

## SENATE GRIDLOCK AND FEDERAL JUDICIAL SELECTION

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One crucial locus of gridlock is appointments to the United States Courts of Appeals, which have grown extremely contentious, as the circuits resolve disputes about controversial issues and can effectively be tribunals of last resort for designated areas. Continuous Republican and Democratic charges, recriminations, and divisiveness have roiled the process for decades. The bench constitutes 179 judgeships; however, seventeen remained vacant at President Barack Obama's second inauguration notwithstanding his pledge to end the "confirmation wars" by assiduously consulting senators. Laboring without ten percent of the appellate court members subverts prompt, inexpensive and fair case disposition and undermines citizen respect for selection and the government. These propositions demonstrate that upper chamber gridlock and circuit appointments merit review, which this piece undertakes.

Part One explores the conundrum. The assessment concludes that it derives from rampant partisanship and skyrocketing caseloads, which necessitate more judicial positions; they enlarge the number of vacancies, which complicates selection. The paper next descriptively and critically recounts developments in Obama's tenure. Scrutiny reveals that appointees principally comprised very qualified ethnic minority and female jurists who averaged fifty-five years of age upon nomination. Their confirmations improved diversity and signaled the realization of a career judiciary while marginally widening the experience and age range of the appeals courts. Determining that Obama has proffered sufficient, highly competent individuals, whom the Senate Judiciary Committee has robustly approved, to facilitate processing, but that the chamber has neglected to expeditiously vote on many, this Arti-

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cle canvasses promising ideas that will enhance selection and counter gridlock.

## I. THE HISTORY OF THE JUDICIAL SELECTION DIFFICULTY

### A. Introduction

The history of the appointments predicament requires limited consideration in this Article because the concern's origins and development have experienced comprehensive investigation elsewhere<sup>1</sup> and the contemporary situation is most relevant. The problem actually comprises two aspects. One salient element has been the persistent vacancies dilemma, which resulted from expanding federal court jurisdiction and soaring dockets initially manifested throughout the 1960s. These enlarged the regional circuit and district court judgeships, radically increasing the quantity and frequency of open posts while slowing confirmations. Another essential dimension of the modern vacancy conundrum is political and can be ascribed to conflicting Republican and Democratic control of the White House and Senate that commenced about a quarter century ago.<sup>2</sup>

### B. The Persistent Vacancies Problem

Congress enhanced federal jurisdiction around the 1960s.<sup>3</sup> It criminalized much behavior and recognized numerous federal civil actions, developments that have contributed to accelerated cases and concomitant burgeoning appeals.<sup>4</sup> Congress mainly addressed the rises by expanding

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1 Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319 (1994); MILLER CTR. COMM'N ON THE SELECTION OF FED. JUDGES, IMPROVING THE PROCESS FOR APPOINTING FEDERAL JUDGES (1996) [hereinafter MILLER REPORT]. I rely in this piece on these sources and Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527 (1998).

2 I stress this dimension. The persistent idea needs less treatment; some delay is intrinsic, resists easy solution, and has been assessed. Bermant et al., *supra* note 1; Comm. on Fed. Courts, *Remedying the Permanent Vacancy Problem in the Federal Judiciary: The Problem of Judicial Vacancies and Its Causes*, 42 REC. ASS'N B. CITY N.Y. 374 (1987) [hereinafter N.Y. CITY BAR]; see SARAH BINDER & FORREST MALTZMAN, *ADVICE & DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY* 2-6 (2009).

3 See MILLER REPORT, *supra* note 1, at 3; see also Carl W. Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1268-70 (1996). See generally Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 23-24, 36-37, 39 (1996) (discussing expansion of federal courts).

4 See, e.g., Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327; see also William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 719-21 (1995); Elliot E. Slotnick, *Appellate Judicial Selection During the Bush Administration: Business as Usual or a Nuclear Winter?*, 48 ARIZ. L. REV. 225, 238, 241 (2006); Jeffrey Toobin, *Bench Press: Are Obama's Judges Really Liberals?*, NEW YORKER (Sept. 21, 2009), [http://www.newyorker.com/reporting/2009/09/21/090921fa\\_fact\\_toobin](http://www.newyorker.com/reporting/2009/09/21/090921fa_fact_toobin).

judgeships to the present complement: 179.<sup>5</sup> A study of the decade and a half following 1980 concluded that appointment times rapidly mushroomed.<sup>6</sup> Circuit nominations demanded one year and confirmations three months, and both perceptibly increased.<sup>7</sup> Conditions acutely worsened subsequently. For example, nominations consumed practically twenty months while appointments reached six months in 1997—the earliest year of President Bill Clinton’s last term—and in 2001—the starting year of President George W. Bush’s inaugural administration.<sup>8</sup> The specific periods closely resemble Obama’s term and merit systematic comparative analysis.

The numerous and convoluted steps and number of participants in the contemporary nomination and confirmation processes mean that a certain amount of delay seems inevitable.<sup>9</sup> Presidents and staff charged with responsibility for picking appellate nominees traditionally consult home state elected officers, pursuing much support and constructive advice regarding putative choices. Nevertheless, administrations conventionally insist on assuming the substantive lead when mustering nominations for those vacancies because the circuits, except D.C., include multiple jurisdictions and the courts’ opinions encompass broader application than district judgments. Numerous officials concomitantly adopt commissions which may assist recruitment by canvassing possible nominees and swiftly proposing several capable applicants. The Federal Bureau of Investigation (FBI) performs thorough “background checks.” The American Bar Association (ABA) evaluates designees’ core qualifications and rates the candidates, a useful service that it has provided since the mid-1950s.<sup>10</sup> The Department of Justice (DOJ), especially the Office of Legal Policy (OLP), might help screen aspirants, while DOJ prepares nominees for the Senate confirmation process. The Senate Judiciary Committee analyzes potential court members, stages hearings

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5 28 U.S.C. § 44 (2006); *see also* 155 CONG. REC. S1653 (daily ed. Feb. 5, 2009); U.S. SENATE COMM. ON THE JUDICIARY, *Judicial Nominations and Confirmations*, SENATE GOV (Jun. 27, 2013) <http://www.judiciary.senate.gov/nominations/judicial.cfm> [hereinafter Vacancies in the Federal Judiciary].

6 *See* JUD. CONF. OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 103 (1995).

7 *Id.* at 3. A Federal Judicial Center (FJC) evaluation found 1970–1992 vacancy rates twice as large in courts of appeals. Bermant et al., *supra* note 1, at 323; *see also* BINDER & MALTZMAN, *supra* note 2, at 5–6; David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1896–98 (2008).

8 *E.g.*, Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 904–08 (2004); Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J. L. & PUB. POL’Y 1035, 1038 (2009); David Ingram, *Stealth War over Judges*, NAT’L L.J., Feb. 15, 2010, at 1.

9 I rely here on Bermant et al., *supra* note 1; Sheldon Goldman, *Obama and the Federal Judiciary: Great Expectations But Will He Have a Dickens of a Time Living up to Them?*, 7 FORUM 2, 9–11 (2009); Carl Tobias, *The Federal Appellate Court Appointments Conundrum*, 2005 UTAH L. REV. 743 (2005).

10 *See* MILLER REPORT, *supra* note 1; *see also* ABA, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS (1983); Sheldon Goldman et al., *W. Bush’s Judicial Legacy*, 92 JUDICATURE 258, 274 (2009).

which probe selections, and carefully reviews and casts votes on them; nominees approved may have chamber debates, when necessary, preceding floor ballots.

### C. *The Contemporary Dilemma*

Article II's wording could suggest, and preeminent observers maintain, that the Framers intended senators to cabin unwise administration judicial choices; yet politics has suffused the process since the nation's establishment.<sup>11</sup> Politicization severely multiplied after President Richard Nixon staunchly pledged to demonstrably improve "law and order" by nominating "strict constructionists"<sup>12</sup> and increased most prominently once Judge Robert Bork lost his dramatic 1987 Supreme Court nomination fight.<sup>13</sup> Acrimonious, crippling partisanship substantially rose, while divided government and the fervent hope that the party lacking White House control might secure the next presidential election and, consequently, make future appointments, supplied consummate incentive to procrastinate. Administrations, chamber and committee leaders, and numerous senators were partly responsible for multiple downward spiraling problems.

Rather slow nominations may explain the dearth of confirmations. In early 1997 and 2001, Presidents Clinton and Bush submitted relatively few circuit prospects, and opponents directly leveled vociferous criticisms at many.<sup>14</sup> Both White Houses nominated more lawyers in sizable clusters near pertinent recesses; this stymied action.<sup>15</sup> Elected officials who forwarded persons somewhat delayed the pace. In jurisdictions without senators from the

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11 THE FEDERALIST NO. 76, at 414 (Alexander Hamilton) (E. H. Scott ed., 1898); see also CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* (2007); MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 28 (2000); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES* (1997); JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* (2007).

12 DAVID O'BRIEN, *JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION* 20 (1988); accord GOLDMAN, *supra* note 11, at 207 (citations omitted); Roger Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees*, 80 JUDICATURE 274, 275 (1997); Slotnick, *supra* note 4, at 228.

13 See generally, e.g., MARK H. GITENSTEIN, *MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT* (1992); JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 18 (2007); see also David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1057-72 (2008).

14 Press Release, White House, Office of the Press Sec'y, *President Clinton Nominates 22 for the Federal Bench* (Jan. 7, 1997); Remarks Announcing Nominations for the Federal Judiciary, 1 PUB. PAPERS 504-05 (May 9, 2001), available at <http://www.gpo.gov/fdsys/granule/PPP-2001-book1/PPP-2001-book1-doc-pg504/content-detail.html>; see also Slotnick, *supra* note 4, at 243. See generally *infra* notes 17-18, 20, and accompanying text.

15 Vacancies in the Federal Judiciary, *supra* note 5 (for years 1997 and 2001); see also James Oliphant, *Obama Losing Chance to Reshape Judiciary*, L.A. TIMES (Mar. 15, 2010), <http://articles.latimes.com/2010/mar/15/nation/la-na-obama-judges15-2010mar15>. Each failed to nominate for all openings, but nominating more than would be processed

chief executive's party, identifying the officers and treating specific participation requests consumed large amounts of time.<sup>16</sup> Bush's minimal consultation undercut selection,<sup>17</sup> and the drastically curtailed examination which Republicans accorded Clinton nominees might have fostered Democratic paybacks.<sup>18</sup> Accentuated controversy respecting ABA activities confounded appointments. In 1997, Senator Orrin Hatch (R-Utah), the Judiciary Committee chair, discontinued formal American Bar participation regarding committee evaluation, although Clinton always used the material.<sup>19</sup> During Bush's first weeks, he suspended ABA rankings prior to nominations, a decision which routinely stalled confirmations because Democrats invariably requested the assessments' completion ahead of merits votes.<sup>20</sup>

The Judiciary Committee deserved partial responsibility for the small number of appointments when the panel failed to diligently study, conduct hearings, and vote on, more nominees. The Committee usually arranged panel hearings respecting a sole pick every month the chamber was in session.<sup>21</sup> However, in 1997 and 2001, few jurists won confirmation, essentially due to resource inadequacies and multiple compelling political elements,

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was futile. They calibrated speed and scrutiny, as controversial nominees can delay the process.

16 GOP senators demanded input and even sent names. Neil A. Lewis, *Clinton Has a Chance to Shape the Courts*, N.Y. TIMES (Feb. 9, 1997), <http://www.nytimes.com/1997/02/09/us/clinton-has-a-chance-to-shape-the-courts.html>; see also 143 CONG. REC. S2541 (daily ed. Mar. 19, 1997) (statement of Sen. Joe Biden).

17 S.J. Cahn, *Cox Passes on a Judicial Seat*, DAILY PILOT (May 26, 2001), [http://articles.dailypilot.com/2001-05-26/news/export48535\\_1\\_rep-cox-judicial-nomination-judicial-seat](http://articles.dailypilot.com/2001-05-26/news/export48535_1_rep-cox-judicial-nomination-judicial-seat); David L. Greene & Thomas Healy, *Bush Sends Judge List to Senate*, BALT. SUN (May 10, 2001), [http://articles.baltimoresun.com/2001-05-10/news/0105100112\\_1\\_senate-democrats-appeals-court-confirmation-process](http://articles.baltimoresun.com/2001-05-10/news/0105100112_1_senate-democrats-appeals-court-confirmation-process); Henry Weinstein & Faye Fiore, *Rep. Cox Likely Judicial Nominee*, L.A. TIMES (Apr. 5, 2001), <http://articles.latimes.com/2001/apr/05/news/mn-47161>; see also Slotnick, *supra* note 4, at 234; Stras & Scott, *supra* note 7, at 1901; Press Release, White House Office of the Press Sec'y, *supra* note 14.

18 Paul A. Gigot, *How Feinstein is Repaying Bush on Judges*, WALL ST. J., May 9, 2001, at A26; Neil A. Lewis, *Party Leaders Clash in Capitol Over Pace of Filling Judgeships*, N.Y. TIMES (May 10, 2002), <http://www.nytimes.com/2002/05/10/us/party-leaders-clash-in-capitol-over-pace-of-filling-judgeships.html>; see also Tobias, *supra* note 9, at 764.

19 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; see also Editorial, *The ABA Plots a Judicial Coup*, WALL. ST. J. (Aug. 14, 2008), <http://online.wsj.com/article/SB121867190633138889.html>.

20 Letter from Alberto Gonzales, White House Counsel, to Martha Barnett, ABA President (Mar. 22, 2001), available at <http://abcnews.go.com/US/story?id=93754&page=1>; see also Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to Give Up on the Lawyers?*, 10 WM. & MARY BILL RTS. J. 37 (2001); Goldman et al., *supra* note 10, at 254.

21 Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 742 (1997). Senator Joseph Biden (D-Del.), the Judiciary Committee Chair between 1987 and 1994, stated that the committee conducted two hearings every month. See 143 CONG. REC. S2538, S2539 (daily ed. Mar. 19, 1997).

such as the opposition's ideological critiques lodged at circuit nominees.<sup>22</sup> Additional pressing congressional business and the Senate's unanimous-consent procedure, which allows a lone member to halt ballots, explicate stymied nominee floor consideration.

