

## FILLING THE JUDICIAL VACANCIES IN A PRESIDENTIAL ELECTION YEAR

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*In this essay, Professor Tobias responds to Professors Gerhardt and Painter, praising their work and providing further suggestions for how the judicial nominations process might be improved. The essay begins with a brief examination of judicial selection problems that have arisen since the failed nomination of Judge Robert Bork in 1987. Finding that partisan politics have frustrated the nomination process for a quarter century, Professor Tobias engages in a critical analysis of President Barack Obama's efforts to make improvements. He first explains the changes that the Obama administration has implemented and then critically analyzes the benefits and failings of those changes. While Professors Gerhardt and Painter focus on the deterioration of the "Gang of 14" and propose means of reinvigorating its mission, Professor Tobias concentrates on improvements that the executive branch, the Senate, and the judiciary might undertake to expeditiously fill judicial vacancies. Because the judicial nomination process tends to stall during election years, the essay concludes with the recommendation that these suggestions be implemented immediately.*

In "*Extraordinary Circumstances: The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform*," Professors Michael Gerhardt and Richard Painter contribute substantially to

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the understanding of the federal judicial confirmation process.<sup>1</sup> The scholars' recent essay carefully traces the origins and development of the "Gang of 14" (or the "Gang"), the senators' articulation of the "extraordinary circumstances" limitation on invoking filibusters—by which the seven Democratic and seven Republican members of the Gang agreed to abide—and the consequent degradation of the confirmation process.<sup>2</sup> Detecting that subsequent developments have apparently limited the Gang's relevance and undermined, if not eviscerated, the meaning of the "extraordinary circumstances" idea, the writers suggest procedures that individual Senate members "should consider following in assessing and voting on judicial nominations."<sup>3</sup> The scholars conclude by offering a number of justifications which support their proposal.<sup>4</sup>

Professors Gerhardt and Painter deserve substantial credit for identifying the grave problems that attend the modern judicial confirmation process, for developing an efficacious solution to those difficulties, and for adducing support for their cogent recommendation. Many observers of the contemporary appointments process, including executive branch officials, senators, judges, and scholars of law and political science, concur with the authors' trenchant contentions that the confirmation process is deeply flawed, if not broken, and that there is a desperate need to remedy or to ameliorate the present deficiencies.<sup>5</sup> For example, since August 2009, the federal appellate and district courts have experienced more than eighty vacancies, which is approximately ten percent of the judgeships that Congress has authorized, and those

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1. Michael Gerhardt & Richard Painter, "Extraordinary Circumstances": *The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform*, 46 U. RICH. L. REV. 969 (2012).

2. *Id.* at 970–72.

3. *Id.* at 972. The Goodwin Liu and Caitlin Halligan cloture votes suggest the Gang's relevance has been limited and extraordinary circumstances' meaning has been eroded. See 157 CONG. REC. S3146 (daily ed. May 19, 2011) (voting on Liu); *id.* at S8346 (daily ed. Dec. 6, 2011) (voting on Halligan). The proposal basically applies a presumption that "a majority of 'yes' votes are needed to confirm the nominee" with Judiciary Committee approval, but tolerates delay when objecting senators specifically state legitimate reasons for delay and persuade "at least a substantial minority of their colleagues to vote in support of the same objections." Gerhardt & Painter, *supra* note 1, at 980.

4. Gerhardt & Painter, *supra* note 1, at 980–83.

5. See, e.g., Address Before a Joint Session of Congress on the State of the Union, 2012 DAILY COMP. PRES. DOC. 48 (Jan. 24, 2012) [hereinafter 2012 State of the Union]; John G. Roberts, Jr., *2010 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts), Jan. 2011, at 3; NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 5–8 (2005).

numbers promise to increase during a presidential election year when the judicial selection process has traditionally slowed.<sup>6</sup> Moreover, Professors Gerhardt and Painter have formulated a solution that will apparently be effective and perhaps will rectify or temper the “confirmation wars” that have long troubled, and currently plague, the judicial selection process.<sup>7</sup>

I wholeheartedly endorse, and I anticipate that numerous additional observers of contemporary federal judicial selection will favor, the scholars’ constructive efforts, and I agree with virtually everything that the writers describe and prescribe in their valuable essay. However, as the commentators themselves forthrightly acknowledge, the remedy which Professors Gerhardt and Painter suggest remains only a partial solution and, even if adopted, would probably not become effective until 2013.<sup>8</sup> Therefore, my response to their solution proffers and explores numerous other promising ideas that simultaneously might improve the appointments process immediately across the 2012 presidential election year—especially because the concepts apply in all three branches of the federal government—and that should prove efficacious over the longer term.

The first section of my response provides a brief examination of federal judicial selection’s background and of the dilemma which has arisen, emphasizing developments throughout the administration of President Barack Obama. Finding that accusations, countercharges, partisan bickering, and continuous paybacks have accompanied the process for a quarter century and have become acute during the Obama years, the second part tenders and

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6. Cf. OFF. OF LEGAL POL’Y, DEP’T OF JUSTICE, 112TH CONGRESS—JUDICIAL NOMINATIONS (2012) [hereinafter DOJ OLP 2012], available at <http://www.justice.gov/olp/nominations112.htm>; OFF. OF LEGAL POL’Y, DEP’T OF JUSTICE, 111TH CONGRESS—JUDICIAL NOMINATIONS (2011) [hereinafter DOJ OLP 2011], available at <http://www.justice.gov/archive/olp/nominations111.htm>. Judicial selection has traditionally slowed in presidential election years, and 2012 is not likely to be an exception. See Al Kamen, *And Now a Word from the Disgraced One*, WASH. POST, Feb. 3, 2012, at A16; Carrie Johnson, *Obama Gets High Marks for Diversifying the Bench*, NAT’L PUB. RADIO, Aug. 4, 2011, <http://www.npr.org/2011/08/04/138903866/obama-gets-high-marks-for-diversifying-the-bench>; see also George Packer, *The Empty Chamber*, NEW YORKER, Aug. 9, 2010, at 38, 47.

7. Gerhardt & Painter, *supra* note 1, at 967–69; see also Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 874–75 (2005) (explaining that the confirmation wars resulted from the ideological divide between Democratic and Republican party activists). See generally Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667 (2003) (explaining how the combative nature of judicial selection makes the process like war).

