately by consulting the behavior and observations of many participants in judicial selection. I scrutinize the second Clinton Administration and George W. Bush's Administration to date, stressing the initial year of each, because appointments during 1997 and 2001 were relatively similar and recent. This emphasis is appropriate, even though the present complication appeared to originate earlier, perhaps with Judge Bork's 1987 rejection.

Numerous political factors which accompanied selection throughout the fifteen years contributed significantly to the current situation, although certain features of the generic dilemma have implicated appointments since 1997, particularly in that year and 2001. Each chief executive and the Senate — including the Majority Leader, the Judiciary Committee, its chair and panel members, and specific senators — were principally responsible for many phenomena that comprise the existing difficulty. These public officials alone or in combination could have remedied or ameliorated numerous problems if they exercised the requisite political will.

The time that the Clinton and Bush Administrations and the respective Senates required to conclude nomination and confirmation were substantial and analogous during 1997 and 2001. For example, in 1997, nominations on average consumed over 600 days, with confirmations needing a record high of 183 days.³⁴ Much delay which involved appointments continued to happen between the date an opening arose and the president submitted a nominee.

(1) Nomination Process

The dearth of confirmations during 1997 and 2001 resulted in part from slow nominee submission. Some temporal complications should be ascribed to both chief executives and to individual senators or other political officers who recommended designees for presidential consideration. However, in 1997, additional participants, namely Senator Orrin Hatch (R-UT), then chair of the Judiciary Committee; Senator Trent Lott (R-MS), then Senate Majority Leader; and other GOP senators delayed processing out of concerns regarding matters such as

³⁴ See Viveca Novak, *Empty-Bench Syndrome*, TIME, May 26, 1997, at 37; see also Orrin G. Hatch, *There's No Vacancy Crisis in the Federal Courts*, WALL ST. J., Aug. 13, 1997, at A15 (claiming confirmation required 91 days and nominations required 618 days); Editorial, *Clearing the Bench*, DALLAS MORNING NEWS, June 17, 1997, at A16 (reciting similar statistics); *supra* note 20 and accompanying text (affording comparable data for 1980-1995).

"judicial activism." During 2001, their analogues, Senators Patrick Leahy (D-VT) and Tom Daschle (D-SD), might have similarly slowed consideration because Democrats found the political perspectives of some Bush nominees troubling.

The presidents apparently had certain responsibility for the small number of appointments attributable to delays in tendering nominees. For instance, on January 7, 1997, the Clinton Administration forwarded 22 attorneys for nomination, many of whom had been nominated in the previous Congress and had testified in confirmation hearings or had secured favorable committee votes. President Bush did not announce his initial set of nominees until May 2001.³⁵ Both chief executives thereafter gradually, albeit rather sporadically, provided additional names. Illustrative was each president's tendency to suggest large groups as the Senate neared a recess.³⁶ Most designees of the two chief executives were apparently well qualified, and a number had served on the federal or state bench.³⁷ Some seemed to possess moderate political views, several were affiliated with the party that did not control the presidency, and previous presidents had named a few as district judges.³⁸

In fairness, the chief executives' tendency to submit many persons immediately before Senate recesses and their general treatment of the nomination process posed certain difficulties. Tendering numerous people at once on the eve of a Senate recess frustrated Judiciary Committee consideration. Clinton had forwarded only eight new designees by June 1997. Senator Hatch found some unacceptable in the January group, thereby enabling him to claim that the Committee lacked sufficient nominees for effective Committee processing.³⁹

³⁵ See The White House, Office of the Press Sec'y, *President Clinton Nominates Twenty-two to the Federal Bench* (Jan. 7, 1997); REMARKS ANNOUNCING NOMINATIONS FOR THE FEDERAL JUDICIARY, 37 PUB. PAPERS 19 (May 14, 2001) [hereinafter PRESIDENT'S REMARKS].

³⁶ The White House, Office of the Press Sec'y, *President Clinton Nominates Thirteen to the Federal Bench* (July 31, 1997); Jonathan Ringel, *Bush Nominates 18 to Federal Bench*, AM. LAW. MEDIA, Aug. 6, 2001 [hereinafter Ringel, *Bush Nominates 18*].

³⁷ PRESIDENT'S REMARKS, *supra* note 35; see Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309, 315 (1996); Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254, 258-59 (1997). See generally 143 CONG. REC. S5653 (daily ed. June 16, 1997) (statement of Sen. Leahy); *infra* notes 70, 114-116 and accompanying text.

³⁸ See Goldman & Slotnick, *supra* note 37; Shannon P. Duffy, *Clinton Announces Nominees for Eastern District Court*, LEGAL INTELLIGENCER, Aug. 4, 1997, at 1; David G. Savage, *Bush Picks 11 for Federal Bench*, L.A. TIMES, May 10, 2001, at A1; see also *infra* notes 68-70, 114-16, and accompanying text.

³⁹ See Hatch, *supra* note 34; see also Neil A. Lewis, *Keeping Track: Vacant Federal Judgeships*, N.Y. TIMES, Aug. 11, 1997, at A12. Analogous are President Bush's submission of rather few additional nominees by June 2001 and Senator Leahy's apparently

Neither administration proffered designees for every opening, which would have permitted it to pressure the Judiciary panel and the Senate, although there was little reason to provide more individuals than Hatch and Leahy had suggested they would consider.⁴⁰ In 1997 and 2001, both presidents had nominated more persons than the respective Committee chairs had indicated the panel would review. Clinton and Bush also had to balance expediency and careful examination of nominees' capabilities and character, because designees who proved controversial or lacked competence or were unethical might have eroded administration credibility and could have slowed or jeopardized the process.

Particular senators or other political figures from the areas where vacancies arose who proposed individuals to the chief executives may have delayed nominations during 1997 and 2001. For example, in jurisdictions without Senate members from the president's party, designating the officials who were to suggest attorneys or treating demands that senators participate consumed resources. During the Clinton Administration, GOP senators from Arizona and Washington insisted that they be involved and even recommend lawyers.⁴¹ When President Bush was preparing his initial appeals court slate, lack of consultation with the Maryland Democratic senators may have jettisoned one designee's nomination,⁴² and similar circumstances in California seemingly led another candidate to withdraw.⁴³

The Clinton and Bush Administrations are largely responsible for the slow transmittal of nominees.⁴⁴ Insofar as both administrations could

considering unacceptable some nominees included in the May package.

⁴⁰ During 1997, Senator Hatch typically conducted one hearing each month that the 105th Senate was in session for one appellate, and four or five district court, nominees. See *infra* note 48 and accompanying text. Senator Leahy followed a somewhat similar approach during much of 2001. Ringel, *Bush Nominates 18*, *supra* note 36.

⁴¹ See Peter Callaghan, *Senators Agree on Selecting Judges*, NEWS TRIBUNE, Aug. 12, 1997, at B1; Neil A. Lewis, *Clinton Has a Chance to Shape the Courts*, N.Y. TIMES, Feb. 9, 1997, § 1, at 30 [hereinafter Lewis, *Clinton Has a Chance to Shape the Courts*]; see also 143 CONG. REC. S2538-41 (daily ed. Mar. 19, 1997) (statement of Sen. Biden) (saying GOP senators may have so intimidated).

⁴² See David L. Greene & Thomas Healy, *Bush Sends Judge List to Senate*, BALT. SUN, May 10, 2001, at 1A; Lewis, *Washington Talk*, *supra* note 33; see also *infra* note 118 and accompanying text.

⁴³ See Jean O. Paso et al., *Cox Gives up Shot at Judgeship*, L.A. TIMES, May 26, 2001, at A1; Henry Weinstein, *Rep. Cox Called Likely Judicial Nominee*, L.A. TIMES, Apr. 5, 2001, at A1; see also Savage, *supra* note 38.

⁴⁴ See, e.g., Helen Dewar, *Confirmation Process Frustrates President; Clinton Wants Senate GOP to Pick Up Pace*, WASH. POST, July 25, 1997, at A21; Greg Pierce, *Clinton vs. Clinton*, WASH. TIMES, Aug. 12, 1997, at A6; *President's Counsel Quits*, N.Y. TIMES, Dec. 12, 1996, at B22; Savage, *supra* note 38.

have encouraged senators and other political officers to speed their recommendations for the presidents, Executive Branch staff might have done more or been frustrated by the “start-up” costs of creating an administration. Illustrative was the time each president spent assembling a Justice Department.