The persistent and modern openings concerns have numerous deleterious impacts. Both aspects severely pressure courts and frustrate counsel and litigants, who must compete for scarce judicial resources.<sup>23</sup> Numbers of appeals proceed slowly because complex and expanding prosecutions mean that some district jurists conduct no civil trials, forcing a multitude of civil litigants to wait interminably.<sup>24</sup> Throughout 1997, stunning case growth and protracted vacancies required that a few circuits suspend oral arguments.<sup>25</sup> Voluminous, complicated dockets and remarkably long vacancies created so much difficulty then and in 2001 that Chief Justice William Rehnquist astutely employed the unprecedented concept of publicly insisting that the executive branch and Senate, which different parties controlled, fill the seats.<sup>26</sup>

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22 Tobias, *supra* note 21; see Neil A. Lewis, *Bush and Democrats in Senate Trade Blame for Judge Shortage*, N.Y. TIMES (May 4, 2002), <http://www.nytimes.com/2002/05/04/us/bush-and-democrats-in-senate-trade-blame-for-judge-shortage.html>; Editorial, *A Judicial Nominations Scorecard*, WASH. POST, Aug. 9, 2002, available at <http://www.highbeam.com/doc/1P2-380904.html>. Nominees, who will enjoy life tenure and exercise the enormous power of the state, deserve scrutiny to insure that they are qualified.

23 N.Y. CITY BAR, *supra* note 2, at 374. Vacancies had a statistically significant nine percent effect on circuit workloads between 1970 and 1992. Bermant et al., *supra* note 1, at 327; *supra* note 7; see Carl Tobias, Op. Ed., *Act on Judges*, SAN ANTONIO EXPRESS-NEWS, Dec. 31, 2011, at B7; Editorial, *Vacancies Must Be Filled Quickly*, ARIZONA REPUBLIC (Aug. 7, 2011), <http://www.azcentral.com/arizonarepublic/opinions/articles/20110807vacancies-editorial.html>.

24 Ted Gest et al., *The GOP's Judicial Freeze*, U.S. NEWS & WORLD REP., May 26, 1997, at 23; Robert A. Schmidt, *The Costs of Judicial Delay*, LEGAL TIMES, Apr. 28, 1997; see also Gary Fields & John R. Emshwiller, *Criminal Case Glut Impedes Civil Suits*, WALL ST. J. (Nov. 10, 2011), <http://online.wsj.com/article/SB10001424052970204505304577001771159867642.html>.

25 See, e.g., Carl Tobias, *Filling the Federal Appellate Openings on the 9th Circuit*, 19 REV. LITIG. 233, 251 (2000); David G. Savage, *Rehnquist Chides GOP for Judicial Stalling*, L.A. TIMES, Jan. 1, 1998, at A1.

26 WILLIAM REHNQUIST, YEAR-END REPORT ON THE FEDERAL JUDICIARY (1997 & 2001), available at <http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx>; Slotnick, *supra* note 4, at 233; see also Linda Greenhouse, *Rehnquist Sees a Loss of Prospective Judges*, N.Y. TIMES (Jan. 1, 2002), <http://www.nytimes.com/2002/01/01/us/rehnquist-sees-a-loss-of-prospective-judges.html>. For some analogous views, see A.B.A., REPORT TO THE HOUSE OF DELEGATES (2008), available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2008/annual/recommendations/OneHundredEighteen.doc&sa=U&ei=S8YrUYmKIOW70QHAmoGQBw&ved=0CBgQFjAA&usg=AFQjCNH6kzNAEfp0QG5CtOkSCajEdbzYsA>; Alfred P. Carlton, Jr., *More and Faster—Now: The Crisis in the Federal Judiciary*, A.B.A. J., Apr. 2003, at 8; *infra* note 141.

## II. OBAMA ADMINISTRATION JUDICIAL SELECTION

### A. Descriptive Evaluation

Obama artfully crafted appointment plans, concentrating on numerous activities related to the circuits. He speedily drafted as White House Counsel experienced attorney Gregory Craig and other impressive lawyers who recruited designees.<sup>27</sup> Vice President Joe Biden's lengthy Judiciary Committee service permitted him to offer many cogent insights, especially about smoothly confirming nominees.<sup>28</sup> The selection group foresaw and skillfully handled numbers of relevant matters, in particular a new Supreme Court vacancy, by delineating pertinent qualifications and compiling "short lists" of extraordinary possibilities. This White House assigned the Counsel's Office major appellate court responsibility and gave the DOJ several duties involving nominee preparation for the Senate process. Obama reinstated ABA scrutiny before making nominations. He determined that the ABA furnishes valuable perspectives; early inquiries unearth salient concerns, aiding chief executives and prospects in conserving resources and confining any embarrassment.<sup>29</sup>

Obama instituted concerted efforts to vastly improve ethnic, gender, and sexual-preference diversity.<sup>30</sup> He comprehensively approached less conventional organizations, such as minority, community, and women's groups, which have copious information about numerous worthy candidates, as well

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27 Jon Ward, *White House Beefs up Legal Staff*, WASH. TIMES (July 21, 2009), [http://www.washingtontimes.com/news/2009/jul/21/white-house-beefs-up-legal-staff/?feat=home\\_headlines](http://www.washingtontimes.com/news/2009/jul/21/white-house-beefs-up-legal-staff/?feat=home_headlines). I rely much in this subsection on the following: Sheldon Goldman et al., *Obama's Judiciary at Midterm*, 94 JUDICATURE 262 (2011); Charlie Savage, *Obama Lags on Judicial Picks, Limiting His Mark on Courts*, N.Y. TIMES (Aug. 17, 2012), <http://www.nytimes.com/2012/08/18/us/politics/obama-lags-on-filling-seats-in-the-judiciary.html?pagewanted=all>; Toobin, *supra* note 4; Peter Baker & Adam Nagourney, *Sotomayor Pick a Product of Lessons from Past Battles*, N.Y. TIMES (May 27, 2009), <http://www.nytimes.com/2009/05/28/us/politics/28select.html?pagewanted=all>; Jonathan Bernstein, *Op-Ed., Empty Bench Syndrome*, N.Y. TIMES (Feb. 8, 2011), <http://www.nytimes.com/2011/02/09/opinion/09Bernstein.html>.

28 Peter Baker & Jeff Zeleny, *Obama Hails Judge as "Inspiring,"* N.Y. TIMES (May 26, 2009), <http://www.nytimes.com/2009/05/27/us/politics/27court.html?pagewanted=all>; Keith Koffler, *Biden's Staff to Play Key Role in Sotomayor Confirmation*, ROLL CALL (May 26, 2009), <http://www.rollcall.com/news/-35256-1.html>; *see generally* GITENSTEIN, *supra* note 13 (recounting Robert Bork's nomination).

29 JEFFREY TOOBIN, *OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 46 (2012); Terry Carter, *Do-Over: After an Eight-Year Pause, the ABA is Again Vetting Possible Federal Bench Nominees*, A.B.A. J., May 2009, at 62; Doug Kendall, *Confirmation Warriors: What's the Endgame for Obama's Judicial Nominees?*, SLATE (Oct. 8, 2010), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/10/confirmation\\_warriors.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/10/confirmation_warriors.html); *see also* Josh Gerstein, *Right Sees Law Group Tilting Left*, POLITICO (Sept. 27, 2010), <http://www.politico.com/news/stories/0910/42709.html> (discussing ABA viewpoints); *supra* note 20; *infra* note 112 and accompanying text.

30 I rely below on Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587 (2011); Carl Tobias, *Diversity and the Federal Bench*, 87 WASH. U. L. REV. 1197 (2010); Goldman et al., *supra* note 27, at 288.

as politicians, especially certain minority and female lawmakers. They searched for, considered, and recommended innumerable qualified people of color, women, and out lesbian, gay, bisexual, or transgender (LGBT) counsel, helping specific designees navigate the appointments gauntlet.

The President emphasized bipartisanship through rigorous consultation, seeking useful guidance from Democratic *and* Republican Judiciary Committee members and political figures in states which encountered vacancies *before* nominations. Many implemented commissions that ably picked numbers of exceptional individuals whom the officials suggested to the chief executive and whom he chose, but initiatives amply varied when they denominated preferences, ranked, or tendered a single candidate.<sup>31</sup> Most applicants possessed strong capabilities and contributed plentiful diversity vis-à-vis ethnicity, gender, sexual orientation, and ideology.<sup>32</sup> Creating new, and revamping extant, commissions, thoroughly interviewing and proposing choices, and efficaciously canvassing the input devoured limited resources; Obama's assistants expended considerable time seeking advice from both parties.<sup>33</sup>

The White House controlled appointments. Courts of appeals include several contiguous jurisdictions and have perceptibly less frequent vacancies, which senators effectively deem more important, because circuits are essentially courts of last resort for ninety-nine percent of filings and decide complex questions regarding issues including terrorism and constitutional

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31 Bob Egelko, *Feinstein Taps Bipartisan Panels to Pick Judges*, S.F. GATE (Jan. 5, 2009), <http://www.sfgate.com/politics/article/Feinstein-taps-bipartisan-panels-to-pick-judges-3177869.php>; WIS. FED. NOMINATING COMM'N CHARTER (2008); *see also* Goldman, *supra* note 9 (describing this process); RACHEL CAUFIELD, *INSIDE MERIT SELECTION* (AJS 2012) (same); RUSSELL WHEELER & REBECCA LOVE KOURLIS, *OPTIONS FOR FEDERAL JUDICIAL SCREENING COMMITTEES* (IAALS 2010) (same); *see also infra* note 34 (same); *infra* notes 81–83, 105–06, 113 and accompanying text (same).

32 *See* Tricia Bishop, *Davis Confirmed to 4th Circuit Court of Appeals*, BALT. SUN (Nov. 10, 2009), [http://articles.baltimoresun.com/2009-11-10/news/bal-md.davis10nov10\\_1\\_andre-maurice-davis-appeals-court-appellate-bench](http://articles.baltimoresun.com/2009-11-10/news/bal-md.davis10nov10_1_andre-maurice-davis-appeals-court-appellate-bench) (discussing diversity of Judge Andre Davis); Egelko, *supra* note 31 (discussing judicial diversity); Joe Ryan, *U.S. Senate Confirms Judge Joseph Greenaway Jr. for Federal Appeals Court*, STAR-LEDGER (Feb. 9, 2010), [http://www.nj.com/news/index.ssf/2010/02/new\\_jersey\\_judge\\_joseph\\_greenaway.html](http://www.nj.com/news/index.ssf/2010/02/new_jersey_judge_joseph_greenaway.html) (discussing Judge Joseph Greenaway); *infra* notes 61–64.

33 Some officials, namely Texas GOP Senators Kay Bailey Hutchison and John Cornyn, even suggested names. *See, e.g.*, Todd J. Gillman, *Texas' Open U.S. Attorney Posts Languish Under President Barack Obama*, DALLAS MORNING NEWS (Aug. 8, 2010), <http://www.dallasnews.com/news/politics/local-politics/20100808-Texas-open-U-S-7378.ece> (discussing GOP senators' suggestion of names); Gary Martin, *Obama Nominates First Federal Judge for Texas*, SAN ANTONIO EXPRESS-NEWS (July 14, 2010), <http://www.mysanantonio.com/news/politics/article/Obama-nominates-first-federal-judge-for-Texas-783165.php> (regarding GOP senators' recommendation of Judge Diana Saldaña); *see also* David Fontana, *Judging Obama's Second Term*, HUFF. POST (Nov. 14, 2012), [http://www.huffingtonpost.com/david-fontana/obama-judicial-appointments-2nd-term\\_b\\_2131912.html](http://www.huffingtonpost.com/david-fontana/obama-judicial-appointments-2nd-term_b_2131912.html) (describing roles of White and Senate in the nominating process).



interpretation.<sup>34</sup> The Administration encouraged legislators to send multiple candidates and chose a nominee from the particular state in which the vacancy arose. Obama evidenced immense deference to politicians, basically assimilating many circuit and trial level appointments.

The chief executive issued short press releases when gradually nominating a few attorneys simultaneously,<sup>35</sup> unlike predecessors.<sup>36</sup> He correspondingly depoliticized selection by, for example, personally introducing only Justices Sonia Sotomayor and Elena Kagan, the tradition governing most prospective Justices; both were sworn in at the Court, not the White House, a gesture that had enormous pragmatic and symbolic value primarily respecting separation of powers.<sup>37</sup> These measures departed from Bush's reliance on the White House to stage a ceremony when announcing the initial circuit nominees.<sup>38</sup> The Obama Administration's conciliatory approach finds

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34 See Letter from Prof. Bruce Ackerman, et al., to President Barack Obama (Feb. 24, 2010), available at <http://media.washingtonpost.com/wp-srv/politics/documents/lettertopresidentobama022410.pdf>; David Fontana, *Obama Should Pack the (Lower) Courts*, NEW REPUBLIC (Mar. 13, 2012), <http://www.newrepublic.com/article/politics/101566/obama-symposium-judge-appointment-federal-court>; Neil A. Lewis, *Move to Limit Clinton's Judicial Choices Fails*, N.Y. TIMES (Apr. 30, 1997), <http://www.nytimes.com/1997/04/30/us/move-to-limit-clinton-s-judicial-choices-fails.html>; RICHARD POSNER, *THE FEDERAL COURTS* 81–93 (1985); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403 (1996); Stras, *supra* note 13, at 1069–71, 1073.