8. Gerhardt & Painter, *supra* note 1, at 983.

evaluates numerous practices that could help fill the many judicial vacancies in 2012 when presidential, Senate, and House of Representatives elections will compound these difficulties.

## I. THE FEDERAL JUDICIAL SELECTION CONUNDRUM

### A. *Judge Bork to President Bush*

Interbranch disagreements that relate to federal judicial nominations may inhere in the regime established, and they date from the nation's founding.<sup>9</sup> However, the process became considerably worse after Circuit Judge Robert Bork's unsuccessful Supreme Court nomination.<sup>10</sup> Allegations and recriminations, incessant paybacks, as well as partisan divisiveness, have since troubled selections when the party lacking executive branch control ratcheted up the stakes. For instance, Senate Republicans deployed "pocket vetoes" to slow judicial nominee confirmations during much of President Bill Clinton's tenure,<sup>11</sup> and Democrats invoked filibusters when stalling many nominees whom President George W. Bush selected.<sup>12</sup>

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9. Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587, 587 (2011); see MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 28 (2000); see also *id.* at 67–68 (describing Senate nomination hearings before 1987).

10. MARK GITENSTEIN, *MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT* 330–31 (1992); JEFFREY TOOBIN, *THE NINE* 18–21 (2007).

11. See Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 264, 284 (1999); Brannon Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, WM. & MARY BILL RTS. J., 75, 75, 83 n.58 (2001); Carl Tobias, *Choosing Judges at the Close of the Clinton Administration*, 52 RUTGERS L. REV. 827 (2000).

12. See, e.g., Press Release, White House, Office of the Press Sec'y, President Bush Says Senate Filibuster Decision Is a "Disgrace," Mar. 6, 2003, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/print/20030306.html> (discussing Senate filibuster of Miguel Estrada). See generally Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467 (2011) (discussing the history of the Senate filibuster); Gerard N. Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 303 (2011) (same). There is additional analysis of the period between 1985 and 2006. See SCHERER, *supra* note 5, at 150–51; AMY STEIGERWALT, *BATTLE OVER THE BENCH: SENATORS, INTEREST GROUPS, AND LOWER COURT CONFIRMATION* 73–74, 64–92 (2010).

## B. *Judicial Selection in the Obama Administration*

### 1. Descriptive Analysis

President Obama relied upon a substantial White House Counsel Office<sup>13</sup> and Vice President Joseph Biden's three and a half decade Judiciary Committee experience,<sup>14</sup> assumed principal responsibility for selecting appellate court judges<sup>15</sup> and some responsibility for choosing district court judges,<sup>16</sup> and assigned the Department of Justice (the "DOJ") primary responsibility to prepare nominees for Senate Judiciary Committee hearings and votes as well as upper chamber floor debates and votes.<sup>17</sup> The Chief Executive aggressively consulted Republican *and* Democratic elected officials from jurisdictions with vacancies *before* undertaking official nominations.<sup>18</sup>

Prior to and following nominations, the White House cooperated with Senator Patrick Leahy (D-Vt.), the Judiciary Committee chair; Senator Harry Reid (D-Nev.), the Majority Leader; and their Republican analogues, Senator Jeff Sessions (R-Ala.), the Ranking Member, and Senator Mitch McConnell (R-Ky.), the Minority Leader.<sup>19</sup> This panel quickly investigated nominees, yet the

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13. See generally Sheldon Goldman et al., *Obama's Judiciary at Midterm*, 94 JUDICATURE 262 (2011); Jeffrey Toobin, *Bench Press*, NEW YORKER, Sept. 21, 2009, [http://www.newyorker.com/reporting/2009/09/21/090921fa\\_fact\\_toobin?printable=true](http://www.newyorker.com/reporting/2009/09/21/090921fa_fact_toobin?printable=true); Jon Ward, *White House Beefs Up Legal Staff*, WASH. TIMES, July 21, 2009, at B1.

14. Keith Koffler, *Biden Staff Playing Key Role in Sotomayor Confirmation*, ROLL CALL (May 26, 2009), <http://www.rollcall.com/news/35256-1.html>.

15. The courts of appeals cover multiple states; have fewer, more critical openings; are courts of last resort in virtually all cases; and treat controversial issues. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 79–83 (1996).

16. Carl W. Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 777 (2010) [hereinafter Tobias, *Postpartisan*]; see, e.g., Christopher Cadelago, *Republicans Push Challenge to Redrawn Districts*, SAN DIEGO UNION TRIB., Nov. 3, 2011, at B2 (noting Obama nominated Judge Gonzalo P. Curiel to serve on the U.S. District Court in San Diego); Joe Swickard, *Judge Nominated for District Court*, DETROIT FREE PRESS, Nov. 18, 2011, at A17 (reporting Obama nominated Judge Gerswhin Drain to a seat on the U.S. District Court).

17. Goldman et al., *supra* note 13, at 264; Tobias, *Postpartisan*, *supra* note 16, at 777. The Office of Legal Policy (the "OLP") assumes lead responsibility. See Goldman et al., *supra* note 13, at 264.

18. See sources cited *supra*, note 13. Many officials used merit selection commissions that proposed names which officers sent President Obama. RUSSELL WHEELER & REBECCA LOVE KOURLIS, GOVERNANCE INST. & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *OPTIONS FOR FEDERAL JUDICIAL SCREENING COMMITTEES 2* (2010).

19. See sources cited *supra* note 13. *But see infra* notes 21–29 and accompanying text. Leahy sets hearings and votes, and Reid sets floor action. See Committee on the Judiciary

committee conducted a relatively small number of hearings before the end of 2009.<sup>20</sup> The Grand Old Party (the “GOP”) held over well-qualified consensus nominees’ committee votes for seven days, typically without any, much less persuasive, reasons, but Republicans did agree to report most nominees the subsequent week.<sup>21</sup>

The Senate did not vote on any of President Obama’s appellate or district court judicial nominees until September 2009,<sup>22</sup> partly because Justice Sonia Sotomayor’s appointment process consumed three months during which there was practically no lower court selection activity.<sup>23</sup> That year, Senator McConnell agreed to comparatively few nominee chamber ballots and none before Justice Sotomayor’s confirmation, and the GOP placed holds on myriad well-qualified, noncontroversial candidates.<sup>24</sup> This conduct slowed review and necessitated Democrats’ filing of cloture petitions.<sup>25</sup> Republicans requested substantial debate time and roll call votes for nominees whom they ultimately favored.<sup>26</sup> Numer-

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Rules of Procedure, 157 CONG. REC. S837 (2011) available at <http://www.judiciary.senate.gov/about/committee-rules.cfm> (explaining that the Judiciary Committee Chairman calls meetings and votes); see also CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., FLOW OF BUSINESS: TYPICAL DAY ON THE SENATE FLOOR 2 (2011) (noting that the majority leader sets the agenda on the Senate floor). In 2011, Senator Charles Grassley (R-Iowa) replaced Senator Sessions. *Charles E. Grassley*, WASH. POST, [http://www.washingtonpost.com/politics/charles-e-grassley-r-iowa/gIQAxWx9O\\_topic.html](http://www.washingtonpost.com/politics/charles-e-grassley-r-iowa/gIQAxWx9O_topic.html) (last visited May 1, 2012).