In short, Clinton and Bush discharged their nomination duties rather similarly in 1997 and 2001. To be sure, the administrations did not rely on identical practices, but the differences were merely of degree. Both chief executives could also have anticipated or remedied some problems experienced by deriving lessons from previous selection endeavors, although certain difficulties might be inherent in the process.

(2) ABA Committee

Throughout the 104th Congress, the American Bar Association (ABA) Standing Committee on Federal Judiciary, which has rated candidates' qualifications since the mid-twentieth century, continued to provide that valuable service.⁴⁵ Nevertheless, Senator Hatch expressed mounting concern about ABA participation and, in February 1997, he terminated formal Bar Association involvement with the Senate, although President Clinton relied upon the entity's rankings for his entire second term.⁴⁶ In March 2001, the Bush Administration correspondingly informed the ABA that President Bush would not seek its input before tendering nominations.⁴⁷

(3) Confirmation Process

During 1997 and 2001, the Senate Judiciary Committee bore partial responsibility for slowed appointments principally by failing to investigate, hold hearings for, and vote on additional nominees. For

⁴⁵ For the proposition included in the text as well as the notions that the ABA is overly political and too slow, see MILLER REPORT, *supra* note 2, at 5-6, 8, 11. See generally AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON FEDERAL JUDICIARY — WHAT IS IT AND HOW IT WORKS (1983) available at <http://www.abanet.org/scfedjud/background.html>.

⁴⁶ See, e.g., Terry Carter, *A Conservative Juggernaut*, A.B.A. J., June 1997, at 32; N. Lee Cooper, *Standing Up to Critical Scrutiny*, A.B.A. J., Apr. 1997, at 6.

⁴⁷ See Letter from Alberto Gonzales, White House Counsel, to Martha Barnett, ABA President (Mar. 22, 2001); see also Laura Little, *The ABA's Role in Prescreening Federal Judicial Candidates*, 10 WM. & MARY BILL RTS. J. 37, 37 (2001). Democrats' insistence on ABA input led to more delay, but the future influence that the ABA will have is unclear. See Senate Judiciary Comm.: Hearings on Judicial Nominations, 107th Cong. (Feb. 26, 2002) (statement of Sen. Leahy). See generally Jonathan Groner, *ABA Adjusts to Role on Judges*, LEGAL TIMES, Aug. 5, 2002, at 10.

instance, the panel normally held a hearing in which one appellate court nominee and four or five district court designees testified each month of the 105th Congress's initial session and during much of the Second Clinton Administration. However, the committee did not invariably adhere to the schedule; and the Senate had confirmed only nine judges by early September 1997.⁴⁸ President Bush and other observers similarly criticized the Senate for failing to hold enough hearings, particularly for appeals court nominees, and for approving a mere 28 judges during 2001, although the Committee apparently operated better and had conducted hearings for all district court designees by spring 2002.⁴⁹

The few 1997 appointments might be ascribed to inadequate Committee resources and to politics. For example, Senator Hatch resolved the ongoing controversy about the ABA. Republican Senate members discussed the confirmation responsibilities of the panel, its chair and specific senators, but ultimately maintained the status quo.⁵⁰ These disputes consumed resources that could have been devoted to approving judges. The comparatively few confirmations in 2001 might similarly have resulted from the panel's commitment of deficient resources to the process and from politics.⁵¹ Senator Leahy did invoke special measures to expedite review, namely exceptional hearings during the August recess.⁵² Insofar as particular Democratic members delayed nominees, they could have been "paying back" the GOP for its slowed

⁴⁸ See Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741 (1997). Senator Joseph Biden (D-Del.), who served as Committee chair from 1987 until 1994, claimed that there were two hearings each month in his tenure. See 143 CONG. REC. S2538, S2539 (daily ed. Mar. 19, 1997).

⁴⁹ 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. Most controversial were the rejection of Judges Priscilla Owen and Charles Pickering on 10-9 party-line votes after contentious hearings and debate. See 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; Neil A. Lewis, *First Punch in the Revived Bench-Tipping Brawl*, N.Y. TIMES, Mar. 16, 2002, at § 1, p. 35.

⁵⁰ See sources cited *supra* note 26; see also *supra* note 45 and accompanying text.

⁵¹ I rely here on the *Symposium On The Judicial Appointments Process*, 10 WM. & MARY BILL RTS. J. 1, 1-176 (2001); Senate Judiciary Comm.: Hearings on Judicial Nominations, *supra* note 47 (Feb. 26, 2002) (statement of Sen. Leahy), (Mar. 19, 2002) (statement of Sen. Hatch); Jonathan Ringel, *Picking Judges: The Art of the Deal*, THE RECORDER, Apr. 30, 2001, at 1; Ringel, *Bush Nominates*, *supra* note 36; William Safire, *Battle of the Blue Slips*, N.Y. TIMES, May 10, 2001, at A33.

⁵² See Senate Judiciary Comm.: Hearings on Potential Judicial Nominations (Aug. 22 & Aug. 27, 2001); see also Neil A. Lewis, *Democrats Are Pushed on Judicial Nominees*, N.Y. TIMES, Oct. 21, 2001, at § 1A, p. 22.

treatment of Clinton designees.⁵³ Moreover, the May determination of Senator James Jeffords (R-VT) to assume independent status meant that the Senate did not conclude an organizational agreement until July, which postponed the process' institution and felicitous operation.⁵⁴

In fairness, public officials who have life tenure and exercise the great power of the United States warrant deliberate consideration to insure that they are qualified, while appropriately balancing nominee scrutiny and prompt processing is subtle and complex. Senator Hatch claimed he preferred to discharge this obligation with substantial care, but politics apparently contributed as much as caution to delayed confirmation.⁵⁵

Senator Lott and the Republican leadership seemed to be more responsible for slowed consideration during 1997. The Senate had approved only nine judges by September of that year, although the Judiciary Committee had voted favorably on numerous others and sent their names to the floor.⁵⁶ Some observers believe Senator Daschle and Democratic leaders behaved similarly in 2001.⁵⁷ The pressures imposed by other critical business as well as the chamber's unanimous consent procedure may explain certain delays in placing nominees with panel approval on the Senate calendar and according them floor debates and votes.

⁵³ See, e.g., Jess Bravin, *Aid Bill is Stalled By Bid to Force Votes on Judges*, WALL ST. J., Oct. 17, 2001, at A16; Paul A. Gigot, *How Feinstein is Repaying Bush on Judges*, WALL ST. J., May 9, 2001, at A26; Hunt, *supra* note 49; Neil A. Lewis, *Party Leaders Clash in Capitol Over Pace of Filling Judgeships*, N.Y. TIMES, May 10, 2001, at A33.

⁵⁴ See *supra* note 33. The presidents were also responsible because, in early 1997 and 2001, each tendered few names, some of whom the chair or his colleagues opposed, and sent others irregularly, thus slowing the process. However, Hatch's claim that he lacked nominees to process seemed unconvincing, as delay also resulted from the few hearings for, and votes on, nominees and senators' opposition. Similarly, by the conclusion of 2001, Bush had furnished enough names, but that may have been too late. See *supra* notes 36, 39-40 and accompanying text.

⁵⁵ Hatch faced conflicts in Senate traditions and obligations to GOP senators who opposed activist judges. He did criticize opposition to some nominees and resist the challenge to Senate traditions, and the 1997 record resembled some in prior similar periods. See 143 CONG. REC. S2538-41 (daily ed. Mar. 19, 1997); see also 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; Neil A. Lewis, *Republicans Seek Greater Influence in Naming Judges*, N.Y. TIMES, Apr. 26, 1997, at 1; Novak, *supra* note 34. But see *supra* text accompanying note 49.

⁵⁶ This dynamic was similar to Republican consideration of nominees during the 1996 election year. See Hatch, *supra* note 34; 143 CONG. REC. S8041, S8045 (daily ed. July 24, 1997) (statement of Sen. Leahy); see also Goldman & Slotnick, *supra* note 37, at 257 (recounting 1996 treatment); Tobias, *supra* note 48 (same).