35 Press Release, White House, Office of the Press Sec'y, *President Obama Announces Judge Gerard Lynch for United States Court of Appeals for the Second Circuit, Judge Andre Davis for the United States Court of Appeals for the Fourth Circuit*, (Apr. 2, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/President-Obama-Announces-Judge-Gerard-Lynch-for-United-States-Court-of-Appeals-for-the-Second-Circuit-Judge-Andre-Davis-for-the-United-States-Court-of-Appeals](http://www.whitehouse.gov/the_press_office/President-Obama-Announces-Judge-Gerard-Lynch-for-United-States-Court-of-Appeals-for-the-Second-Circuit-Judge-Andre-Davis-for-the-United-States-Court-of-Appeals); Press Release, White House, Office of the Press Sec'y, *President Obama Nominates Judge Joseph A. Greenaway, Jr. for the United States Court of Appeals for the Third Circuit, and Judge Beverly B. Martin for the United States Court of Appeals for the Eleventh Circuit*, (June 19, 2009), available at <http://www.whitehouse.gov/the-press-office/president-obama-nominates-judge-joseph-a-greenaway-jr-third-circuit-and-judge-bever>.

36 See *supra* text accompanying note 15; see also Editorial, *Congress Needs to Stop Stonewalling on Federal Court Vacancies*, WASH. POST (Sept. 9, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/08/AR2010090806476.html> (describing Obama's nomination of smaller groups of candidates).

37 See, e.g., Peter Baker & Jeff Zeleny, *Obama Picks Kagan as Justice Nominee*, N.Y. TIMES (May 9, 2010), <http://www.nytimes.com/2010/05/10/us/politics/10court.html> (discussing nomination of Justice Elena Kagan); Paul Kane & Robert Barnes, *Senate Confirms Elena Kagan's Nomination to Supreme Court*, WASH. POST (Aug. 6, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/05/AR2010080505247.html> (discussing Justice Elena Kagan's swearing in ceremony); Shailagh Murray & Michael D. Shear, *First Latina Picked for Supreme Court; GOP Faces Delicate Task in Opposition*, WASH. POST (May 27, 2009), [http://articles.washingtonpost.com/2009-05-27/news/36845463\\_1\\_group-of-white-firefighters-sonia-sotomayor-firefighters-case](http://articles.washingtonpost.com/2009-05-27/news/36845463_1_group-of-white-firefighters-sonia-sotomayor-firefighters-case) (discussing nomination of Justice Sonia Sotomayor); Sheryl Gay Stolberg, *Sotomayor, a Trailblazer and a Dreamer*, N.Y. TIMES (May 26, 2009), <http://www.nytimes.com/2009/05/27/us/politics/27websotomayor.html> (detailing the life of Justice Sonia Sotomayor).

38 TOOBIN, *supra* note 29, at 120; Neil A. Lewis, *Bush Appeals for Peace on His Picks for the Bench*, N.Y. TIMES (May 10, 2001), <http://www.nytimes.com/2001/05/10/us/bush-appeals>

expression in a promise to stop confirmation wars by aggressively consulting each party and submitting a multitude of fine consensus possibilities.<sup>39</sup>

Often before nominations, and invariably subsequently, the chief executive and chamber members, namely the leadership, attempted to cooperate. In facilitating efficacious processing, the White House and the Justice Department coordinated avidly with Senator Patrick Leahy (D-Vt.), the Judiciary Committee chair, who schedules panel hearings and votes; Senator Harry Reid (D-Nev.), the Majority Leader, who plans nominee Senate floor consideration; and their Grand Old Party (GOP) counterparts, Senators Jeff Sessions (Ala.), whom Charles Grassley (Iowa) succeeded in 2011, and Mitch McConnell (Ky.).

The committee promptly instituted searching analyses with thorough questionnaires, comprehensive hearings, and fast votes. Both parties cooperated actively on nominee examinations. For instance, when Leahy diligently convened a hearing so fast that Republicans lacked enough preparation time, he quickly set another; when the party sought a pair of sessions for Professor Goodwin Liu, whom it determined was controversial, Leahy generously acceded.<sup>40</sup> The Ranking Member conscientiously deployed the rare action of granting two Fourth Circuit nominees, Judges Albert Diaz and James Wynn, a sole hearing.<sup>41</sup>

Republicans coordinated less attentively than the political figures might, nonetheless. The lawmakers systematically held over panel ballots seven days

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for-peace-on-his-picks-for-the-bench.html; Charlie Savage, *Obama Backers Fear Opportunities to Reshape Judiciary Are Slipping Away*, N.Y. TIMES (Nov. 14, 2009), <http://www.nytimes.com/2009/11/15/us/politics/15judicial.html>; see generally Sheldon Goldman et al., *W. Bush: Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 282 (2003) (detailing President George W. Bush's philosophy in seating federal judges).

39 See Jeffrey Toobin, *One Year: Where Are the Judges?*, NEW YORKER (Jan. 20, 2010), <http://www.newyorker.com/online/blogs/newsdesk/2010/01/one-year-where-are-the-judges.html>; Letter from President Barack Obama to Sen. Harry Reid et al., (Sept. 30, 2010) [hereinafter Obama Letter]; David G. Savage, *Senate Face-Off Is Due over Judicial Nominee*, L.A. TIMES (Nov. 16, 2009), <http://articles.latimes.com/2009/nov/16/nation/najudges16>.

40 Maureen Groppe, *No Sparks Fly at Hearing*, INDIANAPOLIS STAR (Apr. 30, 2009), <http://www.indystar.com/article/20090430/NEWS05/904300456/No-sparks-fly-hearing>; David Ingram, *Switching Teams: Specter's Move Upsets GOP Judge Strategy*, NAT'L L.J., May 4, 2009, at LT1; see Toobin, *supra* note 4; *infra* note 102. For audio of Liu's confirmation hearing, see Senate Judiciary Comm., *Hearing Before the Senate Judiciary Committee on Goodwin Liu to be a Judge for the Ninth Circuit* (Mar. 2, 2011), <http://www.senate.gov/fplayers/Comm-Player/commFlashPlayer.cfm?fn=judiciary030211p&st=xxx>. See also Richard Painter, *Qualified, Measured, and Mainstream: Why the Senate Should Confirm Goodwin Liu*, HUFF. POST (Mar. 2, 2011, 8:39 AM), [http://www.huffingtonpost.com/richard-painter/qualified-measured-and-ma\\_b\\_829298.html](http://www.huffingtonpost.com/richard-painter/qualified-measured-and-ma_b_829298.html); Savage, *supra* note 27; *infra* note 136.

41 *Nominations of James A. Wynn, Jr., Nominee to be United States Circuit Judge for the Fourth Circuit; And Albert Diaz, Nominee to be United States Circuit Court Judge for the Fourth Circuit: Hearing Before the Senate Comm. on the Judiciary*, 111th Cong. (2009), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg63004/html/CHRG-111shrg63004.htm>; Barbara Barrett, *Senate Approves Wynn for Fourth Circuit, Diaz Still Waits*, CHARLOTTE OBSERVER, Aug. 6, 2010.

without meaningful explanation for nominees the committee in turn perfunctorily reported the following business meeting. Sessions even delayed review of Judges Diaz, Wynn, and Barbara Keenan, although he glowingly complimented the jurists' qualifications and the Fourth Circuit urgently required that nominees assume the court's sustained openings.<sup>42</sup>

During 2009, floor activity proceeded slowly. The chamber approved merely three nominees. Reid incessantly pursued cooperation with McConnell and his colleagues, yet they effectively did not reciprocate. The Minority Leader insistently opposed ballots for pending designees until Sotomayor's appointment; no pick was confirmed by August.<sup>43</sup> He entered few specific voting concords on appellate prospects.<sup>44</sup> Leahy said that his party consumed months after nominees won the committee's approval carefully seeking accords on many people who in turn easily captured appointment. Illustrative was Second Circuit Judge Gerard Lynch; the jurist waited twelve prolonged weeks before attaining confirmation ninety-four to three.<sup>45</sup>

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42 *Hearing, supra* note 41; *Hearing Before the Senate Judiciary Comm. on Barbara Milano Keenan to be a Judge for the Fourth Circuit* (Oct. 7, 2009), <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da15120db>; *Nomination of Barbara Milano Keenan, Nominee to be U.S. Circuit Judge for the Fourth Circuit: Hearing Before the Senate Judiciary Comm., 111th Cong. (2009)*, available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg63004/html/CHRG-111shrg63004.htm>; Senate Judiciary Comm., Exec. Business Mtg., (Oct. 29, 2009): *see id.*, Oct. 22, 2009 (holding over Keenan); *id.*, Dec. 17, 2009 (Sessions found Democrats' urging Keenan's confirmation like a child who murders his parents and complains that he is an orphan); *id.*, Jan. 21, 2010 (holding over Diaz and Wynn); *id.*, Nov. 29, 2012 (providing one recent example of GOP holding over 5 nominees); Ingram, *supra* note 8 (providing other examples).

43 Goldman et al., *supra* note 27; 156 CONG. REC. S904 (daily ed. Mar. 2, 2010) (statement of Sen. Patrick Leahy); *see also* George Packer, *The Empty Chamber: Just How Broken Is the Senate?*, NEW YORKER (Aug. 9, 2010), [http://www.newyorker.com/reporting/2010/08/09/100809fa\\_fact\\_packer](http://www.newyorker.com/reporting/2010/08/09/100809fa_fact_packer) (describing this opposition); Savage, *supra* note 27 (same).

44 I rely here and below on Senator Leahy's statement, *supra* note 43; Joan Biskupic, *Republicans Lead Obama in War for Judicial Dominance*, CHI. TRIB. (Oct. 5, 2012), [http://articles.chicagotribune.com/2012-10-05/news/sns-rt-us-usa-obama-appealscourts-sb9405e-20121004\\_1\\_caitlin-halligan-elena-kagan-appeals-courts](http://articles.chicagotribune.com/2012-10-05/news/sns-rt-us-usa-obama-appealscourts-sb9405e-20121004_1_caitlin-halligan-elena-kagan-appeals-courts); Michael A. Fletcher, *Obama Criticized as Too Cautious, Slow on Judicial Posts*, WASH. POST (Oct. 16, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/15/AR2009101504083.html>.

45 155 CONG. REC. S9541 (daily ed. Sept. 17, 2009). Judges Andre Davis and Joseph Greenaway did wait longer. *Id.* at S11,282 (daily ed. Nov. 9, 2009); 156 CONG. REC. S510 (daily ed. Feb. 9, 2010); Carl Tobias, Op.-Ed., *Fill the 4th Circuit's Vacancies Now*, BALT. SUN, Oct. 6, 2009, at A13, available at

The GOP reserved much debate time on selections but employed practically none and insisted that the Senate hold roll call votes for distinguished aspirants who ultimately polled extensive support. Judge Beverly Martin illuminates the concepts; Republicans demanded one hour, yet needed minutes, after which the chamber approved the jurist ninety-seven to zero.<sup>46</sup> The unanimous consent process enables a lone member to stall nominees. Placing anonymous holds or those with minimal reasons on seasoned noncontroversial candidates violates a lengthy tradition. It makes nominee advocates file cloture petitions, wasting scarce debate time; protracts vacancies; and confounds swift, economical, and fair case resolution. The abominable machinations implicating Judge Keenan elucidate these problems because the able, uncontroversial nominee waited four months until the chamber agreed on cloture ninety-nine to zero and confirmed her by the identical margin.<sup>47</sup>

During 2009, Democrats sought cloture for one nominee essentially when promoting a Senate ballot; that provoked Republicans and delayed related wonderful choices.<sup>48</sup> This initiative, as with Keenan, vividly epitomized strident partisanship. In March, Obama attempted to elevate Southern District of Indiana Judge David Hamilton, the chief executive's first nominee.<sup>49</sup> He proposed the jurist after meticulously consulting Indiana

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46 156 CONG. REC. S13 (daily ed. Jan. 20, 2010); see James Fallows, *American Dysfunction Watch: State of the Judiciary*, ATLANTIC (June 5, 2012, 8:19 A.M.), <http://www.theatlantic.com/politics/archive/2012/06/american-dysfunction-watch-state-of-the-judiciary/258073/> (discussing length of vacancies); Bill Rankin, *Senate OKs Martin for U.S. Appeals Court*, ATLANTA J. CONST., Jan. 21, 2010, at B4 (discussing unanimous confirmation of Judge Beverly Martin).

47 156 CONG. REC. S908, S910 (daily ed. Mar. 2, 2010); see THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 94 (2012); Amanda Becker, *Senators' Use of "Anonymous Hold" Contributes to Backlog of Stalled Judicial Nominations*, WASH. POST (Sept. 27, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/24/AR2010092406035.html> (discussing stalling of judicial nominees); Doug Kendall, *The Bench in Purgatory: The New Republican Obstructionism on Obama's Judicial Nominees*, SLATE (Oct. 26, 2009), [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) (same). But see 156 CONG. REC. at S519, *supra* note 45.

48 Dana Milbank, *Filibusted*, WASH. POST (Nov. 18, 2009), [http://articles.washingtonpost.com/2009-11-18/opinions/36835604\\_1\\_filibuster-nominees-republican-senators](http://articles.washingtonpost.com/2009-11-18/opinions/36835604_1_filibuster-nominees-republican-senators); Carl Tobias, Op. Ed., *Ending "Confirmation Wars": Despite Rancor Over Hamilton Nomination, There are Signs These Fights May Be Over*, BALT. SUN, Nov. 30, 2009, at A15; see also David Fontana, *Going Robe*, NEW REPUBLIC (Dec. 17, 2009), <http://www.newrepublic.com/article/environment-energy/going-robe> (discussing this delay); Kendall, *supra* note 29 (same).