20. See *Hearings for the 111th Congress*, U.S. SENATE COMMITTEE ON JUDICIARY, [http://www.judiciary.senate.gov/hearings/index.cfm?t=congress&c=111&\)=hearings](http://www.judiciary.senate.gov/hearings/index.cfm?t=congress&c=111&)=hearings) (last visited May 1, 2012) (listing only three “judicial nominations” hearings before the end of 2009).

21. Senator Sessions found that most nominees were “fine.” See *Business Meetings for Month of Oct. 2009*, U.S. STATES SENATE COMMITTEE ON JUDICIARY, <http://www.judiciary.senate.gov/hearings/index.cfm?t=month&d=10-2009&p=meetings> (last visited May 1, 2012).

22. See Paul West, *Nomination of Davis Likely to Move Forward*, BALT. SUN, Sept. 11, 2009, at 2A.

23. See Tobias, *Postpartisan*, supra note 16, at 780, 782–83; Alex Leary, *Supreme Court Seat Not Only One Empty*, ST. PETERSBURG TIMES (Florida), Aug. 6, 2009, at 1A.

24. See Doug Kendall, *The Bench in Purgatory*, SLATE (Oct. 26, 2009, 9:34 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/10/the\\_bench\\_in\\_purgatory.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/10/the_bench_in_purgatory.html).

25. 155 CONG. REC. S908–09 (daily ed. Mar. 2, 2010) (Judge Barbara Keenan 99-0 cloture and merits votes); 155 CONG. REC. S11,421–22 (daily ed. Nov. 17, 2009) (Judge David Hamilton cloture vote); *id.* at S10,751–52 (statement of Sen. Cardin). Cloture gives opponents thirty debate hours, devouring scarce time. S. Comm. on Rules & Administration, 112th Cong., Rules of the Senate R. XXII (2011); Burgess Everett, *Rand Paul Blocks Transportation Bill*, POLITICO (Feb. 13, 2012, 7:44 PM), <http://www.politico.com/news/stories/0212/72820.html>.

26. The GOP sought an hour for Judge Beverly Martin and two hours for Roberto Lange, but overwhelmingly approved both in minutes. See 156 CONG. REC. S13, S18 (daily

ous well qualified, uncontroversial nominees, but especially people of color and women, including Fourth Circuit Judges Andre Davis and Barbara Keenan, waited on floor ballots for protracted times, although the court had as many as five vacancies during the period when the nominees were undergoing Senate consideration.<sup>27</sup>

Analogous behavior continued across subsequent years. Most significantly, the Minority Leader continued to infrequently enter time agreements on Senate floor votes, while individual Republican senators kept putting holds on excellent consensus nominees.<sup>28</sup> More specifically, the 2010 approval of Justice Elena Kagan stalled appointments for lower courts, in part explaining why one appellate selection garnered floor consideration across a three-month period, while chamber members only confirmed five 2010 circuit nominees at the year's conclusion and merely one person in late 2011.<sup>29</sup> President Obama has made 181 lower court judicial nominations, while the Senate has approved 2 Supreme Court Justices, 26 appellate court judges, and 110 district court judges.<sup>30</sup>

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ed. Jan. 20, 2010) (voting on Martin) 155 CONG. REC. S10,601, S10,611 (daily ed. Oct. 21, 2009) (voting on Lange).

27. See 156 CONG. REC. S908 (daily ed. Mar. 2, 2010) (holding cloture and merits votes on Judge Keenan's nomination); 155 CONG. REC. S10,754 (daily ed. Oct. 27, 2009) (statement of Sen. Sessions) (stating his concerns about Judge Davis, among other nominees). *But see id.* at S10,753.

28. Carl Tobias, *Where Are All the Federal Judges?: Why 90 Empty Seats Threaten American Justice* CHRISTIAN SCI. MONITOR (Jan. 5, 2011), [www.csmonitor.com/commentary/opinion/2011/0105/Where-are-all-the-federal-judges-why-90-empty-seats-threaten-american-justice](http://www.csmonitor.com/commentary/opinion/2011/0105/Where-are-all-the-federal-judges-why-90-empty-seats-threaten-american-justice).

29. 157 CONG. REC. S8770 (daily ed. Dec. 17, 2011) (statement of Sen. Leahy) (commenting on the unjust delay in filling vacancies in federal courts); 156 CONG. REC. S6971 (daily ed. Aug. 5, 2010) (statement of Sen. Whitehouse); Paul Kane & Robert Barnes, *Senate Confirms Kagan as Justice*, WASH. POST, Aug. 6, 2010, at A1. Jane Stranch and Albert Diaz waited thirteen months even with their GOP senators' support. 156 CONG. REC. S10,667 (daily ed. Dec. 18, 2010) (nominating Diaz); *id.* at S7009, S7016 (daily ed. Sept. 13, 2010) (nominating Stranch). The Senate confirmed thirteen circuit judges in 2010 and nine in 2011. DOJ OLP 2012, *supra* note 6; DOJ OLP 2011, *supra* note 6. In late 2011, the Senate recessed without voting on twenty-one nominees who had Judiciary Committee approval, and the GOP returned eight nominees to President Obama. See 157 CONG. REC. S8769, S8784 (daily ed. Dec. 17, 2011) (returning nominees and recessing); Press Release, Patrick Leahy, Statement of Senator Patrick Leahy on Judicial Nominations (Jan. 23, 2012), available at [http://www.leahy.senate.gov/press/press\\_releases/release/?id=4dfa0646-6f9a-40a6-86a2-eec90db1ec2](http://www.leahy.senate.gov/press/press_releases/release/?id=4dfa0646-6f9a-40a6-86a2-eec90db1ec2).