⁵⁷ See David Savage, *Bush's Nominees Go 28 for 80 in Senate*, L.A. TIMES, Dec. 31, 2001, at A12.

However, the small number of judges confirmed in 1997, particularly as contrasted with earlier periods, suggests that considerable responsibility could be assigned the Senate majority leadership and its inability to schedule floor votes. At the 105th Congress' outset, Lott pledged to evaluate assiduously Clinton nominees.⁵⁸ That spring, Senator Leahy, who was then the Judiciary Committee ranking minority member, and additional Democrats responded by explaining how they had facilitated selection in GOP presidencies by calling for floor debate and votes on nominees.⁵⁹

(4) Nomination and Confirmation

In 1997 and 2001, some Executive Branch and Senate employees who worked on appointments may not have appreciated the problem's gravity, as manifested in the uneven pace of nominations and of Committee consideration. Numerous observers, including senators, asserted that the present difficulty and much delay were animated primarily by politics and even by concerns related to nominees' political views. For example, in 1997, Senators Joseph Biden (D-DE) and Paul Sarbanes (D-MD) claimed that their Republican colleagues were politicizing selection and modifying 200 years of tradition.⁶⁰

A project some observers considered political and which implicated the current dilemma and slow processing was the effort of Senator Charles Grassley (R-IA) to assess how regional circuits use and distribute judicial resources.⁶¹ For instance, his subcommittee held hearings to ascertain if the appeals courts needed additional positions or even their existing complements.⁶² Perhaps most significant to the issues treated in

⁵⁸ See Lewis, *Clinton Has a Chance to Shape the Courts*, *supra* note 41. See generally Gest et al., *supra* note 55; Novak, *supra* note 34.

⁵⁹ Senators Biden and Sarbanes urged that all nominees have floor votes. See 143 CONG. REC. S2538-41 (daily ed. Mar. 19, 1997). When Lott threatened delay, Leahy recounted nominees, with bipartisan support and unanimous panel votes, to courts under pressure. *Id.* at S5653 (daily ed. June 16, 1997) (statement of Sen. Leahy).

⁶⁰ *Id.* at S2538, S2541. Biden even said the GOP was attempting to prevent Clinton appeals court appointments. *Id.* at S2538. Others offered similar ideas. Professor Sheldon Goldman said "a newly-elected president has [never] faced this sort of challenge to his judicial nominations," while Professor Geoffrey Stone found the GOP actions irresponsible. See Gest et al., *supra* note 55 (quoting both professors).

⁶¹ See Charles E. Grassley, Chairman's Report on the Appropriate Allocation of Judgeships in the United States Courts of Appeals (1999) [hereinafter Grassley's Report]; Tobias, *supra* note 48.

⁶² See, e.g., Conserving Judicial Resources: Considering the Appropriate Allocation of Judgeships in the U.S. Court of Appeals for the Seventh Circuit Before the Sen. Judiciary Subcomm. on Admin. Oversight & the Courts, 105th Cong. (June 25, 1998); Conserving

this essay was Chief Judge Martin's written statement, in which he asserted the Sixth Circuit could operate better with several more members but was "functioning effectively and efficiently."⁶³ It was working well in part through "practices designed to enhance [the tribunal's] efficiency and improve" justice's administration and "heavy reliance on visiting judges [that he warned] can lead to instability and unpredictability in the law of the circuit."⁶⁴ Senator Grassley issued a report which found that few courts required new positions and that the Sixth Circuit should have no additional judgeships until the tribunal "takes alternative approaches to manage its caseload efficiently" by, for example, "channeling more work to staff counsel and by granting oral argument only [when] truly necessary."⁶⁵

The proper employment of appellate court resources is a legitimate Senate concern. However, this endeavor may have delayed appointments to regional circuits, which have experienced large percentages of openings, numerous judicial emergencies, and mounting dockets.⁶⁶ Moreover, lawmakers have not created any appeals court judgeships for twelve years, even though the Judicial Conference has recommended that Congress authorize numerous positions, including two for the Sixth Circuit. The entities based this proposal on expert, conservative calculations and carefully assembled empirical information regarding dockets and workloads.⁶⁷

Judicial Resources: Considering the Appropriate Allocation of Judgeships in the U.S. Court of Appeals for the Fourth Circuit Hearing Before the Sen. Judiciary Subcomm. on Admin. Oversight & the Courts, 105th Cong. (Feb. 5, 1997). Chief Judge Martin regretted the "press of case related duties [did] not permit [him] to attend the hearing" on the Sixth and Seventh Circuits but submitted a "written statement for inclusion in the record." See Letter from Boyce F. Martin, Jr., Sixth Circuit Chief Judge, to Sen. Charles Grassley, Chair, Senate Judiciary Subcomm. on Admin. Oversight & the Courts (June 19, 1998); see also Statement of Chief Judge Boyce F. Martin, Jr., Before the Subcomm. on Admin. Oversight & the Courts (June 25, 1998) [hereinafter Statement of Chief Judge Boyce F. Martin, Jr.].

⁶³ See Statement of Chief Judge Boyce F. Martin, Jr., *supra* note 62, at 1. The practices were staff screening of cases, alternatives to dispute resolution, opinions from the bench as well as telephonic oral arguments in some cases and waivers in others. *Id.* at 3.

⁶⁴ *Id.*

⁶⁵ See Grassley's REPORT, *supra* note 61; see also Analysis of the Sixth Circuit 1, 4 (providing quoted material and view that some judges opposed more positions) [hereinafter Sixth Circuit Analysis]; Tobias, *supra* note 48, at 749-50 (finding that many judges on several of regional circuits opposed increasing courts' judicial complements).

⁶⁶ Twenty-five seats were open. See THE THIRD BRANCH, Aug. 1997, at 5; VACANCIES IN THE FEDERAL JUDICIARY (1997). For data on docket growth, see POSNER, *supra* note 27, at 58-64; LONG RANGE PLAN, *supra* note 16, at 10.

⁶⁷ Tobias, *supra* note 48, at 753 (describing proposal as conservative); see also S.1145, 106th Cong. (1997) (providing judgeships bill); 143 CONG. REC. S2538, S2540 (daily ed. Mar. 19, 1997) (statement of Sen. Biden) (claiming that Conference documented needs to fill

Rather similar developments attended selection in 2001. For example, three of the eleven appellate court nominees forwarded by Bush during May received confirmation that year.⁶⁸ Senator Leahy and other Democrats, such as Senator Charles Schumer (D-NY), publicly announced that the Senate would accord prompt approval to designees they found capable and politically moderate.⁶⁹ For instance, the Senate easily confirmed Judge Roger Gregory and Judge Barrington Parker, whom President Clinton had named earlier.⁷⁰

Many activities of senators whose party did not control the White House substantiated the assertions that the current problem and delay were politically motivated, in particular by concerns related to nominees' perceived ideological perspectives. Illustrative have been the numerous appellate openings that senators find more important than district courts, because the shrunken Supreme Court caseload and the applicability of regional circuits' decisions to multiple states mean they increasingly serve as courts of last resort for those locales.⁷¹

(5) Prospects for Change

Insofar as certain political phenomena that accompanied appointments in 1997 and 2001 and led to the present dilemma are intrinsic, they might resist amelioration. For example, the evaluation of persistent vacancies indicated that measures which increase efficiency and resources will only limit delay that is not attributable to politics. Nonetheless, the analysis of political factors which constitute the existing problem suggested that public officers might remedy the situation, if they had sufficient political will. Indeed, politics are all that seemed to prevent Presidents Clinton and Bush from expeditiously submitting additional

vacancies and to authorize more judges but GOP urged decommissioning of judgeships); Letter from Leonadis Ralph Mecham, Sec'y, to Sen. Patrick Leahy (May 28, 2002) (urging action on Conference proposals) (on file with author).

⁶⁸ See, e.g., Jonathan Groner, *Placing Bets on Bush Bench*, LEGAL TIMES, May 13, 2002, at 1 [hereinafter Groner, *Placing Bets*]; *supra* notes 35, 49 and accompanying text. But see *infra* notes 69-70, 114-16 and accompanying text.