49 TOOBIN, *supra* note 29, at 121–22; Press Release, White House, Office of the Press Sec'y, *President Obama Announces David Hamilton for the United States 7th Circuit Court of Appeals* (Mar. 17, 2009), available at <http://www.whitehouse.gov/the-press-office/president-obama-announces-david-hamilton-united-states-7th-circuit-court-appeals>; Michael A. Fletcher, *Obama Names Judge to Appeals Court*, WASH. POST (Mar. 18, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/17/AR2009031703031.html>; Neil A. Lewis, *Moderate Is Said to Be Pick for Court*, N.Y. TIMES (Mar. 17, 2009), <http://www.nytimes.com/2009/03/17/us/politics/17nominate.html>; Savage, *supra* note 27; see Al

Senators Richard Lugar (R) and Evan Bayh (D), who in fact promptly, convincingly, and “enthusiastically supported” confirmation, due to his impeccable record on the district bench and well qualified ABA rating.<sup>50</sup> Obama forwarded the judge, exemplifying a pledge to leave the “confirmation wars behind us.”<sup>51</sup>

Despite Hamilton’s strengths, GOP politicians opposed the jurist. Sessions alleged the President “chose to set an aggressive tone” with his initial nominee, the ex-board member for the Indiana chapter of the American Civil Liberties Union (ACLU), while arguing this nomination was extremely “controversial” because the judge harbored a “political agenda,” subscribing to precepts, which included a “living” Constitution and “so-called empathy.”<sup>52</sup> Sessions orchestrated a filibuster, but ten Republican colleagues joined Democrats’ adoption of cloture after robust, frank debate.<sup>53</sup> Central was Hamilton’s opinion regarding legislative prayers during Indiana state-house proceedings. The Ranking Member strenuously urged that the nominee had authorized Muslim, not Christian, prayers.<sup>54</sup> The majority lawmakers accurately disputed Sessions’s characterization, asserting that the nominee plainly respected the Court’s jurisprudence. Bayh, whom Hamilton earlier served as Indiana gubernatorial counsel, mounted efficacious defenses against the unfounded criticisms, proclaiming that the jurist “is not hostile to religion or Jesus . . . [and] was baptized . . . by his father,” a long-time minister.<sup>55</sup> Senators approved Hamilton, yet nine GOP members voting

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Kamen, *Filling Partisan Benches*, WASH. POST (Aug. 12, 2011), [http://articles.washingtonpost.com/2011-08-12/politics/35271236\\_1\\_downgrade-russian-prime-minister-paddy-power](http://articles.washingtonpost.com/2011-08-12/politics/35271236_1_downgrade-russian-prime-minister-paddy-power) (discussing lack of nominations).

50 156 CONG. REC. S904, *supra* note 43; Fletcher, *supra* note 44; Savage, *supra* note 39; Toobin, *supra* note 4.

51 Savage, *supra* note 39; *see also* Kendall, *supra* note 29; Savage, *supra* note 38; Toobin, *supra* note 4.

52 155 CONG. REC. S11,412–14 (daily ed. Nov. 17, 2009) (statement of Sen. Jeff Sessions); 155 CONG. REC. S10,753 (daily ed. Oct. 27, 2009) (same); *see infra* note 71 and accompanying text; 156 CONG. REC. S10,868, 10,870, 10,887 (daily ed. Dec. 21, 2010) (statement of Sen. Jeff Sessions) (“[I]t seems if you have the ACLU DNA, you get a pretty good leg up on being nominated by this President. . . . [W]e keep seeing the ACLU chromosome.”).

53 155 CONG. REC. S11,421–22 (daily ed. Nov. 17, 2009); Ingram, *supra* note 8; Milbank, *supra* note 48; Savage, *supra* note 39.

54 155 CONG. REC. at S11,414–15 (daily ed. Nov. 17, 2009); *see* Hinrichs v. Bosma, 400 F. Supp. 2d 1103 (S.D. Ind. 2005); Editorial, *Thank Allah It’s Friday*, WASH. TIMES (Jan. 22, 2010), <http://www.washingtontimes.com/news/2010/jan/22/thank-allah-its-friday/>; *see also* Nan Aron, Op-Ed., *GOP Senators Perfect Art of Stalling*, POLITICO (Feb. 2, 2010, 5:12 AM), <http://www.politico.com/news/stories/0210/32342.html> (describing this incident); Dahlia Lithwick, *Jesus vs. Allah: The Fight Over God’s Secular Title*, SLATE (Nov. 22, 2009), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/11/jesus\\_vs\\_allah.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/11/jesus_vs_allah.html) (assessing Judge Hamilton’s opinion).

55 155 CONG. REC. at S11,411–12 (daily ed. Nov. 17, 2009) (statement of Sen. Evan Bayh); *see also* Fletcher, *supra* note 44; Obama Letter, *supra* note 39.

for cloture ultimately rejected the preeminent judge even while appreciating that the nominee deserved a chamber ballot.<sup>56</sup>

The year 2010 and later years resembled the first. The Senate minority party continued directly invoking automatic holds related to dynamic nominees whom the committee reported the succeeding meeting and putting chamber secret and unexplained holds on very competent, noncontroversial possibilities with home state politician support; McConnell frequently eschewed time accords. Keenan's ninety-nine to zero cloture and confirmation votes, discussed above, were pernicious specific illustrations. However, a plethora of analogous examples slowed consideration. The GOP afforded five 2010 picks ballots only upon the year's end; the Fourth Circuit's Diaz waited thirteen months, although the North Carolina senators lauded him and won unanimous roll call appointment by championing the accomplished jurist on the floor; 2011 witnessed merely nine confirmations; and the minority improperly kept lawyer Edward DuMont and Professor Victoria Nourse, meritorious nominees, stalled more than one year for panel hearings the candidates never received while it addressed Eleventh Circuit Judge Adalberto José Jordán like Keenan.<sup>57</sup>

In 2009, Obama mustered a dozen, and subsequently proffered twenty-nine, stellar circuit nominees.<sup>58</sup> During his beginning year, the chamber approved three prospects while the committee reported six others. The following year, thirteen had appointments, with the committee approving four more. During 2011, nine were confirmed, and the panel reported three others. Finally, last year, five captured Senate approval and four more committee approval.<sup>59</sup> Obama proposed Sotomayor promptly when Justice David

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56 155 CONG. REC. S11,544, 11,552 (daily ed. Nov. 19, 2009); see Kate Phillips, *Hamilton Confirmed for Appeals Court*, N.Y. TIMES (Nov. 20, 2009), <http://query.nytimes.com/gst/fullpage.html?res=9B05E6DC103FF933A15752C1A96F9C8B63>; *infra* note 88 and accompanying text (affording effects of cloture's use).

57 Judge Jane Stranch was treated similarly to Judge Diaz. 156 CONG. REC. S6011 (daily ed. July 20, 2010) (statement of Sen. Lamar Alexander); *id.* at S7009 (daily ed. Sept. 13, 2010); *id.* at S10,704 (daily ed. Dec. 18, 2010); 158 CONG. REC. S558 (daily ed. Feb. 13, 2012) (discussing Judge Jordán); *id.* at S673 (daily ed. Feb. 15, 2012) (same); DOJ OFFICE LEGAL POL'Y, *Judicial Nominations (2009–2012)*, available at <http://www.justice.gov/archive/olp/judicialnominations112.htm> (detailing judicial nomination statistics); Letter from Edward DuMont, Partner at Wilmer Hale, to President Barack Obama, Nov. 4, 2011; Savage, *supra* note 27; Bruce Vielmetti, *Nourse Asks Obama to Withdraw her Nomination to Federal Appeals Court*, MILWAUKEE J. SENTINEL (Jan. 19, 2012), available at <http://www.jsonline.com/blogs/news/137702938.html> (detailing letter from Prof. Victoria Nourse to President Barack Obama); *infra* note 91.

58 Vacancies in the Federal Judiciary, *supra* note 5 (for years 2009–2013); see DOJ OFFICE LEGAL POL'Y, *supra* note 57 (detailing nominations); Savage, *supra* note 38 (same); *infra* note 91 and accompanying text (same). See generally Doug Kendall, *Fill the Bench Now*, SLATE (Feb. 5, 2010), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/02/fill\\_the\\_bench\\_now.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/02/fill_the_bench_now.html) (discussing nominations from President Obama).

59 Appointees in 2009 were Davis, Hamilton, and Lynch; 2010 were Denny Chin, Diaz, Greenaway, Keenan, Raymond Lohier, Martin, Scott Matheson, Mary Murguia, Kathleen O'Malley, Stranch, O. Rogerie Thompson, Thomas Vanaskie, and Wynn; 2011 were Susan

Souter chose to retire and Kagan as quickly for Justice John Paul Stevens's vacancy; expeditiously processing both Supreme Court nominees was imperative.<sup>60</sup> Thirteen possibilities are experienced Clinton district jurists, two are capable magistrate judges,<sup>61</sup> and seven nominees currently are prominent state court jurists. With half on benches, that phenomenon apparently portends the institution of a career judiciary.<sup>62</sup> Many earned the best ABA ranking: well qualified.<sup>63</sup> These judges improve ethnic, gender, and sexual-preference diversity in the circuits: eight are African Americans, four are Asian Americans, four are Latinos, fifteen are women, and a single candidate is openly gay.<sup>64</sup>

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Carney, Morgan Christen, Bernice Donald, Christopher Droney, Henry Floyd, James Graves, Stephen Higginson, Jimmie Reyna, and Evan Wallach; and 2012 were Andrew Hurwitz, Jordán, Jacqueline Nguyen, Stephanie Thacker, and Paul Watford. DOJ OFFICE LEGAL POL'Y, *supra* note 57; Savage, *supra* note 27.

60 The crucial need to have all Justices for the 2009 term was exacerbated with the September 9th argument over *Citizens United v. FEC*, 558 U.S. 310 (2010). See, e.g., David G. Savage, *Hilary: The Law Changer*, 95 A.B.A. J. 24 (2009) (discussing *Citizens United*); Robert Barnes & Dan Eggen, *Court Rejects Corporate Political Spending Limits*, WASH. POST (Jan. 22, 2010), [http://articles.washingtonpost.com/2010-01-22/politics/36798985\\_1\\_corporations-free-speech-majority-cast](http://articles.washingtonpost.com/2010-01-22/politics/36798985_1_corporations-free-speech-majority-cast) (same); Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES (Jan. 21, 2010), <http://www.nytimes.com/2010/01/22/us/politics/22scotus.html> (same); Toobin, *supra* note 39; see also *supra* note 37.

61 The thirteen are Robert Chatigny, Chin, Donald, Droney, Greenaway, Jordán, Martín, Murguía, O'Malley, and Vanaskie, and the 2009 appointees. See *supra* note 59. The Magistrate Judges are Robert Bacharach and Patty Shwartz. Nguyen was also an Obama district appointee. See DOJ OFFICE LEGAL POL'Y, *supra* note 57; Emily Bazelon, *The Supreme Court's Painful Season*, N.Y. TIMES (Aug. 5, 2011), [www.nytimes.com/2011/08/07/magazine/the-supreme-courts-painful-season.html](http://www.nytimes.com/2011/08/07/magazine/the-supreme-courts-painful-season.html) (discussing President Obama's Supreme Court Justices); Sherilynn A. Ifill, *Storming the Court?*, THE ROOT (Nov. 18, 2009, 6:43 AM), <http://www.theroot.com/views/storming-court> (arguing that President Obama should appoint liberal judges to counter conservative judges).

62 The seven are Christen, Diaz, Graves, Hurwitz, Keenan, Thompson, and Wynn. Elevation is a venerable tool. Federal judges have Senate approval, accessible records, and prompt FBI and ABA review. See Tobias, *supra* note 21, at 752; Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. TIMES (Apr. 10, 1990), <http://www.nytimes.com/1990/04/10/us/bush-picking-the-kind-of-judges-reagan-favored.html>; Ruth Marcus, *Bush Quietly Fosters Conservative Trend in Courts*, WASH. POST, Feb. 18, 1991, at A1; see *infra* note 68 and accompanying text. But see David Fontana & Micah Schwartzman, *Old World*, NEW REPUBLIC (July 17, 2009), [www.newrepublic.com/article/politics/old-world](http://www.newrepublic.com/article/politics/old-world) (arguing that President Obama should appoint younger federal judges). For a "career judiciary," see Goldman, *supra* note 38, at 305; RUSSELL WHEELER, *THE CHANGING FACE OF THE FEDERAL BENCH* 7-9 (Brookings Inst. 2009), available at [http://www.brookings.edu/~media/research/files/papers/2009/8/federal-judiciary-wheeler/08\\_federal\\_judiciary\\_wheeler.pdf](http://www.brookings.edu/~media/research/files/papers/2009/8/federal-judiciary-wheeler/08_federal_judiciary_wheeler.pdf).

63 See ABA STANDING COMM. ON THE JUDICIARY, RATINGS OF ARTICLE III JUDICIAL NOMINEES, 111TH CONG. (2010); ABA STANDING COMM. ON THE JUDICIARY, RATINGS OF ARTICLE III JUDICIAL NOMINEES, 112TH CONG. (2012).

64 Davis, Donald, Graves, Greenaway, Lohier, Thompson, Watford, and Wynn are African Americans. Chin, Liu, Nguyen, and Sri Srinivasan are Asian Americans. Diaz, Jordán, Murguía, and Reyna are Latinos. Carney, Christen, Donald, Caitlin Halligan, Keenan, Mar-

## B. Critical Evaluation

### 1. Positive Aspects

The White House's leadership reaped particular advantages. Obama confirmed two sterling Justices and thirty preeminent court of appeals jurists while concomitantly sending eleven additional competent individuals; the panel duly reported all who secured committee ballots. Thorough, early, and persistent consultation with home state politicians sustained the smooth nomination and confirmation of quite a few talented picks and circumscribed the divisiveness and corrosive paybacks which have long subverted the appellate process.<sup>65</sup> For instance, ten Republicans supported Hamilton's cloture petition; senators may have believed that the President's nominee was entitled to an up or down vote.<sup>66</sup> More cooperation seemingly facilitated appointments, increasing public regard for the executive, chamber, selection, nominees, confirmees, and circuits.<sup>67</sup> The administration calibrated multiple priorities well. It sagely emphasized appeals courts over district courts, given the comparative importance of appellate tribunals, and particularly emphasized prominent numbered circuits, especially the Second and Fourth, in light of their vacancies.