30. The panel reported 35 circuit and 123 district court nominees. DOJ OLP 2012, *supra* note 6; DOJ OLP 2011, *supra* note 6. Thirteen Clinton district appointees, two magistrate judges, and six state judges comprised President Obama's appellate possibilities, while twenty-seven magistrate judges and thirty-seven state judges constituted trial as-

## 2. Critical Analysis

### a. Benefits

President Obama's judicial selection efforts have produced a number of significant benefits. This White House has surpassed prior administrations vis-à-vis swift nominations of highly qualified candidates, particularly individuals who are diverse in terms of ethnicity, gender, and sexual orientation.<sup>31</sup> Early, persistent consultation with home-state elected officers has prompted the nomination and confirmation of highly competent, uncontroversial candidates, restricting somewhat the incessant divisions and paybacks that have undermined the selection process.<sup>32</sup> Another successful technique has been the nomination of many presently sitting federal and state appellate and trial court judges, whose accessible records have been easily scrutinized by the White House, Federal Bureau of Investigation (the "FBI"), the American Bar Association (the "ABA"), the Senate, and the public, and who bring experience to the bench so they can promptly assist in the disposition of rising dockets.<sup>33</sup> Moreover, these candidates earn strong ratings from the ABA, which has conscientiously evaluated and ranked a plethora of candidates for decades.<sup>34</sup> Most critically, additional cooperation has directly facilitated appointments,

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pirants. DOJ OLP 2012, *supra* note 6; DOJ OLP 2011, *supra* note 6. These numbers and elevation of magistrate judges suggest a career judiciary. Goldman et al., *supra* note 13, at 300; RUSSELL WHEELER, GOVERNANCE STUDIES AT BROOKINGS, THE CHANGING FACE OF THE FEDERAL JUDICIARY 7–9 (2009).

31. See Carl Tobias, *Diversity and the Federal Branch*, 87 WASH. U. L. REV. 1197, 1206–07 (2010); Johnson, *supra* note 6; John Schwartz, *For Obama, a Record on Diversity but Delays on Judicial Confirmations*, N.Y. TIMES, Aug. 7, 2011, at A17.

32. See sources cited *supra* note 25 (ten GOP senators favored cloture because the President's nominees deserve up or down votes); sources cited *supra* note 26 (other examples). Compare *supra* notes 10–15 and accompanying text, with Carl Tobias, *The Federal Appellate Court Appointments Conundrum*, 2005 UTAH L. REV. 743, 773–76 [hereinafter Tobias, *Conundrum*].

33. See, e.g., 157 CONG. REC. S664–70 (daily ed. Feb. 14, 2011) (confirming James E. Graves, Jr. and Edward J. Davila).

34. AM. BAR ASS'N, RATINGS OF ARTICLE III JUDICIAL NOMINEES: 111TH CONG. (2010), <http://www.americanbar.org/content/dam/aba/migrated/scfedjud/ratings/ratings112.authcheckdam.pdf>; AM. BAR ASS'N, RATINGS OF ARTICLE III JUDICIAL NOMINEES: 112TH CONG. (2010), <http://www.americanbar.org/content/dam/aba/migrated/scfedjud/ratings/ratings112.authcheckdam.pdf>; see also AM. BAR ASS'N, STANDING COMM. ON THE FED. JUDICIARY: WHAT IT IS AND HOW IT WORKS 1 (2009) (describing the evaluation process).



while improving citizen regard for the White House, the Senate, the process, and the nominees, as well as court legitimacy.<sup>35</sup>

b. Disadvantages

President Obama's initiatives have provided numerous benefits, even though several features could warrant improvement. A valuable yardstick for measuring the effectiveness of federal judicial selection is the alacrity of confirmations. Slow appointments erode the legitimacy of the federal judiciary by leaving many appellate and district court judgeships empty and delaying access to justice. For example, in 2009, the Senate confirmed merely one dozen nominees.<sup>36</sup>

The Obama Administration bears a measure of responsibility for delayed nominations. Aggressively consulting elected officials and minimizing rampant divisiveness, particularly through evaluating the candidates whom politicians recommended, assembling lawmakers' input, negotiating with elected officers, and choosing possibilities were efficacious, but these activities consumed considerable time.<sup>37</sup>

However, the GOP bears substantial responsibility for slow confirmations. The party held over virtually all nominee committee ballots, ostensibly stalling for partisan benefit.<sup>38</sup> Nonetheless, the floor was the most important bottleneck. The chamber did not vote on six appellate nominees whom the panel reported in 2009, and it only minimally accelerated the pace over subsequent years.<sup>39</sup> Senator McConnell and his GOP colleagues essentially disregarded Senator Reid's importuning; numerous Republican members placed holds on exceptional, noncontroversial nominees and reserved hours for debate, even though the senators only re-

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35. Cf. 156 CONG. REC. S904–07 (daily ed. Mar. 2, 2010) (statement of Sen. Leahy); Tobias, *Conundrum*, *supra* note 32, at 767–68; Dahlia Lithwick & Carl Tobias, *Vacant Stares*, SLATE (Sept. 27, 2010, 6:39 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisdiction/2010/09/vacant\\_stares.html](http://www.slate.com/articles/news_and_politics/jurisdiction/2010/09/vacant_stares.html).

36. DOJ OLP 2011, *supra* note 6; see Scherer, *supra* note 9, at 625 (defining legitimacy).

37. President Obama did not always nominate expeditiously or consult. Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2190–91 (2011) [hereinafter Tobias, *Vacancies*]. Senate use of merit selection commissions to review and send names, assessing and choosing picks, and negotiating consumed time. *See id.* at 2191.

38. *See supra* note 21 and accompanying text.

39. *See* Tobias, *Vacancies*, *supra* note 37, at 2180–84.

quired minutes.<sup>40</sup> Democrats rarely pressed Senate ballots or deployed cloture to force votes, although that behavior would have ultimately proved counterproductive because it would have inflamed Republicans and would have enhanced delay.<sup>41</sup>

This partisan activity imposed quite a few disadvantages. The conduct protracted appellate and district court appointments, reduced already declining civility and accentuated the confirmation wars. The behavior made numbers of nominees place their lives on hold, prevented a multitude of excellent prospects from considering judicial service, deprived courts of necessary judicial resources—thus slowing case resolution—and decreased citizen respect for the selection process and the federal government.