⁶⁹ See, e.g., Neil A. Lewis, *More Battles Loom Over Bush's Nominees for Judgeships*, N.Y. TIMES, Apr. 7, 2002, at § 1, p. 24; sources cited *supra* note 47; see also *infra* notes 114-16 and accompanying text.

⁷⁰ See Mark Hamblett, *Parker Brings Experience and Intellect to Court*, 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; *Unappealing Judges*, BOSTON GLOBE, Mar. 16, 2002, at A18. Clinton gave 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 A28.

⁷¹ See *supra* note 27 and accompanying text.

candidates with moderate political views and a majority of senators from promptly confirming them.

(6) Effects of the Current Impasse

The current difficulty has created many problems, some of which resemble ones the permanent dilemma fosters.⁷² For instance, the present dilemma has imposed analogous pressures on tribunals and litigants, impacts witnessed in factors, such as judicial workloads. The district courts have substantial civil backlogs, so that individuals and entities must wait years to conclude their cases.⁷³ Moreover, docket increases and vacancies during 1997 compelled Ninth Circuit cancellation of 600 oral arguments, while similar circumstances required the Sixth Circuit to postpone 60 arguments.⁷⁴ In July, the impending crisis, fueled by numerous empty seats and difficulties, led seven national legal organizations to write an open letter requesting that the chief executive and the Senate Majority Leader devote the requisite resources to facilitate selection.⁷⁵ At the end of 1997 and 2001, Chief Justice William Rehnquist, in nearly identical terms, similarly urged both the White House and Senate to expedite confirmation.⁷⁶ The concepts above demonstrate how vacant judgeships can disadvantage millions of people. To the extent that the public finds the existing impasse results from partisan politics, the actions may erode respect for the government, especially presidents and senators.

⁷² See *supra* notes 22-23 and accompanying text.

⁷³ See Gest et al., *supra* note 55; see also Robert Schmidt, *The Costs of Judicial Delay*, LEGAL TIMES, Apr. 28, 1997, at 6 (assessing substantial civil backlogs and additional costs imposed by delayed selection).

⁷⁴ Novak, *supra* note 34; *Chronic Federal Judge Shortage Puts Lives, Justice On Hold*, LAS VEGAS REV.-J., Aug. 13, 1997, at A9 (providing information on 6th Circuit); Bill Kisliuk, *Judges' Conference Slams Circuit-Splitting, Vacancies*, THE RECORDER, Aug. 19, 1997, at 1 (providing information on 9th Circuit).

⁷⁵ See Letter to William J. Clinton, President, from N. Lee Cooper, ABA President, et al., July 14, 1997, reprinted in 143 CONG. REC. S8046 (daily ed. July 24, 1997); see also sources cited *supra* note 46.

⁷⁶ See William H. Rehnquist, *2001 Year-End Report on the Federal Judiciary*, available at <http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html>; William H. Rehnquist, *1997 Year-End Report on the Federal Judiciary*, 30 THE THIRD BRANCH, NEWSLETTER OF THE FEDERAL COURTS 1 (1998) available at <http://www.uscourts.gov/ttb/jan98ttb/january.htm>. Similar ideas appear in *Judicial Nominations Scorecard*, *supra* note 49 and a resolution adopted at the ABA's recent annual meeting. See Jonathan Groner, *ABA: Speed Up Judicial Nomination Process*, LEGAL INTELLIGENCER, Aug. 14, 2002, at 4.

C. Sixth Circuit Developments

The rise and development of the factors which have made Sixth Circuit appointments controversial in some ways resemble and in some ways diverge from the national phenomena discussed above. This court's problems also are comparatively recent and rather complicated. For example, the dispute over the Michigan vacancies appears principally to implicate political infighting among the state's past and current United States senators. However, the controversy about the Ohio positions seems to have national overtones and to be animated partly by interest group concerns regarding the nominees' political views.⁷⁷

Several considerations alone and in combination have meant that the persistent difficulty had little applicability to the Sixth Circuit until the last quarter century. These factors encompassed the court's rather small docket and judicial complement and the relative infrequency with which its seats opened. For instance, as recently as 1975, the Sixth Circuit, like most appellate courts, terminated less than 1,000 appeals (tiny percentages of which were complex); accorded most filings appellate justice; operated with few active judges (9); and encountered rare vacancies that chief executives and senators easily filled.

In the late 1970s, the Sixth Circuit sustained multiplying caseloads and its membership grew to eleven when Congress enacted omnibus judgeships legislation.⁷⁸ Even burgeoning dockets and the concomitant increase in the tribunal's complement apparently had limited effects on appointments during the 1980s. Lawmakers approved four new positions, while President Ronald Reagan promptly nominated, and the Senate expeditiously confirmed, judges for the numerous openings which arose. The court had no empty seats at his administration's end. The longstanding vacancies problem, thus, lacked much historical import for the Sixth Circuit, although it may explain selection over the last several years.

In contrast, the present dilemma seems quite salient. A 1990 statute expanded the tribunal to sixteen members.⁷⁹ Some positions opened in

⁷⁷ See, e.g., Michael Collins, *Approval of Judges is Stalled*, CINCINNATI POST, Nov. 17, 2001, at 1A; Groner, *Placing Bets*, *supra* note 68; Lewis, *supra* note 33. See generally GERHARD, *supra* note 5, at 213-19; sources cited *supra* notes 49, 68.

⁷⁸ See Pub. L. No. 95-486, 92 Stat. 1629-32 (1978); see also 28 U.S.C. § 44 (1994). See generally WILLIAM MCLAUGHLAN, *FEDERAL COURT CASELOADS* (1984). I rely here on GOLDMAN, *supra* note 5, at 285-345.

⁷⁹ See Pub. L. No. 101-650, 104 Stat. 5099 (1990); see also 28 U.S.C. § 44 (1994); Goldman, *supra* note 28; Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*,

the presidency of George H.W. Bush, who experienced problems filling them, especially near his administration's end. Democratic senators holding a majority ascribed the complications to tardy, erratic nomination of people they deemed acceptable, while GOP chamber members alleged Democrats slowed consideration of capable designees because they hoped the Democratic candidate would win the presidential election.⁸⁰ In any event, when Bush departed the White House, the Sixth Circuit had some vacancies.⁸¹

Judicial selection followed a somewhat analogous pattern over the course of the Clinton presidency. For example, the administration realized considerable success, particularly during the initial five years of its tenure. The chief executive rather felicitously appointed to the appellate court numerous well qualified judges, including Eric Clay, R. Guy Cole, Jr., Martha Craig Daughtrey, Ronald Gilman, and Karen Nelson Moore.⁸²

Clinton did encounter difficulty securing confirmation of his nominees in his second term. Indeed, throughout most of 2000, the Sixth Circuit operated with four empty seats for which the administration had proposed three nominees, only one of whom it had suggested early that year. In 1997, the chief executive tendered Helene White, a Michigan Court of Appeals judge, and in 1999 forwarded Kathleen McCree Lewis, an experienced Detroit litigator, but Senator Abraham precluded Judiciary Committee hearings on both nominees.⁸³ In February 2000, Clinton nominated Kent Markus, who had discharged several high-level policy assignments in the Justice Department, for an Ohio seat, and he received Senate treatment similar to that of White and Lewis.⁸⁴ Notwithstanding the administration's endeavors, when Clinton finished his second term, the 16-member tribunal had four vacancies. In 2001, an identical number (4) of active judges correspondingly assumed senior

74 JUDICATURE 294 (1991). *See generally* Tobias, *supra* note 29, at 1270-74.

⁸⁰ *See supra* notes 28-29 and accompanying text.

⁸¹ *See* VACANCIES IN THE FEDERAL JUDICIARY (1992). *See generally* sources cited *supra* note 78.

⁸² For example, Judges Daughtrey and Gilman had rendered distinguished service as Tennessee state court judges, while Judge Cole was a bankruptcy judge. *See* FEDERAL JUDICIAL ALMANAC (2002).

⁸³ *See, e.g.,* Nedra Pickler, *Bush Picks Judge for Appeals Panel*, GRAND RAPIDS PRESS, June 27, 2002, at A15; Jonathan Ringel, *The Battle for the 6th Circuit*, LEGAL TIMES, Nov. 12, 2001, at 8.