Promoting candidates who are court members necessarily furnishes benefits. Most significant, the judges have acquired copious pertinent expertise, so appointees can immediately assume the critical task of resolving gigantic appeals court dockets. The nominees present full records that the White House, FBI, ABA, Senate, and citizens easily discover; many impressive Obama prospects and confirmees enjoy the finest ABA ratings.<sup>68</sup>

Improved ethnic, gender, and sexual-preference diversity confers numerous advantages. The skilled people of color, women, and LGBT jurists serving on the regional circuits professionally discharge the usual judicial responsibilities, yet supply distinct related benefits. The jurists augment how colleagues understand and treat complex questions about matters including

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tin, Murguia, Nguyen, Nourse, O'Malley, Jill Pryor, Shwartz, Stranch, Thacker, and Thompson are women. Edward DuMont is openly gay. See John Schwartz, *For Obama, a Record on Diversity But Delays on Judicial Confirmations*, N.Y. TIMES (Aug. 7, 2011), <http://www.nytimes.com/2011/08/07/us/politics/07courts.html>. Obama's efforts, such as increasing diversity and consultation, resemble Clinton's. See Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 276 (1995); Tobias, *supra* note 21.

65 Compare *supra* notes 6–26 and accompanying text, with *supra* notes 27–41 and accompanying text.

66 See *supra* text accompanying notes 53, 56. But see *infra* note 140 (discussing use of filibusters). They may have wanted consistency with prior criticism of Democrats' filibuster use. For other examples, see *supra* text accompanying notes 40–41, 47.

67 See 156 CONG. REC. S904, *supra* note 43; see also Tobias, *supra* note 9, at 743; Obama Letter, *supra* note 39.

68 See *supra* notes 61–63 and accompanying text; see also *infra* notes 104, 112, 114, and accompanying text (demonstrating those records and fine ABA ratings).



capital punishment and corporate speech,<sup>69</sup> while the judges possess salutary different perspectives respecting associated fields, notably criminal and employment law, which they often confront.<sup>70</sup> Some minority, female, and LGBT confirmees and nominees can broaden ideological diversity; the jurists apparently concur with empathy and a living Constitution.<sup>71</sup> Insofar as possible candidates have moderate views, Obama could justify this; he essentially nullified ideology's salience<sup>72</sup> and might now want to balance conservative appellate judges.<sup>73</sup> Persons of color, women, and LGBT court members narrow ethnic, gender, sexual-preference, and similar biases that plague the justice system.<sup>74</sup> Circuits which resemble America inspire expanded public confidence.<sup>75</sup> Diversity's increase also can underscore the administration's

69 See Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 599–600, 610–17 (2003); Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 19–21 (2001).

70 See, e.g., Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009); Mark Curriden, *Tipping the Scales*, A.B.A. J., July 2010, at 37, 42 (2010); George, *supra* note 69, at 18–25; Madhavi McCall, *Structuring Gender's Impact: Judicial Voting Across Criminal Justice Cases*, 36 AM. POLITICS RESEARCH 264 (2008); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L. J. 1759 (2005); Lauren Collins, *Number Nine*, NEW YORKER (Jan. 11, 2010), [http://www.newyorker.com/reporting/2010/01/11/100111fa\\_fact\\_collins](http://www.newyorker.com/reporting/2010/01/11/100111fa_fact_collins); sources cited *supra* note 30. But see Stephen J. Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504 (2011).

71 See, e.g., STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK* (2010); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Cass R. Sunstein, *The Hidden Stakes of the Election*, N.Y. REV. BKS. (Oct. 9, 2012), <http://www.nybooks.com/blogs/nyrblog/2012/oct/09/hidden-stakes-election/>. But see ANTONIN SCALIA & BRYAN GARNER, *READING LAW* (2012); Curt Levey, *Living Constitution*, R.I.P., NAT'L REV. (Sept. 30, 2005, 4:09 PM), <http://old.nationalreview.com/comment/levey200509301609.asp>; *infra* note 72.

72 He may find political branches better adopt social change than unelected judges. Justin Driver, *Obama's Law*, NEW REPUBLIC (June 30, 2011), <http://www.newrepublic.com/article/politics/magazine/89647/obama-legal-philosophy-laurence-tribe>; Toobin, *supra* note 4. Sotomayor and some circuit picks disavowed empathy. 156 CONG. REC. S520 (daily ed. Feb. 9, 2010) (statement of Sen. Jeff Sessions); see *supra* text accompanying notes 35–38.

73 Herman Schwartz, *Federal Judiciary Failures*, NATION (Jan. 2, 2013), <http://www.thenation.com/article/171976/obamas-federal-judiciary-failures>; Russell Wheeler, *How Might the Obama Administration Affect the Composition of the U.S. Courts of Appeals?*, BROOKINGS INST. (Mar. 18, 2009), <http://www.brookings.edu/research/opinions/2009/03/18-courts-wheeler>. His elections could be mandates for more balance.

74 See Report of the First Circuit, Gender, Race and Ethnic Bias Task Forces, 9 B.U. PUB. INT. L.J. 173 (1999); FINAL REPORT, NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS & ETHNIC FAIRNESS (1997). See generally REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169–70 (1990) available at [www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/file/repfsc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/file/repfsc.pdf). (advocating education of judges on racial, ethnic, and gender discrimination).

75 See, e.g., Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 253 (1978); Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1442 (2008). See generally Sherrilyn A. Ifill,

commitment to enhancing the situations of minorities, women, and LGBT individuals throughout the legal profession, the courts, and society.<sup>76</sup>

## 2. Negative Aspects

Obama's concerted efforts provided advantages, but some features seem to require improvement. A crucial dimension was alacrity: confirmations and nominations respecting prolonged openings moved less expeditiously than is warranted. For example, in the chief executive's beginning year, he appointed a sole Fourth Circuit jurist, although numbers of posts did continue unfilled.<sup>77</sup> The administration could have set priorities more appropriately. The initiative expended on this court undermined actions which involved related tribunals. The Second Circuit had a larger percentage of vacancies, four "judicial emergencies" and a nominee in March 2010.<sup>78</sup> The White House submitted no one for multiple, critical Ninth and D.C. Circuit positions until then, while seventeen were open at Obama's Second Inauguration, more than were at the November 2008 election.<sup>79</sup> However, court prioritization is effectively more art than science. The Second Circuit was only in a predicament during August 2009, when Sotomayor received confirmation and her preeminent colleague assumed senior status. The Ninth Circuit depends predominantly on twenty-eight active court members and substantially on sixteen consistently productive senior jurists, and the D.C.

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*Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000).

<sup>76</sup> Carl Tobias, *Dear President Bush: Leaving a Legacy on the Federal Bench*, 42 U. RICH. L. REV. 1041, 1048 (2008); see George, *supra* note 69, at 18–25. For appointment of LGBT judges, see Michael Nava, *The Servant of All: Humility, Humanity, and Judicial Diversity*, 38 GOLDEN GATE U. L. REV. 175, 192 (2008); Carl Tobias, *Considering Gay, Lesbian, Transgender and Bisexual Nominees for the Federal Courts*, 90 WASH. U. L. REV. 577 (2012); Linda Greenhouse, *Recuse Me*, N.Y. TIMES (May 4, 2011, 9:39 PM), <http://opinionator.blogs.nytimes.com/2011/05/04/recuse-me/>; *supra* note 64.

<sup>77</sup> Vacancies in the Federal Judiciary, *supra* note 5 (for 2009); see also *supra* notes 41–42, 45, and accompanying text (detailing unfilled posts).

<sup>78</sup> Vacancies in the Federal Judiciary, *supra* note 5 (for years 2009–2010). Obama emphasized the Fourth Circuit's "judicial emergencies," defined as vacancies (1) in which adjusted filings per panel exceed 700 or (2) in existence more than eighteen months having adjusted filings between 500 and 700. *Id.* at Judicial Emergencies; see Oliphant, *supra* note 15.

<sup>79</sup> The Tenth Circuit also had two unforeseen 2010 vacancies; both judges resumed academic careers. Brooke Adams, *Inaction on Judges Affecting Utah*, SALT LAKE TRIB. (July 21, 2012, 1:01 AM), <http://www.sltrib.com/sltrib/news/54522568-78/court-judicial-federal-senate.html.csp>; Robert Boczkiewicz, *Resignation Turns to Politics*, TULSA WORLD (Dec. 12, 2009, 5:40 AM), [http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20091212\\_14\\_a1\\_denver882223](http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20091212_14_a1_denver882223); see Vacancies in the Federal Judiciary, *supra* note 5 (for years 2008–2012); Savage, *supra* note 27; Toobin, *supra* note 39. See generally *supra* text after text at note 67; *infra* notes 93, 135 and accompanying text.

Circuit warrants peculiar attention because the compelling nature of its appeals essentially makes the court the nation's second most important.<sup>80</sup>

To the extent nominations and confirmations proceeded slowly, the president and certain aides bear a modicum of responsibility. Some ideas directly explicate the complications with nominations. Reducing partisanship and consulting home state political leaders appeared useful, yet the concepts seemingly imposed temporal expenses and promoted compromises. Applying merit commissions, which sought out, investigated, and proposed capable lawyers, analyzing the selections closely, denominating terrific picks, and negotiating with Obama took remarkable energy. Comprehensive White House attempts to collect and synthesize massive input from elected officers, coordinate promising activities, cautiously scrutinize prospects, and offer strong possibilities drained scarce resources. A trenchant illustration was the delicate process for reallocating North Carolina one judgeship earlier assigned to South Carolina.<sup>81</sup> Pervasive administration consultation and the consummate deference accorded senators may have noticeably restricted the President's flexibility to mold the courts by nominating and confirming the sorts of jurists he preferred.<sup>82</sup> Symptomatic was the Maryland and Virginia politicians' behavior; the Democratic senators contravened norms when proffering a single aspirant.<sup>83</sup>

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80 Vacancies in the Federal Judiciary, *supra* note 5 (for 2010); Carl Tobias, *Filling the Three Openings on the U.S. Court of Appeals for the Second Circuit*, FINDLAW (Sept. 23, 2009), [http://writ.news.findlaw.com/commentary/20090923\\_tobias.html](http://writ.news.findlaw.com/commentary/20090923_tobias.html); Carol J. Williams, *Robert R. Beezer Dies; Judge on 9th Circuit Court of Appeals*, L.A. TIMES (Apr. 3, 2012), <http://articles.latimes.com/2012/apr/03/local/la-me-robert-beezer-20120403>. Obama appointed no D.C. Circuit judges his first term. See Charlie Savage, *Obama Nominates Two for Federal Appeals Court*, N.Y. TIMES (June 11, 2012), [www.nytimes.com/2012/06/12/us/politics/obama-nominates-halligan-and-srinivasan-to-dc-appeals-court.html](http://www.nytimes.com/2012/06/12/us/politics/obama-nominates-halligan-and-srinivasan-to-dc-appeals-court.html); *infra* note 140.

81 Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2174 (2011); Barbara Barrett, *Hagan Drove Court Nominations*, RALEIGH NEWS & OBSERVER, NOV. 23, 2009, at B1; Jim Morrill, *Diaz Confirmed to 4th Circuit*, CHARLOTTE OBSERVER, DEC. 19, 2010, at B1; see also Obama Letter, *supra* note 39 (regarding those circuits); *supra* text accompanying notes 41–42 (same); *infra* notes 125, 134 (regarding same).

82 His views on molding the bench are unclear. Dahlia Lithwick, *What Does He See in Her?*, SLATE (May 13, 2010, 6:11 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/05/what\\_does\\_he\\_see\\_in\\_her.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/05/what_does_he_see_in_her.html); *supra* note 72; see also TOOBIN, *supra* note 29, at 297–98 (describing unclear views on molding the bench); Ifill, *supra* note 61 (describing same); Kendall, *supra* note 29 (describing same).

83 Press Release, White House, Office of the Press Sec'y, *President Obama Nominates Justice Barbara Milano Keenan for United States Court of Appeals for the Fourth Circuit* (Sept. 14, 2009), available at [http://infoweb.newsbank.com/iw-search/we/InfoWeb?p\\_action=doc&p\\_topdoc=1&p\\_docnum=1&p\\_sort=YMD\\_date:D&p\\_product=NewsBank&p\\_text\\_direct=0=document\\_id=%28%201343E4FFBA943358%20%29&p\\_docid=1343E4FFBA943358&p\\_theme=aggdocs&p\\_queryname=1343E4FFBA943358&f\\_openurl=yes&p\\_nbid=N50K48OEMTM2MzA1NTcwNi40ODIxMzY2MToxMToxNDEuMTY2LjAuMA&&p\\_multi=CHOB](http://infoweb.newsbank.com/iw-search/we/InfoWeb?p_action=doc&p_topdoc=1&p_docnum=1&p_sort=YMD_date:D&p_product=NewsBank&p_text_direct=0=document_id=%28%201343E4FFBA943358%20%29&p_docid=1343E4FFBA943358&p_theme=aggdocs&p_queryname=1343E4FFBA943358&f_openurl=yes&p_nbid=N50K48OEMTM2MzA1NTcwNi40ODIxMzY2MToxMToxNDEuMTY2LjAuMA&&p_multi=CHOB); *supra* note 35 (regarding Davis nomination); see also Bishop, *supra* note 32; Tom Jackman, *Va. Judge Nominated for Appeals Court*, WASH. POST (Sept. 15, 2009), [http://articles.washingtontimes.com/2009-09-15/news/36807438\\_1\\_court-judge-appeals-court-circuit-bench](http://articles.washingtontimes.com/2009-09-15/news/36807438_1_court-judge-appeals-court-circuit-bench); *supra* note 42.