In short, the Obama Administration has instituted numerous procedures that facilitated the nomination and confirmation of many well-qualified, uncontroversial individuals. However, the Senate has not expeditiously processed a number of these nominees. Professors Gerhardt and Painter afford one salient remedy for the problem, but the authors' proposal remains somewhat narrow and probably would not take effect before 2013.<sup>42</sup> Therefore, the concluding segment of this response canvasses mechanisms that the executive branch, the Senate, and the judiciary can effectuate which should facilitate appointments in a presidential election year.

## II. SUGGESTIONS

### A. *The Executive Branch*

There are numerous measures which President Obama and the executive branch could implement that would help to lower the vacancy rate on the federal appellate and district judiciary, a statistic which has remained above ten percent for nearly the entire

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40. See *supra* notes 23–26 and accompanying text. Holds were traditionally rare. See James Oliphant, *Obama Losing Chance to Reshape Judiciary*, L.A. TIMES, Mar. 15, 2010, at A1; Nan Aron, *GOP Perfects Art of Stalling*, POLITICO (Feb. 2, 2010, 5:12 AM), <http://www.politico.com/news/stories/0210/32342.html>; Letter from Prof. Bruce Ackerman, Sterling Prof. of Law & Political Science, Yale Univ., et al., to Barack Obama, U.S. Pres. (Feb. 24, 2010), available at [http://media.washingtonpost.com/wp-srv/politics/documents/letter\\_topräsidentobama022410.pdf](http://media.washingtonpost.com/wp-srv/politics/documents/letter_topräsidentobama022410.pdf). For debate time, see *supra* note 26.

41. See *supra* notes 23–29 and accompanying text.

42. Gerhardt & Painter, *supra* note 1, at 979–80.

period since August 2009.<sup>43</sup> The Obama Administration has already instituted a number of these practices; however, certain techniques could be effectuated with greater intensity, clarity, or alacrity, and there are some ideas which the executive branch has apparently not entertained or at least has yet to implement. The White House should generally proceed as before, although it may want to consider and institute the alterations suggested below. For example, the administration might reevaluate the procedures that the executive branch has deployed, better calibrate or omit less productive devices, redouble certain actions, canvass and employ constructive solutions that were applied earlier, and survey, and perhaps rely on, innovative endeavors.

Some observers have criticized President Obama for nominating insufficient appellate and district court candidates with the requisite speed.<sup>44</sup> These criticisms may have enjoyed some validity during 2009, the first year of the Obama Administration. However, since 2010, the President has steadily nominated more than enough well-qualified appellate and district court nominees to facilitate expeditious Senate processing.<sup>45</sup> For example, the President nominated twice as many individuals during 2010 as he had in 2009, as well as three candidates on the day that the 112th Senate convened for its second session and two the following week.<sup>46</sup>

Nonetheless, the White House may want to accelerate the pace by sending greater numbers of outstanding consensus appellate and district court nominees more quickly. The administration might specifically achieve these goals through enhancing many aspects of the nominating process. For example, it should continue cultivating relationships and consulting with home-state politicians and should continue to do so more vigorously and quickly. The White House must correspondingly capitalize on the politicians' instructive advice, keep deferring to elected officials when indicated, as well as continue elevating judges and anticipating Supreme Court vacancies. The administration could also expedite FBI background checks as well as White House and DOJ nominee

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43. DOJ OLP 2012, *supra* note 6.

44. *See, e.g.*, 158 CONG. REC. S558 (daily ed. Feb. 13, 2012) (statement of Sen. Grassley); 155 CONG. REC. S10,753–54 (daily ed. Oct. 27, 2009) (statement of Sen. Sessions).

45. DOJ OLP 2012, *supra* note 6; DOJ OLP 2011, *supra* note 6.

46. *See* DOJ OLP 2012, *supra* note 6; DOJ OLP 2011, *supra* note 6.

review.<sup>47</sup> The executive branch should keep deemphasizing the role that political ideology plays and emphasizing merit by selecting nominees who possess balanced temperament and who are extremely intelligent, diligent, independent, and ethical.

The White House should continue attempting to work closely with Republican political officers who participate in the selection process, especially by accommodating officials who cooperate with Democrats. For example, President Obama has solicited, and often followed, the guidance provided by GOP politicians, nominating quite a few individuals whom Republican senators recommended.<sup>48</sup> The administration also might want to consider nominating more candidates whom Republicans can support, perhaps including additional selections whom GOP members propose or even some district court judges whom Republican presidents, namely George W. Bush, appointed.<sup>49</sup> Those ideas may be effective for specific courts plagued by several protracted openings or gigantic dockets or that encompass jurisdictions—namely Arkansas, Oklahoma, South Carolina, and Texas—which have pairs of Republican senators.<sup>50</sup>

President Obama has vigorously attempted to employ conciliatory approaches through intensive consultation and broad transparent communications.<sup>51</sup> The White House should keep following measured, nuanced policies because mistakes will undercut credibility and slow judicial appointments. President Obama, whose touchstone is bipartisanship, should continue adopting conciliato-

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47. See Goldman et al., *supra* note 13 at 265; Tobias, *Postpartisan*, *supra* note 16, at 777 n.55.

48. See, e.g., 157 CONG. REC. S8771 (daily ed. Dec. 17, 2011) (discussing the nomination of Adalberto Jordán); 156 CONG. REC. S7009 (daily ed. Sept. 13, 2010) (discussing the nominations of Scott Matheson and Mary Murguía); see also *infra* notes 49–50 and accompanying text.

49. Arizona Republican Senators John McCain and Jon Kyl suggested Judge Murguía, while South Carolina Republican Senator Lindsey Graham suggested George W. Bush appointee Judge Henry Floyd. *Confirmation Hearing on Federal Appointments: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 7–8 (2010); see James Rosen, *Floyd Tapped for Appeals Court*, STATE, Jan. 27, 2011, at 11; Carol Williams, *Judge Confirmed to 9th Circuit*, L.A. TIMES, Dec. 23, 2010, at AA5 (reporting confirmation of Murguía).

50. See Williams, *supra* note 49 (providing an example of a state with two Republican senators). For long openings, see Tobias, *Vacancies*, *supra* note 37, at 2184–85. For courts with long openings and many cases in states where officials differ, compromises or “trades” may work, but are controversial. 143 CONG. REC. S2541 (daily ed. Mar. 19, 1997) (statement of Sen. Biden); GERHARDT, *supra* note 9, at 143–53.