⁸⁴ *See* The White House, Office of the Press Sec'y, *President Clinton Nominates Robert J. Cindrich, Kent R. Markus, John Antoon, II and Phyllis J. Hamilton to the Federal Bench* (Feb. 9, 2000); *see also* VACANCIES IN THE FEDERAL JUDICIARY (2001), available at <http://www.uscourts.gov/vacancies/judgevacancy.htm>; Ringel, *supra* note 83.

status.⁸⁵

The numerous Sixth Circuit openings and the significant time that they have lacked occupants may have detrimentally affected its efforts to dispense appellate justice. For example, the Commission on Structural Alternatives for the Federal Courts of Appeals — which recently undertook an evaluation of the appellate system at Congress's request — determined that the Sixth Circuit publishes fewer opinions than most other appellate courts.⁸⁶ The tribunal only publishes opinions in 18 percent of the cases it reviews, which is five points below the national average and one-half the rate provided by four courts.⁸⁷ Moreover, the Commission found that the Sixth Circuit concludes filings less expeditiously from notice of appeal to final resolution than all tribunals save the one which has the biggest caseload. The court also ranks tenth for another indicium and eleventh for two additional criteria that the commissioners employed in calculating time to disposition.⁸⁸ The most recent empirical data that the Administrative Office of the U.S. Courts gathered shows Sixth Circuit resolution times have lengthened and its comparative situation has deteriorated.⁸⁹

The Commission also ascertained that the court depended more heavily on visiting judges over the preceding half-decade period than any other tribunal.⁹⁰ The relatively few published determinations and

⁸⁵ These were Judge Gilbert Merritt, a Democratic appointee, as well as Judges Alan Norris, Eugene Siler, and Richard Suhrheinrich, Republican appointees. See VACANCIES IN THE FEDERAL JUDICIARY (2001), *supra* note 84.

⁸⁶ See Commission on Structural Alternatives for the Federal Courts of Appeals, Working Papers, 93, tbl. 2 (1998); see also Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report (1998). See generally Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L. J. 177 (1999).

⁸⁷ Working Papers, *supra* note 86, at 93, tbl. 8. Chief Judge Martin emphasized: except for appeals resolved from the bench, all cases "terminated on the merits are accompanied by a statement of reasons for the decision. Unlike some of our sister circuits that claim a somewhat higher 'productivity' rate, the Sixth Circuit does not issue one word 'opinions' which simply state that the decision below is 'affirmed.'" Statement of Chief Judge Boyce F. Martin, Jr., *supra* note 62, at 1.

⁸⁸ See Working Papers, *supra* note 86, at 95, tbl. 7. The Sixth Circuit did surpass the system-wide average vis-à-vis the remaining two parameters deployed by the Commission. *Id.*

⁸⁹ See U.S. Courts of Appeals, Median Time Intervals in Cases Terminated After Hearing or Submission, By Circuit During the 12-Month Period Ending Sept. 30, 2001. Indeed, the Sixth Circuit presently resolves cases only a half month faster than the Ninth Circuit, rather than 2.2 months quicker, as the Sixth Circuit did in 1997.

⁹⁰ See Working Papers, *supra* note 86, at 96, tbl. 8. Indeed, only eight of the 168 panels that the appeals court constituted in the 1997 fiscal year were comprised of three active Sixth Circuit appellate judges. See Sixth Circuit Analysis, *supra* note 65, at 3; accord Statement of Chief Judge Boyce F. Martin, Jr., *supra* note 62, at 2 (asserting same).

the slow disposition times are instructive measures of appellate justice and efficacious performance. These measures involve critical process values, such as open court access, while placing substantial reliance on visitors can reduce judges' accountability, visibility and collegiality, limit fairness to litigants, and permit less consistent decisionmaking. Chief Judge Martin eloquently warned the Senate about these issues in the statement prepared at Senator Grassley's behest.⁹¹

The Sixth Circuit does function effectively in terms of certain parameters. For instance, the Commission determined that the tribunal surpasses the nationwide average for provision of oral arguments by ten percentage points.⁹² Chief Judge Martin agreed that the court furnishes "arguments in a greater percentage of our docket than some of our sister circuits [and has] a long tradition of according oral argument unless the parties waive" it.⁹³ He also remarked that the Sixth Circuit performs well, yet could operate better with two additional judgeships, which the Judicial Conference concluded its caseload supported.⁹⁴ Moreover, the 1999 report assembled by the Senate Judiciary Subcommittee on Administrative Oversight and the Courts ascertained the tribunal functions efficiently and needs no more positions, while it noted that new seats should be created only after the court institutes alternative techniques to manage the circuit docket efficiently. Two examples that would increase efficiency are delegating greater responsibility to the tribunal's staff counsel and not permitting oral argument unless clearly warranted.⁹⁵

The Senate evaluation praised the court for instituting the practices meant to increase efficiency and enhance the administration of justice, which Chief Judge Martin documented in his written statement. The evaluation also lauded the "hard work of the Sixth Circuit's active and senior judges."⁹⁶ The study's recommendation that the tribunal depend

⁹¹ See *supra* note 62 and accompanying text; JUDITH MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 9-12 (1993) (discussing real or perceived stress on courts); see also Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1466-71 (1987) (assessing numerous, important process values).

⁹² See Working Papers, *supra* note 86, at 93, tbl. 2.

⁹³ See Working Papers, *supra* note 86, at 93, tbl.2; Statement of Chief Judge Boyce F. Martin, Jr., *supra* note 62, at 1. The Senate report found that the court's "policy of granting oral argument in so many cases significantly increases [its] workload" which could be reduced by doing so only when "truly necessary." Sixth Circuit Analysis *supra* note 65, at 1, 4.

⁹⁴ See Statement of Chief Judge Boyce F. Martin, Jr., *supra* note 62, at 4-5.

⁹⁵ Sixth Circuit Analysis, *supra* note 65, at 1, 3.

⁹⁶ See Sixth Circuit Analysis, *supra* note 65, at 2; Statement of Chief Judge Boyce F.

more on staff counsel and grant fewer oral arguments, however, could erode judicial accountability and visibility, increase bureaucratization and restrict court access, sentiments which Chief Judge Martin trenchantly articulated:

We have resisted, and will continue to resist, the adoption of shortcut practices, such as the issuance of decisions that do not contain an explanation of the rationale of the decision, or increasing the reliance on the use of staff, rather than judges to prepare the decision of the court. We believe that our approach insures that judges will remain accountable for the exercise of their constitutional responsibilities.⁹⁷

Therefore, although certain raw information from the Commission indicates the Sixth Circuit may perform less well than it might, these data are essentially inconclusive and additional material suggests the tribunal operates rather effectively.

D. A Word About State-Specific Developments

The most crucial phenomenon implicating Michigan and Ohio is that few active judges, particularly Republican appointees, from these states now serve on the Sixth Circuit. Michigan GOP members and others who are concerned about the situation should not forget that Senator Abraham shares some responsibility for this circumstance. During the late 1990s, he prevented Judge White and Ms. Lewis from having Judiciary Committee hearings.⁹⁸ The Senator and his Republican colleagues who represent states in the Sixth Circuit, such as Senator Mitchell McConnell (R-KY), may also have stopped Senate consideration of Kent Markus because they hoped George W. Bush would win the 2000 presidential campaign.⁹⁹

Martin, Jr., *supra* note 62, at 3-4.

⁹⁷ See Statement of Chief Judge Boyce F. Martin, Jr., *supra* note 62, at 4. Accord THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL- THE PROBLEMS OF THE U.S. COURTS OF APPEAL 14-30 (1994) (noting ideals for appellate design); POSNER, *supra* note 27, at 26-28; CHRISTOPHER E. SMITH, JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION 94-125 (1995) (discussing growing judicial chambers and bureaucracy). The Senate Subcommittee Study's scope, dearth of empirical data, and political nature are controversial. However, the panel certainly possesses authority to monitor the appellate courts and their allocation of resources, and the subcommittee did attempt to collect some data and seek the views of judges that are informed by experience.