Considerable responsibility for dilatory action could be ascribed to the GOP, which cooperated less than it might. The party automatically held over numerous committee votes a week absent stated reasons, much less persuasive contentions, for talented nominees who smoothly earned panel approval seven days later,<sup>84</sup> conduct apparently meant to limit confirmations for partisan advantage. Sessions candidly acknowledged that the principal Republican tactic basically comprised “delay and conquer” when he answered queries implicating stalled nominees: the Ranking Member claimed Democratic political figures have a rather effective “strategy, if they get out aggressively pushing back, they can create the perception that we’re delaying a lot of nominees, and so it will be harder for us to delay.”<sup>85</sup>

The floor proved the major bottleneck. GOP senators permitted no ballots on six people whom the committee reported across 2009; subsequent years were comparatively analogous. They essentially ignored Democratic pleas urging cooperation from McConnell and the Republican caucus, but the ambitious efficacious White House congressional agenda seemed to impair the confirmation voting dynamics.<sup>86</sup> A number of members wielded anonymous chamber holds and those lacking convincing arguments for qualified uncontroversial nominees, while the party requested copious debate time yet used significantly less and pursued Senate roll call ballots governing able designees whom the politicians easily confirmed.<sup>87</sup> The majority sometimes adopted cloture to force votes, although the petitions were relatively unprofitable because seeking cloture infuriated the GOP, enhanced delay when it required thirty precious debate hours, and concomitantly slowed ballots for numerous additional candidates.<sup>88</sup>

These activities, primarily McConnell’s refusal to enter voting concords and his colleagues’ incessant employment of secret and unexplained holds

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84 See *supra* notes 42, 52, and accompanying text. See generally *infra* notes 137–39 and accompanying text.

85 See Dan Friedman, *Nomination Battle Affects Unopposed Judges*, NAT’L J., Oct. 28, 2009, [http://www.nationaljournal.com/member/daily/nomination-battle-begins-affecting-unopposed-judges-20091028?mrefid=site\\_search](http://www.nationaljournal.com/member/daily/nomination-battle-begins-affecting-unopposed-judges-20091028?mrefid=site_search); ALLIANCE FOR JUSTICE, JUSTICE CAN’T WAIT 2 (Oct. 2009), available at <http://www.afj.org/judicial-selection/alliance-for-justice-report-justice-can-t-wait-the-first-ten-months-of-the-obama-administration.pdf>; Bernstein, *supra* note 27; *supra* notes 42, 52–53, and accompanying text.

86 Sophie Quinton, *Fingerpointing on Judges*, NAT’L J., June 21, 2012, available at [http://www.nationaljournal.com/member/whitehouse/classic-fingerpointing-from-white-house-senate-on-judicial-nominations-20120620?mrefid=site\\_search](http://www.nationaljournal.com/member/whitehouse/classic-fingerpointing-from-white-house-senate-on-judicial-nominations-20120620?mrefid=site_search); Savage, *supra* note 27. The GOP agreed to floor votes in September 2009 and few time accords. See *supra* notes 43–45 and accompanying text.

87 Until recently, holds were extraordinarily rare. Aron, *supra* note 54; *supra* note 47 and accompanying text; see Letter from Sen. Claire McCaskill to Sen. Harry Reid and Sen. Mitch McConnell (Apr. 22, 2010); *infra* note 142. For debate times and roll call votes, see *supra* note 46 and accompanying text; see also Letter, *supra* note 34 (listing debate times and roll call votes).

88 See *supra* notes 43–48, 53, 56, 66, and accompanying text; see also SENATE RULE 22 (2012); Kendall, *supra* note 58; *supra* notes 48–52, 54–55, and accompanying text; *infra* notes 127–28, 140, and accompanying text.

for impressive noncontroversial picks, had several consequences.<sup>89</sup> The behavior profoundly lengthened dilatory appointments, mandating cloture and consuming floor time, abolished civility's remnants, and correspondingly exacerbated the already inflamed confirmation wars. Numbers of endeavors assessed made nominees suspend careers, prevented superior prospects from thinking about bench service, deprived many circuits of judicial resources which they desperately required, impeding quick, economical, and fair case disposition and increasing pressure on sitting jurists, and lessened public regard for court selection and each government branch.

Fewer judges won confirmation during Obama's initial year than under other presidents since the 1960s, while appointments have demanded seven months, but the confirmation and nomination processes could have improved later.<sup>90</sup> Emblematic are Clinton's appointing Justice Ruth Bader Ginsburg and seven circuit jurists and choosing twenty-one more possibilities in 1993, and George W. Bush's 2001 confirmation of six appeals court members and proposal of twenty-nine more nominees, statistical parameters which dramatically rose the succeeding year.<sup>91</sup>

Conditions that Obama and the chamber lacked material ability to control actually explain delayed confirmations and nominations. Crucial was promptly filling Justice Souter's vacancy, an initiative that preempted lower court action over months; similar necessity propelled the effort to replace Justice Stevens.<sup>92</sup> The president incurred the critical "start-up" expenses for

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89 158 CONG. REC. S8376 (daily ed. Dec. 21, 2012) (statement of Sen. Patrick Leahy); Carl Tobias, *A Fourth Circuit Photograph*, 45 WAKE FOREST L. REV. 1373 (2010); Tobias, *supra* note 81; Andrew Cohen, *In Pennsylvania, the Human Costs of Judicial Confirmation Delays*, ATLANTIC (Sept. 10, 2012 3:38 P.M.), <http://www.theatlantic.com/politics/archive/2012/09/in-pennsylvania-the-human-costs-of-judicial-confirmation-delays/261862/>; Todd Ruger, *Nominees Are Living on Hold: Caught in a Political Game, Judicial Candidates Get Used to Waiting*, NAT'L L. J., Dec. 17, 2012, available at [www.dailyreportonline.com/Pub/ArticleDRO.jsp?id=1355684605200&siretom=20130231201307](http://www.dailyreportonline.com/Pub/ArticleDRO.jsp?id=1355684605200&siretom=20130231201307).

90 156 CONG. REC. S904, *supra* note 43 (regarding the fewer jurists). For times, see 158 CONG. REC. S5005 (daily ed. July 16, 2012) (statement of Sen. Charles Grassley); Ari Berman, *Why the Supreme Court Matters*, NATION (Apr. 11, 2012), <http://www.thenation.com/article/167350/why-supreme-court-matters>; Doug Kendall, *The 200-Day Club*, SLATE (Sept. 27, 2012, 4:11 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/09/judicial\\_confirmation\\_process\\_it\\_takes\\_more\\_than\\_200\\_days\\_to\\_join\\_the\\_federal\\_bench\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/09/judicial_confirmation_process_it_takes_more_than_200_days_to_join_the_federal_bench_.html); Richard Wolf, *Obama Determined to Fill Federal Judgeships*, USA TODAY (Nov. 29, 2012, 5:19 PM), <http://www.usatoday.com/story/news/politics/2012/11/28/obama-republicans-judges-senate/1715357/>. *But see* 158 CONG. REC. S6495 (daily ed. Sept. 20, 2012) (statement of Sen. Mitch McConnell).

91 Vacancies in the Federal Judiciary, *supra* note 5 (for years 1993-1994 & 2001-2002); *see also supra* notes 14-26; *infra* note 92.

92 2010 circuit activity was greater. 156 CONG. REC. S6991 (2010); *supra* note 60 and accompanying text; *see supra* text accompanying note 37. The year 2009 was like 1993 when Ginsburg replaced Justice Byron White; her approval took less time due to consultation. Linda Greenhouse, *Senate, 96-3, Easily Affirms Judge Ginsburg as a Justice*, N.Y. TIMES (Aug. 4, 1993), <http://www.nytimes.com/1993/08/04/us/senate-96-3-easily-affirms-judge-ginsburg-as-a-justice.html>; *see also* ORRIN HATCH, SQUARE PEG CONFESSIONS OF A CITIZEN SENATOR 179 (2003); Stras & Scott, *supra* note 7, at 1902-04.

properly instituting a government. During his beginning year and much of the next, members neglected to confirm sufficient upper-echelon DOJ officers, particularly for OLP.<sup>93</sup> Attacking myriad intractable complications, especially the recession, the Iraq and Afghanistan circumstances, and the Guantanamo situation, which previous chief executives bequeathed, also consumed huge resources.<sup>94</sup>

Appointing nominees who serve on courts appears to impose certain detriments, even while the idea yields multiple advantages, namely the comparative ease of tracking important qualifications and conveying applicable experience. For instance, critics question the advisability of effectively converting the appellate bench into a “career judiciary” like that most European nations have adopted.<sup>95</sup> Commentators rely upon the American convention which plucks jurists from a multitude of sources, including the plaintiff and defense civil bars, federal and state criminal practitioners, and legal scholars; they contribute wide-ranging perspectives and skills. A few expert critics inquire whether the desire of numerous judges to be elevated may not undercut independence or wonder about mounting bureaucratization.<sup>96</sup>

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93 Goldman et al., *supra* note 27, at 264–66; Leahy statement, *supra* note 43; Peter Baker, *Obama's Team is Lacking Most of Its Top Players*, N.Y. TIMES (Aug. 24, 2009), <http://www.nytimes.com/2009/08/24/us/politics/24confirm.html>; see Wil S. Hylton, *Hope. Change. Reality.*, GENTLEMEN'S Q. (Dec. 2010), <http://www.gq.com/news-politics/politics/201012/eric-holder-attorney-general-rahm-emanuel-white-house-elections>; Al Kamen, *The Judicial Waiting Game*, WASH. POST (Aug. 4, 2010); Ed O'Keefe, *Obama Criticizes Holds Placed on his Nominees*, WASH. POST (Feb. 4, 2010), [http://articles.washingtonpost.com/2010-02-04/politics/36788060\\_1\\_confirmation-votes-martha-n-johnson-president-obama](http://articles.washingtonpost.com/2010-02-04/politics/36788060_1_confirmation-votes-martha-n-johnson-president-obama); Seth Stern, *Bench-Clearing Brawl*, C.Q. WEEKLY, Sept. 27, 2010, at 2212.

94 See Peter Baker, *Could Afghanistan Become Obama's Vietnam?*, N.Y. TIMES (Aug. 22, 2009), <http://www.nytimes.com/2009/08/23/weekinreview/23baker.html>; Thomas L. Friedman, Op-Ed, *Finishing Our Work*, N.Y. TIMES (Nov. 4, 2008), <http://www.nytimes.com/2008/11/05/opinion/05friedman.html>; Anne E. Kornblut, *Obama Declares That Combat In Iraq is Over*, WASH. POST (Sept. 1, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/31//AR2010083104496.html>; Mark Landler, *Obama Signs Pact in Kabul, Turning Page in Afghan War*, N.Y. TIMES (May 1, 2012), <http://www.nytimes.com/2012/05/02/world/asia/obama-lands-in-kabul-on-unannounced-visit.html>.

95 For helpful assessment of a “career judiciary,” see *supra* note 62. See generally Russell Wheeler, *Changing Backgrounds of U.S. District Judges: Likely Causes and Possible Implications*, 93 JUDICATURE 140 (2010); Ashby Jones, *Scalia in Mississippi: Stop With the Judges, Already!*, WALL ST. J. (Jan. 5, 2010, 1:37 P.M.), <http://blogs.wsj.com/law/2010/01/05/scalia-in-mississippi-stop-with-the-judges-already>; The Reliable Source, *A Truly Exclusive Washington Party: Antonin Scalia Hosts Justices to Toast New Henry Friendly Bio*, WASH. POST (May 1, 2012), [http://www.washingtonpost.com/blogs/reliable-source/post/a-truly-exclusive-washington-party-antonin-scalia-hosts-justices-to-toast-new-henry-friendly-bio/2012/04/30/gIQR2vYsT\\_blog.html](http://www.washingtonpost.com/blogs/reliable-source/post/a-truly-exclusive-washington-party-antonin-scalia-hosts-justices-to-toast-new-henry-friendly-bio/2012/04/30/gIQR2vYsT_blog.html).

96 POSNER, *supra* note 34, at 139–59; see also JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS* 1–19 (2002); Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L. J. 1442 (1983); Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME L. REV. 648 (1980); Katherine A. Helm & Joel Cohen, *Don't Exclude Academics from the Federal Judiciary*, LAW.COM (Sept. 6, 2011), [http://www.law.com/jsp/article.jsp?id=1202513472093&Dont\\_Exclude\\_Academics\\_From\\_the\\_Federal\\_Judiciary](http://www.law.com/jsp/article.jsp?id=1202513472093&Dont_Exclude_Academics_From_the_Federal_Judiciary)

Commentators emphasize related attributes that confirmees and nominees possess. Critics ask why merely one candidate is thirty-nine and the cohort averages fifty-five, contending GOP appointment of younger jurists supplies much beneficial circuit longevity and excellent picks when Supreme Court Justices decide to retire.<sup>97</sup> Observers ponder the ideological viewpoints which some confirmees and prospects hold, deeming them excessively liberal or conservative. Astute commentators urge greater balance, intimating that ample resistance even to centrists, like Judges Davis and Hamilton, shows that compromise on ideology has been a less productive strategy while Republican presidents assiduously suggested conservative appeals court jurists.<sup>98</sup>

This appointments evaluation concludes that Obama and the chamber implemented many efficacious procedures which should promote accomplished judges' confirmations. However, the analysis determines that nominees might be canvassed with additional speed, in particular given the voluminous openings. The last Part, thus, carefully assesses practices for swiftly considering numbers of possibilities submitted and curbing gridlock.

### III. RECOMMENDATIONS FOR PROMPTLY FILLING THE APPELLATE VACANCIES

#### A. *The Executive and the Senate*

Obama and both parties' senators effectuated manifold crucial policies and should keep applying the constructs and other valuable ideas to the circuit process and the numerous specific vacant posts.<sup>99</sup> The chief executive and the Senate conscientiously identified and handled concerns raised by acute politicization. For example, Obama consciously acted in ways that

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&slreturn=2013113211939. Many Obama appointees do not increase the circuit bench's experiential diversity.