51. See *supra* notes 13–19 and accompanying text.

ry endeavors. Rigorous consultation and the exceptional nominees whom he has already selected are instructive illustrations; their competence, mainstream perspectives, and diverse backgrounds suggest why comparatively few provoked controversy.

However, Republican politicians have not always cooperated. For example, the GOP automatically held over votes for one week in the Senate Judiciary Committee and invoked the unanimous consent procedure to halt or stymie floor votes.<sup>52</sup> Moreover, Senator McConnell has rarely entered into time agreements for conducting floor votes.<sup>53</sup> One recent, dramatic example of Republican failure to cooperate was the Minority Leader's unwillingness to permit floor votes before the first session of the 112th Senate recessed on any of the twenty-one nominees with Senate Judiciary Committee approval because he lacked sufficient White House assurances that President Obama would not employ recess appointments.<sup>54</sup> Other examples were the floor hold imposed on Eleventh Circuit nominee Adalberto José Jordán, which necessitated a February 13, 2012 cloture vote of 89-6, and a GOP senator's insistence on thirty debate hours before a merits vote, which forced the nominee to wait until February 15, 2012 for that 94-5 vote.<sup>55</sup>

If President Obama's ongoing reliance on cooperative approaches proves ineffective because the GOP continues to eschew cooperation, the White House should consider, and perhaps invoke, relatively confrontational approaches. For instance, were Republicans to persist in stalling nominee floor votes, the President might draw on the bully pulpit when attempting to embarrass the minority senators or hold them responsible, force appointments by taking the confirmation issue directly to the American public, or make unoccupied judgeships a presidential election year question.<sup>56</sup> Similar could be the White House nomi-

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52. See *supra* notes 23–28 and accompanying text.

53. See *supra* notes 23–28 and accompanying text.

54. 157 CONG. REC. S8769–70 (daily ed. Dec. 17, 2011) (statement of Sen. McConnell); see *infra* note 57 and accompanying text. President Obama did recess appoint executive officials. Charlie Savage, *Obama Tempts Fight Over Recess Appointments*, N.Y. TIMES BLOGS (Jan. 4, 2012, 5:41 PM), <http://thecaucus.blogs.nytimes.com>.

55. 158 CONG. REC. S671–73 (daily ed. Feb. 15, 2012) (voting on merits); *id.* at S558 (daily ed. Feb. 13, 2012) (voting on cloture); see Dana Milbank, *How Not to Win Friends*, WASH. POST, Feb. 15, 2012, at A17.

56. Press Release, White House, Office of the Press Sec'y, President's Blueprint Includes Renewal of American Values (Jan. 28, 2012), available at <http://www.whitehouse>.

nation of talented consensus individuals for every present appellate and district court opening and selective invocation of recess appointments.<sup>57</sup> These concepts may leverage the opposition through publicizing or dramatizing how systemic vacancies can undermine the civil and criminal justice processes.

### B. *The Senate*

Democratic and Republican senators instituted certain efficacious measures to fill the numerous appellate and district court openings, and both parties should continue applying those notions and should implement a number of other measures to expedite confirmations. The political figures may want to reinstate a few traditions, namely conducting much faster Senate ballots for larger groups of qualified, uncontroversial district nominees, especially at Senate recesses, while exercising more deference to home-state colleagues and President Obama, who has rigorously consulted lawmakers, indulged their preferences, and even nominated some individuals whom Republicans suggested.<sup>58</sup>

The Senate Judiciary Committee has generally processed nominees rather promptly; however, Republicans ought to stop automatically holding over virtually all nominees seven days without persuasive reasons.<sup>59</sup> The panel might correspondingly speed re-

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gov/the-press-office/2012/01/28/weekly-address-president-s-blueprint-includes-renewal-american-values; see Linda Greenhouse, *Rock Bottom*, N.Y. TIMES BLOGS (Dec. 14, 2011, 9:00 PM), <http://opinionator.blogs.nytimes.com>. The GOP has mastered these practices. David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1896–98, 1902–03 (2008); see Tobias, *Conundrum*, *supra* note 32, at 772; see also Toobin, *supra* note 13.

57. President Obama should not recess appoint judges; many legal and political problems explain its rare use. See U.S. CONST. art. II, § 2, cl. 3; *Evans v. Stephens*, 387 F.3d 1220, 1222–27 (11th Cir. 2004); *United States v. Woodley*, 751 F.2d 1008, 1009–11 (9th Cir. 1985); William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMMENT. 515, 515–16, 522–23 (2004). His executive recess appointments inflamed many GOP senators, but it remains unclear whether this will affect judicial selection. Savage, *supra* note 54; Jonathan Weisman, *Republican Vow of Revenge Falls Short*, N.Y. TIMES BLOGS (Feb. 9, 2012, 3:29 PM), <http://thecaucus.blogs.nytimes.com>. George W. Bush used similar ideas, such as renominating controversial picks, to press Democrats, but some lack efficacy and Obama should eschew them. See, e.g., Carl Tobias, *Dear President Bush: Leaving a Legacy on the Federal Bench*, 42 U. RICH. L. REV. 1041, 1052–54 (2008) [hereinafter Tobias, *Bush*]; Toobin, *supra* note 13.

58. 157 CONG. REC. S8770–72 (daily ed. Dec. 17, 2011) (statement of Sen. Leahy); Kendall, *supra* note 24; see *supra* notes 18, 49 and accompanying text.

59. See *supra* notes 13, 21–27, 38, 52 and accompanying text. Republicans should remember that, when they held the presidency, Democrats confirmed more judges and recognize that citizens may blame them for vacancies' problems. Tobias, *Conundrum*, *supra*

view with less comprehensive nominee analysis or a truncated scrutiny of highly qualified consensus nominees, a procedure that Senator Orrin Hatch (R-Utah), the former chair, deployed in 2003.<sup>60</sup> Longstanding practice and tradition indicate that nominees deserve swift committee hearings and votes.<sup>61</sup>

However, the major bottleneck has been the Senate floor. Senator McConnell has refused to enter time agreements for chamber votes, while his GOP colleagues have placed holds on excellent uncontroversial nominees.<sup>62</sup> Republicans should terminate or ameliorate these counterproductive practices. The senators might provide frank, insightful advice when consulted; aggressively employ comprehensive, incisive debates as filibuster substitutes; expeditiously approve preeminent moderate nominees, such as Eleventh Circuit Judge Beverly Martin and President George W. Bush district confirmees whom President Obama tenders; and suggest excellent candidates when the lawmakers deem administration nominees unpalatable.<sup>63</sup> Insofar as controversy regarding nominees means that the prospects languish for substantial periods, Democrats should narrow routine filibuster deployment through encouraging additional robust chamber debates.<sup>64</sup>

If Republican senators continue to not cooperate, Democrats should consider, and perhaps adopt, numerous relatively confrontational devices. The Senate majority could reinstitute some con-

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note 32, at 756. *But see* Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J. L. & PUB. POL'Y 1035, 1037–38 (2009).