⁹⁸ For developments in the Clinton Administration, see *supra* notes 83-84 and accompanying text.

⁹⁹ The Ohio senators apparently did not participate in this activity, but they may have

After Bush secured election, Senator Levin reportedly met with White House officials to suggest that he might support the GOP administration's nominees for Michigan vacancies if the two individuals proposed by President Clinton received hearings or if President Bush agreed to establish a bipartisan judicial nomination commission.¹⁰⁰ In November 2001, Bush apparently responded by forwarding people for three empty Michigan seats and eight months later he tendered a person for the fourth opening.¹⁰¹ On May 9, 2001, the chief executive nominated two designees for the Ohio vacancies, and the following December submitted a name for the unfilled Kentucky seat.¹⁰² Only the Kentucky nominee has received Senate confirmation thus far.¹⁰³

It is critical that all states situated in every regional circuit have active appellate judges on the court whose chambers are located in the states, even though the Third Branch is not a representative institution. A jurist who is stationed in a specific jurisdiction will often have greater familiarity with its substantive law, which can facilitate disposition of appeals that involve diversity of citizenship,¹⁰⁴ and with the state's legal and other cultures, which may help to reconcile federal and local policies.¹⁰⁵ Those living in a jurisdiction might also be more confident about, and more readily accept, the determinations of a court which has a resident judge. Indeed, when an appellate court includes no member

deferred to it. See, e.g., 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.

¹⁰⁰ See, e.g., *Empty Chairs on the Bench*, *GRAND RAPIDS PRESS*, Nov. 27, 2001, at A12; Carl Levin & Debbie Stabenow, *Bipartisanship Can End Judge Stalemate*, *GRAND RAPIDS PRESS*, Dec. 5, 2001, at A15; Ringel, *supra* note 83 (discussing Sixth Circuit stalemate); Pickler, *supra* note 83 (discussing same).

¹⁰¹ VACANCIES IN THE FEDERAL JUDICIARY (2002), *supra* note 15; VACANCIES IN THE FEDERAL JUDICIARY (2001), *supra* note 84; see also Ringel, *supra* note 83.

¹⁰² See VACANCIES IN THE FEDERAL JUDICIARY (2001), *supra* note 84; Savage, *supra* note 38. On July 29, 2002, the Senate did confirm Judge Julia Gibbons, whom President Reagan had first named to the Eastern District of Tennessee. See *infra* note 116 and accompanying text.

¹⁰³ See *UK Professor Confirmed to Appeals Court*, *LOUISVILLE COURIER-JOURNAL*, Nov. 16, 2002, at 1.

¹⁰⁴ See 135 CONG. REC. S5027 (daily ed. May 9, 1989) (statement of Sen. Hatfield). "State law mastery" has become less critical in light of the comparatively few appeals taken in diversity cases. See, e.g., BAKER, *supra* note 97, at 98 (explaining Ninth Circuit decided 255 diversity appeals and over 5,800 federal question appeals); Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 *EMORY L.J.* 1357, 1373 (1995).

¹⁰⁵ This is the regional circuits' federalizing function. See, e.g., CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 10-13 (5th ed. 1994); John Minor Wisdom, *Requiem for a Great Court*, 26 *LOY. L. REV.* 787, 788 (1980) (arguing circuit splitting and adding judges dilutes federalizing function).

(or too few judges) from a state for an extended time, residents can become detached, and even alienated, from the regional circuits that enunciate a growing body of federal law which covers them. The above ideas will be magnified as docket increases and a shrunken Supreme Court caseload increasingly transform the appellate tribunals into the courts of last resort for their areas.¹⁰⁶ The Senate has long respected the tradition whereby each jurisdiction in a regional circuit has a member serve on the court, while Congress found the notion so important that it recently received codification.¹⁰⁷

In sum, the previous analysis of the permanent vacancies dilemma and of the current dilemma indicates these components might have threatened the justice which the federal appeals courts deliver and that the problems require immediate attention. The Second Part, therefore, canvasses numerous measures which officers in every branch of the federal government could implement to treat the complications.

II. ANALYSIS OF PREFERABLE SOLUTIONS

A. *The Executive Branch and the Senate*

The President and the Senate must make concerted efforts to fulfill their respective selection duties.¹⁰⁸ For instance, the Bush Administration and the upper chamber should attempt to streamline those responsibilities each discharges. They should also balance assessment of nominee competence and character with the necessity for facilitating the confirmation process.

Executive and legislative branch officials must confront politicization's growth and appreciate that attempts to surmount it will prove controversial and could be fruitless. The officials should cooperate, strive to accommodate their different perspectives, and amicably resolve disputes that materialize. The officials must also discontinue certain behavior, such as blaming one another — conduct apparently motivated

¹⁰⁶ See POSNER, *supra* note 27, at 58-64, 80-81, 194-95 (documenting growth of appeals and Supreme Court's shrunken docket); Hellman, *supra* note 27 (documenting Supreme Court's shrunken docket).

¹⁰⁷ See Pub. L. No. 105-119, § 307, 111 Stat. 2493 (1997); 28 U.S.C. § 44(c) (1994).

¹⁰⁸ See *supra* note 4. The persistent dilemma's best solution seems to be approval of enough new seats to accord the bench every judge now authorized because this would avoid numerous theoretical, practical, and legal difficulties. See Tobias, *supra* note 2, at 569-70. Other approaches may only limit effectively irreducible temporal restraints. For exposition of many remedies, some of which apply to the Sixth Circuit, see *id.* at 552-73.

by gamesmanship and near-term political advantage. To the extent politicization hampers appointments and fosters the perception that public officers are subverting the best interests of the judiciary and the nation for immediate, partisan benefit, the actions might diminish respect for the process and its participants.

These notions pertain to Sixth Circuit as well as Michigan and Ohio selection. For example, the chief executive should cooperate with senators throughout the region by informally consulting them before he actually tenders names. The choice of someone for the tribunal's next vacant position affords an excellent opportunity to secure advice from Senate members. Bush should maintain open lines of communication, even after nomination, and redouble efforts to break the Michigan logjam. All senators who represent jurisdictions of the Sixth Circuit should closely confer on significant matters, including whether they will continue to approve judges from the same states as seats become empty. Senators in each jurisdiction must work together and identify an acceptable designee when a vacancy arises. They might also think about establishing an intrastate merit-selection panel, which would be analogous to the Circuit Judge Nominating Commission instituted by President Jimmy Carter, the entity that Michigan's senators proposed,¹⁰⁹ or the district group which the Bush Administration and the California Senate members formed last year.¹¹⁰ That idea may rectify or ameliorate the difficulties in Michigan and Ohio, especially when the chamber remains closely divided.

B. The Executive Branch

The administrations of Bill Clinton and George W. Bush bear certain responsibility for the present openings.¹¹¹ Although Bush has now apparently tendered sufficient, competent designees who possess moderate political perspectives for the Judiciary Committee to consider, he must continue forwarding similar nominees at a pace which will

¹⁰⁹ See, e.g., LARRY C. BERKSON & SUSAN B. CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES* (1980); Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136, 140 (1988). See generally Tobias, *supra* note 28, at 1259-60.

¹¹⁰ See Carla Marinucci, *Feinstein, Boxer Given A Say Over Judges*, SAN FRANCISCO CHRONICLE, Apr. 27, 2001, at A3; Henry Weinstein, *Process of Judge Selection Set Up Courts*, L.A. TIMES, May 30, 2001, at B1.

¹¹¹ In early 1997 and 2001, each tendered few nominees, many of whom were qualified and relatively moderate, but Hatch and Leahy claimed some were not. See *supra* notes 35-38, 41-44 and accompanying text.

expedite panel review. In fairness, he may have exercised caution to avoid those missteps that can undermine a new administration's credibility, slow the process, and even jeopardize appointments.