97 Berman, *supra* note 90; see George, *supra* note 69, at 16, 21; Pamela S. Karlan, *Empty Benches*, BOSTON REV. (Sept./Oct. 2012), [http://www.bostonreview.net/BR37.5/pamela\\_s\\_karlan\\_federal\\_courts\\_vacancies\\_obama.php](http://www.bostonreview.net/BR37.5/pamela_s_karlan_federal_courts_vacancies_obama.php); Mark Walsh, *Youth Will Out: No Matter Who Wins, SCOTUS Nominees Will Get Younger*, A.B.A. J., Aug. 2012, at 19; Jamelle Bouie, *How Obama Has Jeopardized the Future of Liberalism*, WASH. POST. (Oct. 9, 2012, 3:28 PM), [http://www.washingtonpost.com/blogs/plum-line/post/how-obama-has-jeopardized-the-future-of-liberalism/2012/10/09/bec545de-1225-11e2-9a39-1f5a7f6fe945\\_blog.html](http://www.washingtonpost.com/blogs/plum-line/post/how-obama-has-jeopardized-the-future-of-liberalism/2012/10/09/bec545de-1225-11e2-9a39-1f5a7f6fe945_blog.html).

98 For balance, see Fontana, *supra* note 48; Ifill, *supra* note 61; *supra* text accompanying notes 52–54, 71–73, 83. For GOP appointees, see Tobias, *supra* note 76, at 1045; Charlie Savage, *Appeals Court Pushed to Right by Bush Choices*, N.Y. TIMES (Oct. 28, 2008), <http://www.nytimes.com/2008/10/29/us/29judges.html>; *supra* text accompanying note 73. A few say ethnic and gender diversity's emphasis erodes merit and other diversity, ideas the "Wise Latina" issue shows. Hon. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87 (2002). See generally SONIA SOTOMAYER, *MY BELOVED COUNTRY* (2013); Scherer, *supra* note 30, at 591.

99 The best remedy may be enough new positions to seat all judges now authorized. Tobias, *supra* note 1, at 569. Others only limit irreducible time restraints. For many ideas, see MANN & ORNSTEIN, *supra* note 47; Goldman et al., *supra* note 27; Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783 (2006); Tobias, *supra* note 1, at 552–73.

essentially depoliticized fundamental constituents of selection.<sup>100</sup> The White House and congressional leaders attempted to coordinate and innovate, reconcile conflicting views, predict and creatively mediate stubborn disputes,<sup>101</sup> and cease or ameliorate conduct found not profitable.<sup>102</sup> Appointments officials will most easily consolidate the best approaches, if the chief executive, legislators, and staff continue assertive communications prior and subsequent to nominations.

Politicians in jurisdictions that encountered unoccupied seats cooperated with the President and a multitude of colleagues respecting substantial issues, especially directly assuming principal responsibility to send potential nominees.<sup>103</sup> When openings in fact materialized, lawmakers delineated several competent picks, encompassing the impressive administration nominees.<sup>104</sup> Officers established commissions which recommended aspirants, yet developing some panels stalled confirmations, although that may be one fixed cost in a nascent presidency and with concomitantly altered Senate composition. Therefore, the political figures might survey numbers of analogous committees prescribed earlier and, when indicated, recalibrate endeavors by improving transparency while effectively safeguarding privacy. Constructive illustrations are the entities that Wisconsin officials sponsored the past third century and California Senators Dianne Feinstein (D) and Barbara Boxer (D) invoked over George W. Bush's tenure.<sup>105</sup> The commissions essentially improve appointments for circuits wrestling with multiple empty positions and combat sustained deadlocks, as the panels help galvanize consensus.<sup>106</sup>

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100 See *supra* notes 35–38 and accompanying text. See generally *supra* notes 27–34 and accompanying text.

101 For example, Democrats clarified they would assume the lead when Texas senators kept the Bush panel. See *supra* note 33; see also H. Thomas Wells Jr., *No Time for Tension, No Room for Rancor*, A.B.A. J., Nov. 2008, at 94.

102 When the GOP opposed a quick hearing, Leahy held a second, while Sessions deviated from tradition by agreeing to one hearing for two nominees. See *supra* text accompanying notes 40–41; see also Toobin, *supra* note 4.

103 See *supra* notes 31–33 and accompanying text. See generally *supra* note 101 and accompanying text.

104 See *supra* notes 31–32, 61–64, 68, and accompanying text. But see *supra* text accompanying notes 31, 83.

105 California kept them; Wisconsin's vets applicants from whom senators pick. See *supra* note 31; Senate Judiciary Comm., Exec. Business Mtg., Feb. 4, 2010 (statements of Sens. Russ Feingold and Dianne Feinstein); Editorial, *Step Aside, Senator*, MILWAUKEE J. SENTINEL (July 19, 2011), <http://www.jsonline.com/news/opinion/125847338.html>. A panel like President Jimmy Carter's may warrant evaluation. See LARRY BERKSON & SUSAN CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION* (1980).

106 If the ideas above fail, Obama and senators must redouble efforts to end logjams. Mark Hansen, *Logjam*, A.B.A. J., June 2008, at 38; Jonathan Bernstein, *Mitch McConnell's Choice: Justice Delayed, and Delayed, and Delayed*, WASH. POST (June 14, 2012, 1:09 P.M.), [http://www.washingtonpost.com/blogs/plum-line/post/mitch-mcconnells-choice-justice-delayed-and-delayed-and-delayed/2012/06/14/gJQAVEMjcV\\_blog.html](http://www.washingtonpost.com/blogs/plum-line/post/mitch-mcconnells-choice-justice-delayed-and-delayed-and-delayed/2012/06/14/gJQAVEMjcV_blog.html); Paul Kane, *Reid Calls for Ending "Gridlock" But Pledges Senate Rules Changes if GOP Tries to Obstruct Obama's*



Sharp filing increases after 1990, when the most recent comprehensive judgeships act passed, dictated the U.S. Judicial Conference request to authorize a dozen new slots.<sup>107</sup> Because the courts' policymaking arm grounds suggestions regarding more posts on conservative work and case load estimates and the circuits have dire needs for additional jurists who remedy docket crises, Obama and Congress must adopt thorough legislation.<sup>108</sup> Supplemental judgeships could prove rather inconsequential, should gridlock persist.<sup>109</sup>

Despite the benefits shown, the procedures used were not entirely successful. Thus, the President and officers may want to concurrently scrutinize various practices which the White House and the lawmakers instituted, refine or delete less effective techniques, if necessary, closely analyze sound concepts previously employed, and cautiously screen, while perhaps applying, innovative untested solutions.

### B. *The Executive*

The last three presidents have similar responsibility for the present difficulties.<sup>110</sup> Obama enunciated broad, critical goals and swiftly implemented efficacious policies which realized commendable objectives and should in essence carefully proceed as he started.<sup>111</sup> This White House considered merit the polestar, tendered very qualified diverse nominees, and streamlined initiatives by restoring pre-submission ABA examinations which definitely illuminate confirmations and can avoid embarrassment.<sup>112</sup> Obama

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*Term*, WASH. POST (Nov. 7, 2012), [http://articles.washingtonpost.com/2012-11-07/politics/35503993\\_1\\_reid-filibuster-rules-boehner](http://articles.washingtonpost.com/2012-11-07/politics/35503993_1_reid-filibuster-rules-boehner). More drastic ideas, namely "trades," may merit use. *Infra* note 126.

107 U.S. JUDICIAL CONF., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONF. OF THE U.S. 20 (Mar. 15, 2011); *see* S.1653, 112th Cong. (2011); S.1014, 112th Cong. (2011); *The Federal Judgeships Act of 2009: Hearing on S.1653 Before the S. Comm. on the Judiciary*, 111th Cong. (2009); 156 CONG. REC. S904, *supra* note 43; Carl Tobias, *Congress and the Pending Comprehensive Judgeships Legislation*, FINDLAW (Sept. 30, 2009), [http://writ.news.findlaw.com/commentary/20090930\\_tobias.html](http://writ.news.findlaw.com/commentary/20090930_tobias.html).

108 Tobias, *supra* note 9, at 748; GORDON BERMANT ET AL., FED. JUDICIAL CTR., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS (1993); *see also* Tobias, *supra* note 76, at 1045, 1052 (appeals and workloads). *But see* Robert Lafolla, *GOP Victory Scrambles the Judiciary Agenda*, L.A. DAILY J., Jan. 21, 2010; *infra* note 149.

109 *E.g.*, *supra* notes 42, 64, 83–90, and accompanying text; *see supra* notes 12–26 and accompanying text.

110 *See supra* notes 14–26 and accompanying text. Obama might want to solicit efficacious guidance from officials who have been responsible for judicial selection in earlier administrations. Tobias, *supra* note 76, at 1051.

111 However, Obama might review and refine or eliminate, as warranted, his ideas, analyze earlier tools, and consider untested ones, *see supra* paragraph after text accompanying note 109, and announce the goals in a national forum; this should increase transparency and inform participants in the process and citizens, *see* Tobias, *supra* note 76, at 1049.

112 *See supra* notes 30, 60–64, and accompanying text; *see also supra* text accompanying notes 10, 20, 29.

must keep retaining dominant responsibility for nominations and continue deferring to politicians, when appropriate, cultivating home state legislators and capitalizing on their informative guidance, accommodating cooperative Republicans,<sup>113</sup> elevating jurists, and forecasting High Court vacancies.<sup>114</sup> The President should also keep providing sufficient able people of color, women, and LGBT designees the committee smoothly reviews at a pace that insures efficient chamber investigation,<sup>115</sup> and continue solicitude for Democratic party leaders and corresponding GOP analogues. However, controversial executive branch recess appointments in 2012 drastically undermined the sensitively calibrated White House activities, precipitating scathing reactions by minority party senators.<sup>116</sup>

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113 GOP votes reflect these ideas. Todd Ruger, *The Senate's Stranglehold*, NAT'L L.J., (Oct. 1, 2012), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202573089819&The\\_Senates\\_stranglehold](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202573089819&The_Senates_stranglehold); David Stout, *Sotomayor Gets 9 G.O.P. Votes*, N.Y. TIMES (Aug. 6, 2009, 12:56 PM), <http://thecaucus.blogs.nytimes.com/2009/08/06/sotomayor-gets-9-gop-votes> (updated Aug. 6, 2009, 1:44 PM); see *supra* text accompanying notes 45–46, 56; *infra* note 123. Obama's cost free, constructive consultation must continue. See *supra* notes 31–33 and accompanying text.

114 Jeffrey Toobin, *After Stevens: What Will the Supreme Court Be Like Without Its Liberal Leader?*, NEW YORKER (Mar. 22, 2010), [http://www.newyorker.com/reporting/2010/03/22/100322fa\\_fact\\_toobin](http://www.newyorker.com/reporting/2010/03/22/100322fa_fact_toobin); see Fontana, *supra* note 48; Lisa Mascaro, *Jacqueline H. Nguyen of L.A. Confirmed to U.S. 9th Circuit Court*, L.A. TIMES (May 7, 2012), <http://articles.latimes.com/2012/may/07/nation/la-na-nguyen-20120508> (elevating Obama's nominee); Jeffrey Rosen, Op-Ed., *Barack Obama Supreme Court Justice*, WASH. POST (Feb. 21, 2010), [articles.washingtonpost.com/2010-02-21/opinions/36783133-1-president-obama-barack-obama-supreme-court](http://articles.washingtonpost.com/2010-02-21/opinions/36783133-1-president-obama-barack-obama-supreme-court) (discussing the qualities of President Obama and their relation to the Supreme Court); *supra* notes 37, 61–64, 68, 92, and accompanying text.

115 Kendall, *supra* note 58; *supra* notes 30–33 and accompanying text; see 156 CONG. REC. S904, *supra* note 43; Letter from Prof. Bruce Ackerman et al., *supra* note 34. In 2009, Obama tapped slowly. Todd Ruger, *Judicial Restraint*, NAT'L L.J. (May 14, 2012), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202553268915&Judicial\\_restraint](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202553268915&Judicial_restraint). The pace did quicken, as Steve Six shows. Press Release, White House, Office of Press Sec'y, *President Obama Nominates Steve Six to United States Circuit Court* (Mar. 9, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/09/president-obama-nominates-steve-six-united-states-circuit-court>; Ruger, *supra* note 113; see Jonathan Bernstein, Op-Ed., *Fill Those Judicial Vacancies!*, WASH. POST (May 21, 2012, 3:19 PM), [http://www.washingtonpost.com/blogs/plum-line/post/fill-those-judicial-vacancies/2012/05/21/gIQAzcJwFU\\_blog.html](http://www.washingtonpost.com/blogs/plum-line/post/fill-those-judicial-vacancies/2012/05/21/gIQAzcJwFU_blog.html).

116 See *supra* notes 27–29 and accompanying text; *supra* notes 40–41; *infra* notes 136–42. But see *supra* text accompanying notes 42–56 (discussing appointments made). For recess appointments, see Noel Canning v. NLRB, 705 F. 3d 490 (D.C. Cir. 2013); *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 OP. O.L.C. 1 (2012); Charlie Savage, *Obama Tempts Fight Over Recess Appointments*, N.Y. TIMES (Jan. 4, 2012, 5:41 PM), <http://thecaucus.blogs.nytimes.com/2012/01/04/obama-tempts-fight-over-recess-appointments/>; Jonathan Weisman, *Republican Vow of Revenge Falls Short*, N.Y. TIMES (Feb. 9, 2012, 3:29 PM), <http://thecaucus.blogs.nytimes.com/2012/02/09/senate-g-o-p-vowed-to-oppose-all-obama-choices-but-nominee-gets-bipartisan-confirmation>; George F. Will, Op. Ed., *Obama's Selective Defense of the Constitution*, WASH. POST (Oct. 10, 2012), [http://articles.washingtonpost.com/2012-10-10/opinions/35498394\\_1\\_recess-appointments-presidential-appointments-vacancies](http://articles.washingtonpost.com/2012-10-10/opinions/35498394_1_recess-appointments-presidential-appointments-vacancies); *infra* note 128.