60. Helen Dewar, *Republicans Push Speedy Action on Court Picks: Partisan Acrimony Marks Senate Panel's Hearing on Judiciary Nominations*, WASH. POST, Jan. 30, 2003, at A7; Neil A. Lewis, *G.O.P. Links Judicial Nominees to Thwart Opponents*, N.Y. TIMES, Jan. 30, 2003, at A21; *see* Tobias, *Conundrum*, *supra* note 32, at 766, 774.

61. *See* Gerhardt & Painter, *supra* note 1, at 981–83; Tobias, *Conundrum*, *supra* note 32, at 764–65, 774–75. *See generally* Michael J. Gerhardt, *Merit vs. Ideology*, 26 CARDOZO L. REV. 353 (2005) (discussing the tension between merit and ideology in the federal judicial selection process, including the curious reluctance of public officials and legal scholars to find an objective measure of merit to guide critical assessment of judicial nominees); Hatch, *supra* note 59, at 1038–39 (discussing time-consuming roll call votes).

62. *See* Kendall, *supra* note 24.

63. *See supra* notes 26, 49 and accompanying text.

64. Debates can be valuable exchanges. *See generally* 155 CONG. REC. S11,421 (daily ed. Nov. 17, 2009) (debating Hamilton nomination); 148 CONG. REC. S7651–56 (daily ed. July 31, 2002) (debating Smith nomination); 143 CONG. REC. S2515 et seq. (daily ed. Mar. 19, 1997) (debating Garland nomination). The Liu and Halligan filibusters succeeded, but the effort to filibuster another circuit nominee, Judge Hamilton, failed. 157 CONG. REC. S8361 (daily ed. Dec. 6, 2011); 157 CONG. REC. S3146 (daily ed. May 19, 2011); 155 CONG. REC. S11,421–22 (daily ed. Nov. 17, 2009); *see* Maura Dolan, *Accolades as Justice Confirmed*, L.A. TIMES, Sept. 1, 2011, at AA1.

cepts, including Gerhardt and Painter's "Gang of 14" suggestion, which would restrict uncooperative conduct by adopting compromises acceptable to centrist politicians; it could reform or ameliorate intractable concepts, as the chamber did with anonymous holds; or it could capitalize on concepts like the assertive endeavors which the President might implement.<sup>65</sup>

In the end, Republicans and Democrats should meticulously calibrate the necessity for thorough investigation of judicial nominees with the necessity for expeditiously filling vacancies and should confirm skilled individuals. The parties must decrease their emphasis on ideology, as President Obama has carefully done.<sup>66</sup> Article II of the Constitution envisions that senators will probe ability, ethics, and temperament,<sup>67</sup> but the legislators should not inquire into how nominees would decide specific cases because this line of questioning could erode judicial independence.<sup>68</sup> One effective remedy for the concerns described may be a presumption that highly qualified, uncontroversial nominees secure floor votes.<sup>69</sup>

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65. 157 CONG. REC. S296 et seq. (daily ed. Jan. 27, 2011) (debating anonymous holds); Memorandum of Understanding on Judicial Nominations, *reprinted in* 151 CONG. REC. S5830–31 (daily ed. May 24, 2005); Gerhardt & Painter, *supra* note 1, at 967–69; *supra* notes 56–57 and accompanying text.

66. Serving groups or writing opinions or articles that senators oppose must not drive approval. Ideology's overemphasis is as futile as attempting to detect whether nominees would be judicial activists. *See generally The Judicial Nomination and Confirmation Process: Hearings Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 107th Cong. (2001) [hereinafter *Hearings*] (examining what role ideology should play in the selection and confirmation of judges); STEPHANIE A. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM 29–33 (2009) (discussing the meaning of "judicial activism").

67. *Hearings*, *supra* note 66, at 145.

68. *See generally*, Task Force on Federal Judicial Selection, Citizens for Indep. Courts, *Justices Held Hostage: Politics and Selecting Federal Judges*, in CITIZENS FOR INDEP. COURTS, THE CONSTITUTION PROJECT, UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS 1–76 (2000) (discussing the importance of judicial decisional independence); Task Force on the Distinction Between Intimidation & Legitimate Criticism of Judges, Citizens for Indep. Courts, *Defending Justice: The Courts, Criticism, and Intimidation*, in CITIZENS FOR INDEP. COURTS, THE CONSTITUTION PROJECT, UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS 121–204 (2000) (discussing when legitimate criticism of judges deteriorates into illegitimate, independence-threatening intimidation). These ideas aptly apply to Davis, Halligan, and Liu, whose vigorous criticism unfairly denigrated their records. *E.g.*, sources cited *supra* notes 3, 27.

69. *Compare* 156 CONG. REC. S908–09 (daily ed. Mar. 2, 2010) (voting 99-0 in favor of confirming Keenan), *with* 157 CONG. REC. S3146 (daily ed. May 19, 2011) (voting 52-43, failing to approve cloture for Liu).



### C. *The Executive Branch and the Senate*

In addition to the separate actions which the executive branch and the Senate might institute, both could implement several cooperative endeavors that would facilitate promptly filling the eighty present appellate and district court vacancies. For example, the White House may consult even more aggressively and comprehensively with home-state politicians, while those elected officials might evidence greater receptivity to these overtures and might proffer excellent candidates when they deem President Obama's suggestions unacceptable.<sup>70</sup> The White House and the Senate might concomitantly build on the ideas, which President Obama espoused in the 2012 State of the Union Address. Most importantly, the President proposed that the Senate conduct up or down votes on judicial nominees ninety days after receiving presidential nominations.<sup>71</sup>

Another illustration is the passage of comprehensive judgeship legislation, which could address substantial caseload increases since 1990 when Congress last enacted a thorough statute.<sup>72</sup> These soaring dockets have prompted the Judicial Conference of the United States to urge authorization of sixty-three new appellate and district court judgeships.<sup>73</sup> Because the federal courts' policymaking arm premises the suggestions for additional jurists on conservative work and case load estimates, and because the appellate and district courts need the resources for meeting docket rises, President Obama and lawmakers should concur on a

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70. Arizona, Oklahoma, and South Carolina provide examples of these ideas. Chris Casteel, *Obama Nominates OKC Federal Judge*, OKLAHOMAN, Jan. 24, 2012, at 5A; see sources cited *supra* note 49 and accompanying text. *But see* Jim Meyers, *Court Vacancy Causes Stir*, TULSA WORLD, May 23, 2010, at A1.