The chief executive must assess and implement cooperative approaches, as the measures could prove effective. Moreover, he can depend on their previous use, should resort to more confrontational possibilities become necessary. Bush must follow practices that will improve the discharge of administration responsibilities. For instance, the President could facilitate nominations by assembling candidates for all existing and anticipated appellate court vacancies.¹¹² He should also reexamine the decision to abrogate early ABA participation, because this determination has fostered delay.¹¹³ Another conciliatory notion is submitting more people Democrats will find acceptable. For example, the Senate expeditiously confirmed Bush's choice of Judge Barrington Parker, whom Clinton had first placed on the Southern District of New York.¹¹⁴ Elevation is concomitantly a time-honored measure, as senators oppose few district judges nominated for appellate seats.¹¹⁵ Indeed, Judge Julia Gibbons, who is the first person Bush named to the Sixth Circuit, was a Reagan district court appointee.¹¹⁶

The chief executive should at least consider proposing additional capable lawyers with Democratic party affiliations.¹¹⁷ This concept may be productive for tribunals which have substantial dockets and protracted openings and are in jurisdictions that regularly elect Democrats or have two Democratic senators. Illustrative is Maryland, whose senators halted the nomination of a Bush designee because the

¹¹² Bush could enhance nomination and confirmation through consultation with the Committee and with senators and by implementing a merit-selection commission. *See supra* notes 109-10 and accompanying text.

¹¹³ *See supra* notes 46-47 and accompanying text; *see also* Leahy statement, *supra* note 47 (discussing delay in appointment procedure).

¹¹⁴ This happened because Parker had been confirmed once, had Democratic support, and had served as a district judge, which informed analysis of his competence and character. The decision resembled Clinton's elevation of Judge Sonia Sotomayor whom Bush's father had named. *See* Neil Lewis, *After Delay, Senate Approves Judge for Court in New York*, N.Y. TIMES, Oct. 3, 1998, at B3.

¹¹⁵ Reagan, Clinton and Bush, Sr. relied on the technique of elevation. *See* Tobias, *supra* note 48, at 742-43; Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. TIMES, Apr. 10, 1990, at A1; Ruth Marcus, *Bush Quietly Fosters Conservative Trend in Courts*, WASH. POST, Feb. 18, 1991, at A4; *supra* note 114.

¹¹⁶ *See, e.g.*, James Brosnan, *Senate Confirms Gibbons 95-0 for Appeals Bench*, MEMPHIS COMMERCIAL APPEAL, July 30, 2002, at B2; Editorial, *At Last, A Beginning*, CINCINNATI POST, July 31, 2002, at 12A.

¹¹⁷ *See supra* note 38 and accompanying text; *see also supra* notes 38, 114 and accompanying text (discussing other presidents' selection methods).

individual had never practiced there and the President failed to consult them, as well as the Sixth Circuit, with its large caseload and six vacancies.¹¹⁸ Several reasons, principally political differences between the two political parties, explain the numerous "Michigan seats" which are empty.¹¹⁹ For courts that experience increasing dockets and multiple, lengthy openings, which are in states where those who suggest or can stop nominees are stalemated, the chief executive might contemplate exchanges, namely permitting Democratic recommendations of half as many people as Republicans.¹²⁰ Bush could even allow Democrats to propose nominees in return for judgeships legislation and, therefore, inaugurate a bipartisan judiciary, a notion which may resolve the current impasse.¹²¹ He might correspondingly strike an accord with the Judiciary Committee Chair and the ranking minority member on a prearranged number of designees who would secure approval each year.¹²²

If cooperative efforts to improve the process are not successful, the chief executive could also analyze and use rather confrontational techniques. For example, Bush might employ his office as a bully pulpit to blame the Senate minority or to provoke more action by senators, and he could force the question if he took the issue to the public. Analogous measures are the nomination of attorneys for each vacancy or the selective application of recess appointments, practices which might pressure the Senate by publicizing or dramatizing how confirmation disputes and prolonged vacancies can slow justice's delivery. The Clinton recess appointment of Judge Roger Gregory to the Fourth Circuit apparently facilitated his subsequent approval, but this was an unusual circumstance and significant legal, political, and pragmatic factors

¹¹⁸ For analysis of Maryland, see Lewis, *supra* note 33; Carl Tobias, *The Bush Administration and Appeals Court Nominees*, 10 WM. & MARY BILL RTS. J. 103, 110, 114 (2001); *supra* note 42 and accompanying text.

¹¹⁹ See Jonathan Groner & Jonathan Ringel, *Judicial Nominee Horsetrading Heats Up As Confirmation Process Gets Weighed*, AM. LAW MEDIA, Sept. 4, 2001; *Senate Nomination Process Needs Repair*, DETROIT NEWS, Mar. 4, 2002, at A8; *The Federal Court Blockade*, GRAND RAPIDS PRESS, May 12, 2002, at G2.

¹²⁰ Senator Biden suggested that the GOP contemplated a similar "informal agreement" yet claimed this violated a two-century tradition. 143 CONG. REC. S2538, S2541 (daily ed. Mar. 19, 1997); see also sources cited *supra* note 41 (discussing appointment delays). "Horsetrading" judgeships is quite controversial. See Groner & Ringel, *supra* note 119.

¹²¹ See Goldman & Slotnick, *supra* note 37, at 271. President Eisenhower made a similar offer in 1960. See *id.*; see also *supra* note 67 and accompanying text (affording judgeships bill and Judicial Conference proposals).

¹²² I do not urge Bush to use the approaches mentioned in this paragraph, but he should assess them and be pragmatic about confirming judges. Bush might consider how important vacancies are and decide that filling the bench is less critical than specific principles, such as naming the type of judges he prefers.

restrict recess appointments' efficacy.¹²³ Bush has relied on, or threatened the invocation of, these mechanisms, particularly to leverage Democratic senators.¹²⁴ However, the chief executive has cautiously used them and he has voiced concern about preserving a dignified process.¹²⁵

These ideas apply to the Sixth Circuit and states within it. For example, consultation is a cost-free approach on which the President should depend. Insofar as limited consultation, or failure to consider any advice given, fostered submission of several nominees for the "Michigan seats" whom the state's Democratic senators apparently find unacceptable, Bush might broach future designees with those senators or accord their perspectives greater weight.¹²⁶

C. The Senate

All senators must analyze and implement conciliatory approaches because they are as responsible as Presidents Clinton and Bush for the present situation. Republicans should bear in mind that the Democratic Senate actually approved more judges, despite how politicized appointments were, when the GOP occupied the White House.¹²⁷ Democrats might remember that the people may blame them for problems attributable to protracted openings and that Republicans have recaptured the chamber.¹²⁸

The minority, thus, should invoke cooperative techniques. It must be responsive to administration endeavors, with effective consultation, which provides candid, informative views on potential nominees, and expeditious confirmation of all Clinton appointees whom Bush may propose for elevation. Numerous conciliatory measures are also available. For example, when Democratic senators find GOP designees unacceptable, they should recommend more palatable compromise

¹²³ For example, if the Senate had not confirmed Circuit Judge Gregory, what effect would have been accorded the opinions that the jurist authored or joined? *See United States v. Woodley*, 751 F.2d 1008, 1012-14 (9th Cir. 1985) (discussing effect of recess appointments); Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758 (1984).

¹²⁴ *See, e.g.*, sources cited *supra* note 49.

¹²⁵ *See* Neil A. Lewis, *Democrats Are Pushed on Judicial Nominees*, N.Y. TIMES, Oct. 21, 2001, at A1, p. 22; *see also* sources cited *supra* note 49.

¹²⁶ *See* sources cited *supra* notes 98-99, 116. Insofar as the Ohio nominees' perceived political views have prompted interest group opposition and delay, Bush may want to consider submitting more moderate designees and he should be realistic about the influence the groups can wield. *See supra* notes 76, 83 and accompanying text.

¹²⁷ *See supra* note 48 and accompanying text; Hartley & Holmes, *supra* note 25, at 277-78.