71. 2012 State of the Union, *supra* note 5; Paul Kane, *A Look at Where Proposals Stand*, WASH. POST, Jan. 26, 2012, at A7; Editorial, *Filibustering Nominees Must End*, N.Y. TIMES, Jan. 28, 2012, at SR10. George W. Bush and others have proposed ideas to expedite selection. Exec. Order No. 13,300, 3 C.F.R. 225 (2008); S. Res. 327, 108th Cong. (2004). A few, such as requiring earlier notice of intent to assume senior status and rigid dates for specific phases, are infeasible or violate tradition. Mike Allen & Amy Goldstein, *Bush Has Plan to Speed Judicial Confirmations*, WASH. POST, Oct. 31, 2002, at A21.

72. Federal Judgeship Act of 1990, Pub. L. No. 101-650, 104 Stat. 5098 (codified as amended at 28 U.S.C. § 1).

73. JUDICIAL CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 20–21 (Mar. 15, 2011), <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/2011-03.pdf>.

comprehensive bill.<sup>74</sup> Were the gridlock to persist, increasing the number of judgeships could have limited impact.<sup>75</sup>

A related, but more dramatic, notion would be the institution of a bipartisan judiciary whereby the party that does not occupy the White House could recommend potential nominees for a certain percentage of appellate and district court vacancies.<sup>76</sup> A small number of senators, who represent particular jurisdictions, have implemented rather analogous ideas in their states.<sup>77</sup>

#### D. *The Judiciary*

The federal judiciary has less ability than the executive branch and the Congress to influence judicial selection partly because the Constitution assigns the political branches primary responsibility for the nomination and the confirmation processes.<sup>78</sup> Overly active judicial participation may correspondingly raise separation of powers concerns, especially in a presidential election year. Nevertheless, there are some measures, especially those which involve publicizing the difficulties that openings create and cooperating with home-state elected officials, which the federal bench might undertake.<sup>79</sup> For example, Chief Justice John Roberts implored Democrats and Republicans to fill the numerous appellate and district court vacancies and deployed examples of tribunals with overwhelming caseloads in his *2010 Year-End Report on the Federal Judiciary*.<sup>80</sup> This effort closely resembled similar activity of Chief Justice William Rehnquist in his *1997* and *2001 Year-End Reports* when the jurist admonished both parties, using identical

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74. See GORDON BERMANT ET AL., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS 28–29 (Fed. Judicial Ctr. 1993); Tobias, *Conundrum*, *supra* note 32, at 748; Tobias, *Bush*, *supra* note 57, at 1045, 1052.

75. See *supra* notes 21–27, 38–41 and accompanying text.

76. STEIGERWALT, *supra* note 12, at 51.

77. *Id.*; Neil A. Lewis, *Clinton Agrees to G.O.P Deal on Judgeships*, N.Y. TIMES, May 5, 1998, at A1; see *Hearings and Meetings*, UNITED STATES SENATE COMMITTEE ON THE JUDICIARY, Jan. 26 2012, <http://www.judiciary.senate.gov/hearings.hearing.cfm?id=f14e6e2889a80b6b53be6d4e4126a8cf> (noting that Illinois senators use own panels to recommend candidates, but attempt to agree on those sent to the President).

78. U.S. CONST. art. II, § 2, cl. 2.

79. See Tobias, *Postpartisan*, *supra* note 16, at 777.

80. Chief Justice John Roberts seemed to follow Chief Justice William Rehnquist. Compare Roberts, *supra* note 5, with William H. Rehnquist, *2001 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts), Jan. 2002, at 1–2.

strong language, to fill the many openings that existed during those years.<sup>81</sup> Ninth Circuit Chief Judge Alex Kozinski and the Ninth Circuit Judicial Council wrote to the Senate leadership in 2010 explaining the desperate need to fill the court's numerous vacancies and imploring the leaders to swiftly fill the openings.<sup>82</sup> Individual circuit and district judges have concomitantly written similar letters to, or communicated with, the leadership making analogous pleas for their courts.<sup>83</sup>

### III. CONCLUSION

Professors Gerhardt and Painter have proffered a valuable suggestion for improving the federal judicial confirmation process. However, their recommendation applies to one dimension, although a critical facet, of the Senate process and, if adopted, would apparently not become effective until 2013. Therefore, the executive branch, the Senate, and the judiciary might want to consider and institute numerous additional ideas that could enable President Obama and the chamber to fill the many appellate and district court vacancies in a presidential election year.

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81. Rehnquist, *supra* note 80, at 1–2; see Linda Greenhouse, *Rehnquist Sees a Loss of Prospective Judges*, N.Y. TIMES, Jan. 1, 2002, at A16. For some analogous views, see ABA Comm. on Federal Judicial Improvement, Recommendation 118 (2008); Alfred. P. Carlton, Jr., *More and Faster-Now*, A.B.A. J., Apr. 2003, at 8.

82. Letter from Alex Kozinski, Chief Judge, U.S. Court of Appeals for the Ninth Circuit, to Sen. Harry Reid et al. (Nov. 15, 2010), in 156 CONG. REC. S8118 (daily ed. Nov. 19, 2010).

83. *E.g.*, Letter from Wiley Y. Daniel, Chief Judge, U.S. District Court for the District of Colorado, to Sen. Harry Reid and Sen. Mitch McConnell (May 6, 2010), in 156 CONG. REC. S6476–77 (daily ed. July 29, 2010). For other ideas that President Obama, senators, and judges may use, see generally Goldman et al., *supra* note 13; Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783 (2006) (suggesting the appointment power be vested in the judiciary); Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527, 552–73 (1998) (assessing a wide range of possible solutions).