¹²⁸ *See* sources cited *supra* notes 33, 49.

candidates.¹²⁹

To the extent that delayed consideration has left seats empty, the Senate leadership and specific senators should employ mechanisms that speed appointments. For instance, the Judiciary Committee might conduct hearings and vote on additional nominees with rather limited scrutiny and perhaps abolish basically ceremonial sessions for those who are not controversial. Insofar as Senator Leahy slowed processing of individuals nominated due to their perceived ideological perspectives, longstanding norms and considerable actual practice since 1990 indicates that persons should receive hearings and panel votes.¹³⁰ The Majority Leader should implement efforts which will facilitate full Senate evaluation. For example, Senator William Frist (R-TN) could provide votes on larger numbers of nominees by scheduling floor consideration soon after he learns about Committee approval. To the extent that disputes over particular designees created delay, the Majority Leader might permit greater floor debate and more final votes on them.¹³¹

Senators must calibrate the necessity for exacting assessment and prompt confirmation, approving nominees who possess the requisite qualifications to be superb jurists. Democrats could examine whether they are overvaluing political views just as GOP Senate members should have eschewed the quixotic venture to ascertain if nominees would be "activist judges."¹³² The concept of advice and consent in Article III contemplates that senators will analyze whether candidates are capable and honest, as well as comprehend and respect separation of powers. However, senators should not slow processing to probe how a nominee, if approved, might resolve individual appeals, because this could

¹²⁹ In 1997, Washington Senators Slade Gorton (R) and Patty Murray (D) agreed on a process to suggest designees. See Callaghan, *supra* note 41. Hatch should reconcile disputes over process and nominees, mediating intractable ones, perhaps with help from Senators Leahy or Daschle.

¹³⁰ See *supra* notes 48, 77 and accompanying text; see also *supra* notes 35-39 and accompanying text. The votes against Judges Owen and Pickering may be "paybacks," but they did receive hearings. See *supra* note 49. Now that Bush has tendered sufficient, acceptable names to facilitate processing, he should receive less criticism.

¹³¹ The Senate confirmation debate on Circuit Judges Merrick Garland, Marsha Berzon and William Fletcher included some candid, healthy interchange. See 143 CONG. REC. S2515-41 (daily ed. Mar. 19, 1997) (Garland); 144 CONG. REC. S11872 (daily ed. Oct. 8, 1998) (Berzon and Fletcher); see also Neil A. Lewis, *After Long Delays, Senate Confirms 2 Judicial Nominees*, N.Y. TIMES, Mar. 10, 2000, at A16.

¹³² See, e.g., Should Ideology Matter?: Judicial Nominations 2001, Hearing Before the Senate Judiciary Subcomm. On Admin. Oversight & the Courts, June 26, 2001; Hearings on Judicial Activism: Assessing the Impact Before the Senate Judiciary Constitution Subcomm., July 15, 1997; 143 CONG. REC. S2515 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch); see also sources cited *supra* notes 25, 47.

jeopardize courts' independence.¹³³

Democrats may also want to think about confirming people whose ability and character would make them fine judges, as Republican senators often so acted when they had a majority and there was a Democratic president.¹³⁴ Some Democrats remain concerned about how the GOP delayed Clinton nominees, while certain Republicans harbor similar resentment over Justice Thomas's bitter confirmation fight and Senate rejection of Judge Bork, behavior which they found animated primarily by opposition to the jurists' substantive decision making.¹³⁵

A number of these notions implicate the Sixth Circuit as well as Michigan and Ohio. Senator Stabenow's 2000 victory has enhanced cooperation within the Michigan Senate delegation. She could even help end the standoff, which has precluded President Bush from filling any of the state's numerous empty seats and which denied the two Clinton nominees Judiciary Committee hearings.¹³⁶ For instance, if Bush suggests one of them, Senators Stabenow and Levin might organize Democratic support for several Bush designees.¹³⁷ Should all Democrats and a few Republicans oppose the two rather controversial Ohio nominees, a similar arrangement may be warranted there.¹³⁸

D. The Judicial Branch

Members of the federal bench have less ability than political branch officials to improve the existing situation because the Constitution assigns the chief executive and the Senate greater responsibility for selection. However, the judiciary could increase efforts to publicize

¹³³ See, e.g., UNCERTAIN JUSTICE POLITICS AND AMERICA'S COURTS 1-75, 121-71, 205-42 (2000). See generally Symposium, *Judicial Independence and Accountability*, 72 S. CAL. L. REV. 311 (1999).

¹³⁴ See *supra* notes 48, 77 and accompanying text; see also *supra* notes 35-39 and accompanying text.

¹³⁵ See Goldman & Slotnick, *supra* note 37, at 256; Melone, *supra* note 5, at 68; Gest et al., *supra* note 55; see also MARK GITENSTEIN, MATTERS OF PRINCIPLE (1992) (chronicling rejection of Bork as judicial appointee because of his subjective rulings); PAUL SIMON, ADVISE AND CONSENT (1992). Democrats could argue that High Court selection is unique and that they rarely so assessed lower court nominees. See 143 CONG. REC. S2538-41 (daily ed. Mar. 19, 1997) (statements of Sen. Biden & Sen. Sarbanes).

¹³⁶ See *supra* notes 83, 98-101 and accompanying text.

¹³⁷ North Carolina has a similar situation. Senator John Edwards (D) delayed blocking Judge Terrence Boyle's Fourth Circuit appointment, until Edwards could discuss with Bush possible nomination of Judge James Wynn, a Clinton nominee. See Matthew Cooper & Douglas Waller, *Bush's Judicial Picks Could Be a Battle Boyle*, TIME, May 21, 2001, at 22.

¹³⁸ See *supra* notes 98-101 and accompanying text.

openings and the severe difficulties that those openings create.¹³⁹ The courts should also develop salutary approaches for facilitating appointments that the president and senators might implement.

Several concepts I explained earlier pertain to the Sixth Circuit. For example, Chief Judge Martin claimed that the tribunal functions well with the present judicial complement but could operate better with a few more positions.¹⁴⁰ A majority of active circuit judges urged Congress to authorize additional seats.¹⁴¹ The court's members positively answered, in the highest percentages, the Commission survey questions whether enlarging the circuit would help the tribunal "avoid a backlog" and "write a statement of reasons for all decisions in nonfrivolous appeals."¹⁴² With all due respect, the small percentage of published opinions which the Sixth Circuit provides, its relatively slow disposition times, and the court's substantial reliance on visiting judges suggest that the tribunal might dispense greater appellate justice or at least work more effectively, were new positions authorized.¹⁴³ Thus, those Sixth Circuit members who oppose expansion may want to reconsider whether the court would function better using additional judges.¹⁴⁴

CONCLUSION

Protracted vacancies can erode the delivery of appellate justice. The difficulty comprises a persistent complication and a current dilemma, which is in essence political and which public officials could remedy if they exercised sufficient political will. The Bush Administration and senators should attempt to expedite and depoliticize appointments. They might cease or reduce criticism of each other, accommodate

¹³⁹ This could increase public awareness of, and may galvanize support to ameliorate, the vacancies problem and perhaps accentuate executive and legislative branch officials sensitivity to the critical need for expedition.

¹⁴⁰ See *supra* notes 63, 94 and accompanying text; see also *supra* note 66 and accompanying text.

¹⁴¹ Some judges did dissent. See Sixth Circuit Analysis, *supra* note 65; Tobias, *supra* note 48, at 749 (explaining process for Judicial Conference recommendations of additional positions).

¹⁴² See Working Papers, *supra* note 83, at 18, 21. The conservative estimates on which the Judicial Conference bases judgeship proposals suggest the court needs new seats. See S.1145, 106th Cong. (1999) (proposing two new Sixth Circuit positions); see also Tobias, *supra* note 48, at 753. But see Grassley's Report, *supra* note 61, at 2-7.

¹⁴³ See *supra* notes 86-91 and accompanying text.

¹⁴⁴ These are disputed, unresolved issues. See *supra* notes 63-67, 86-97 and accompanying text. Of course, the authorization of new positions will prove to be an empty gesture, unless judges can be appointed to the seats.

partisan disagreements, and ameliorate the existing problem for the benefit of the courts and the country. The Senate Majority and Minority Leaders, the Judiciary Committee Chair as well as Attorney General John Ashcroft and White House Counsel Alberto Gonzales should lead this endeavor.

Senators who represent each jurisdiction located in the Sixth Circuit must facilitate cooperation there, among themselves and with President Bush. The election of the 108th Senate could represent a new beginning and facilitate greater cooperation between the chamber and the chief executive. If senators from Sixth Circuit states and the President consult on the above ideas, they can enhance the federal appeals court appointments process in these jurisdictions, the Sixth Circuit, and perhaps the nation.