Obama concomitantly pursued special efforts to profoundly improve ethnic, gender, and sexual-orientation diversity, which his confirmations and nominations consistently represent,<sup>117</sup> and must keep widening that diversity,<sup>118</sup> as it can yield the advantages recounted.<sup>119</sup> Obama's circuit appointees and nominees could enlarge ideological diversity; he might weigh augmenting this because Republican presidents sent numerous conservatives and enhanced balance is warranted.<sup>120</sup> Obama may effectively counter assertions that confirmees and nominees hold comparatively liberal viewpoints by denominating moderates. Insofar as the prospects can spark efficacious interest group resistance and deleterious criticisms which resemble those both parties fired at each other's White Houses, crucially slowing the process and driving rejections, he could assess somewhat conservative aspirants or correspondingly be pragmatic about how this opposition can detrimentally affect selection.<sup>121</sup> These complications had accentuated relevance the last Congress, given Democrats' reduced numbers and the machinations, which include procedural stalling, that normally constrict appointments over presidential election years. Indeed, McConnell ceased entering appellate nominee voting concords in June, and the chamber adjourned without casting ballots on more.<sup>122</sup> Notwithstanding the larger Democratic majority and

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117 See *supra* notes 30–32 and accompanying text. Officials have proposed numerous diverse prospects, *supra* text accompanying note 32, as has Obama, *supra* text accompanying note 64; see Goldman, *supra* note 9 (recounting presidential records since Nixon).

118 He may review and refine his ideas and assess effective prior ones. Carter used panels, and Presidents George H.W. Bush and Clinton asked senators to suggest many strong women. See Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477, 479–80 (1991) (discussing President Bush's efforts to suggest more strong women); Neil A. Lewis, *Unmaking the G.O.P. Court Legacy*, N.Y. TIMES (Aug. 23, 1993), <http://www.nytimes.com/1993/08/23/us/unmaking-the-gop-court-legacy.html> (discussing President Clinton's efforts to suggest more strong women); *supra* note 105 (discussing President Carter's use of panels to suggest more strong women); see also *supra* paragraph after text accompanying note 109.

119 See *supra* notes 69–76 and accompanying text. See generally *supra* notes 30–33 and accompanying text. But see *supra* note 98 (discussing “erosion” of merits).

120 See *supra* notes 71–73 and accompanying text; see also *supra* notes 97–98 and accompanying text.

121 Carl Hulse, *G.O.P. Blocks Judicial Nominee in a Sign of Battles to Come*, N.Y. TIMES (May 19, 2011), <http://www.nytimes.com/2011/05/20/us/politics/20congress.html>; Neil A. Lewis, *Bush Judicial Choice Imperiled by Refusal to Release Papers*, N.Y. TIMES (Sept. 27, 2002), <http://www.nytimes.com/2002/09/27/us/bush-judicial-choice-imperiled-by-refusal-to-release-papers.html?ref=neilalewis>; see GERHARDT, *supra* note 11, at 217–29; NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE APPOINTMENT PROCESS 4–10 (2005).

122 158 CONG. REC. S5642 (daily ed. July 30, 2012) (statement of Sen. Patrick Leahy); RUSSELL WHEELER, JUDICIAL CONFIRMATIONS: WHAT THURMOND RULE?, BROOKINGS INST. (2012), available at <http://www.brookings.edu/research/papers/2012/03/judicial-wheeler>; Letter from Sen. Mitch McConnell to Bill Robinson, ABA President, (June 25, 2012); Carl Tobias, *Senate Should Not Invoke “Thurmond Rule” to Block Kayatta Nomination*, THE HILL (Aug. 14, 2012), <http://thehill.com/blogs/congress-blog/judicial/243511-senate-should-not-invoke-thurmond-rule-to-block-kayatta-nomination>; *infra* note 135; see also

Obama's second victory, the notions retain pertinence. The chief executive might also contemplate increasing diversity with respect to experience and age; Obama could name and confirm many strong attorneys who practice civil and criminal law, scholars, and younger candidates.<sup>123</sup>

Another cogent idea would be rigorously proffering additional nominations the GOP can support. Prominent examples are Circuit Judges Diaz, Murguia, and Stranch, possibilities officials in their jurisdictions favored.<sup>124</sup> The White House should consider proposing greater numbers of Republican appointees like Judge Henry Floyd whom the chief executive tapped after consulting home state officers and perhaps suggest more, capable individuals with party affiliations.<sup>125</sup> Those notions may be effective for confirmations involving appeals courts, which have several protracted vacancies and gargantuan dockets, or encompass jurisdictions, namely Idaho, Kansas, Texas and Utah, with two GOP senators.<sup>126</sup>

The President should continue following measured, nuanced policies, as mistakes erode credibility and can narrow appointments. Obama, whose touchstone is bipartisanship, must keep adopting conciliatory endeavors. Illustrative are robust consultation and his exceptional nominees; the submissions' competence, mainstream points of view, and diverse backgrounds show why few have provoked significant controversy. If these actions lack

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Carl Tobias, *Filling the Judicial Vacancies in a Presidential Election Year*, 46 U. RICH. L. REV. 985 (2012).

123 Fontana, *supra* note 48; David G. Savage, *Senate Judicial Confirmations Skip 2 California Nominees*, L.A. TIMES (Dec. 20, 2010), <http://articles.latimes.com/2010/dec/20/nation/la-na-senate-judges-20101221>; Micah Schwartzman, *Not Getting Any Younger*, SLATE (May 26, 2011), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/05/not\\_getting\\_any\\_younger.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/05/not_getting_any_younger.html); Carol J. Williams, *9th Circuit Candidate's Career Marked by Rapid Ascent, Ranging Roles*, L.A. TIMES (Mar. 9, 2010), <http://articles.latimes.com/2010/mar/09/local/la-me-goodwin-liu9-2010mar09>; see Wheeler, *supra* note 95; *supra* notes 61–62, 64, 96–98, and accompanying text.

124 Bill Theobald, *Nashville Attorney's Appointment to U.S. Appeals Court is Confirmed*, THE TENNESSEAN (Sept. 14, 2010), <http://pqasb.pqarchiver.com/tennessean/access/2137361621.html?FMT=ABS&FMTS=ABS:FT&type=current&date=Sep+14%2C+2010&author=Bill&pub=The+Tennessean&edition=&startpage=n%2Fa&desc=Nashville+attorney%27s+ap+pointment+to+U.S.+appeals+court+is+confirmed>; *supra* note 57; *infra* note 132 and accompanying text; see *supra* text accompanying note 113; *infra* notes 133–35.

125 157 CONG. REC. S6027 (daily ed. Oct. 3, 2011); James Rosen, *Obama Nominates S.C. Federal Judge to Appellate Court*, McCLATCHY WASH. BUREAU (Jan. 27, 2011, 11:06 AM) [www.mcclatchydc.com/2011/01/27/v-print/107597/obama-nominates-sc-federal-judge.html](http://www.mcclatchydc.com/2011/01/27/v-print/107597/obama-nominates-sc-federal-judge.html); *infra* note 134. Quintessential is Sotomayor whom George H.W. Bush first chose. Neil A. Lewis, *After Delay, Senate Approves Judge for Court In New York*, N.Y. TIMES (Oct. 3, 1998), <http://www.nytimes.com/1998/10/03/nyregion/after-delay-senate-approves-judge-for-court-in-new-york.html?ref=neilalewis>; see Tobias, *supra* note 9, at 770–71.

126 See *infra* text accompanying notes 133–35. For lengthy vacancies, see Tobias, *supra* note 81. For courts with long openings and many cases in states where officials differ, compromises or “trades” may work, as Georgia suggests. Bill Rankin, *Vote Sets Stage for Changes on the Bench*, ATLANTA J. CONST., Oct. 21, 2012, at 1A. Trades spark controversy. 143 CONG. REC. S2541 (daily ed. Mar. 19, 1997) (statement of Sen. Joe Biden); see GERHARDT, *supra* note 11, at 157–63.

efficacy because Republicans do not cooperate, administration personnel ought to contemplate applying relatively confrontational alternatives. For instance, should the GOP continue delaying numerous approval votes, the chief executive might use the bully pulpit in embarrassing the officials and holding senators publicly responsible, force confirmations by taking the divisive issue to the nation, or make unfilled seats a prominent election year question.<sup>127</sup> Substantially analogous would be proffering skilled consensus nominees for all present court openings and selectively instituting circuit recess appointments; both devices could leverage Republicans through publicizing and dramatizing how chronic vacancies eviscerate justice.<sup>128</sup>

### C. *The Senate*

The Senate must adopt cooperative practices, as the chamber shares responsibility with the past three administrations for the deteriorating condition of judicial selection and the numerous current openings. The GOP may want to remember that Democrats helped approve greater numbers of jurists when it controlled the presidency<sup>129</sup> and citizens might now blame Republicans for severely prolonged vacancies.<sup>130</sup> Accordingly, GOP members essentially need to be less confrontational. The senators may afford candid advice, if consulted; employ incisive debates, not filibusters; vote more expeditiously on accomplished centrist nominees and Bush confirmees Obama proposes; and recommend stellar choices when his prove unacceptable.<sup>131</sup>

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127 158 CONG. REC. S1065 (daily ed. Feb. 28, 2012); Press Release, White House, Office of the Press Sec'y, *President Obama Renominates Thirty-Three to Federal Judgeships*, (Jan. 3, 2013) available at <http://www.whitehouse.gov/the-press-office/2013/01/03/president-obama-re-nominates-thirty-three-federal-judgeships>; 158 CONG. REC. S8376, *supra* note 89; Jonathan Bernstein, Op-Ed., *Will Obama Push for Judicial Confirmations this Fall?*, WASH. POST (Aug. 31, 2011), [http://www.washingtonpost.com/blogs/plum-line/post/will-obama-push-for-judicial-confirmations-this-fall/2011/08/31/gIQARwd5rJ\\_blog.html](http://www.washingtonpost.com/blogs/plum-line/post/will-obama-push-for-judicial-confirmations-this-fall/2011/08/31/gIQARwd5rJ_blog.html); Linda Greenhouse, Op-Ed., *Rock Bottom*, N.Y. TIMES (Dec. 14, 2011), <http://opinionator.blogs.nytimes.com/2011/12/14/rock-bottom/>. The GOP has mastered these ideas. Stras & Scott, *supra* note 7, at 1902–06; Tobias, *supra* note 9, at 772; Ruger, *supra* note 113.

128 Unless the situation substantially worsens, Obama should not recess appoint judges, as many legal and political concerns explain its rare use. U.S. CONST. art. II, § 2, cl. 3; *see Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMMENT. 515 (2004); sources cited *supra* note 116. George W. Bush used similar ideas, such as renominating controversial picks, to press Democrats, but some concepts lack efficacy and Obama should eschew them. *See, e.g.*, Tobias, *supra* note 76, at 1052–54; Lewis, *supra* note 37; Toobin, *supra* note 4.

129 *See* Tobias, *supra* note 9, at 756–57. *See generally* Hartley, *supra* note 12. *But see* Hatch, *supra* note 8, at 1035–40 (discussing constitutional ways to appoint).

130 *See supra* notes 22, 24–26; *see also* Jack Newfield, *The Right's Judicial Juggernaut*, THE NATION (Oct. 7, 2002), <http://www.thenation.com/article/rights-judicial-juggernaut#>. *But see* 158 CONG. REC. S5647–49 (statements of Sens. Chuck Grassley & Mitch McConnell) (daily ed. July 30, 2012).

131 Bush, Obama, and others posit ideas to speed selection. Some, such as requiring judges to give earlier notice of intent to assume senior status and rigid dates for specific

Illustrations abound the last two congresses. Arizona Senators John McCain (R) and Jon Kyl (R) personally supported nomination of Judge Murguia, energetically assisting the fine pick to navigate the gauntlet.<sup>132</sup> Utah Senator Hatch championed Professor Scott Matheson and deftly reassured Kyl, allaying concerns about the nominee's constitutional principles, which seemingly persuaded the Arizonan to favor the superb prospect.<sup>133</sup> Cooperation implicating Senators Lindsey Graham (R) and Jim DeMint (R) and Representative James Clyburn (D), active preeminent South Carolina leaders, underlay their proffer, and White House tender, of very competent Bush appointee Floyd, who easily captured approval.<sup>134</sup> In contrast, for egregious scenarios—particularly those mirroring the Oklahoma appeals court vacancy, where GOP Senators James Inhofe and Tom Coburn apparently enjoyed nominal consultation—the President's staff might, and ultimately did, readjust, commencing dialogue and canvassing Republican attorneys or names concomitantly deemed preferable by Inhofe and Coburn, who seemed receptive to overtures.<sup>135</sup>

Judiciary panel evaluations have minimally frustrated confirmations. Democrats generously accommodated innumerable GOP requests. There

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phases, are infeasible or violate traditions. Exec. Order No. 13,300, 68 Fed. Reg. 25,807 (May 9, 2003); S. Res. 327, 108th Cong. (2004) (enacted); Bermant et al., *supra* note 1; Mike Allen & Amy Goldstein, *Bush Has Plan to Speed Judicial Confirmations*, WASH. POST, Oct. 31, 2002, at A21; Fontana, *supra* note 33; Paul Kane, *State of the Union Proposals: What Might Pass?*, WASH. POST (Jan. 25, 2012), [http://www.washingtonpost.com/politics/state-of-the-union-proposals-what-might-pass/2012/01/25/g1QAQhsVRQ\\_story.html](http://www.washingtonpost.com/politics/state-of-the-union-proposals-what-might-pass/2012/01/25/g1QAQhsVRQ_story.html); *see supra* notes 46, 57, 124–26; *infra* note 142 and accompanying text.

132 *Hearing Before the Senate Judiciary Comm. on Mary Murguia to be a U.S. Circuit Judge for the Ninth Circuit*, 111th Cong. (2010); 156 CONG. REC. S10,986 (daily ed. Dec. 22, 2010); *see* 158 CONG. REC. S3947 (daily ed. June 12, 2012) (showing Arizona senators' similar treatment of Arizona Supreme Court Justice Andrew Hurwitz).

133 Senate Judiciary Comm., Exec. Business Mtg., June 10, 2010; *see* Thomas Burr, *Scott Matheson Jr. OK'd for Appeals Court Position*, SALT LAKE TRIB. (Dec. 25, 2010), <http://archive.slttrib.com/article.php?id=12707607&itype=storyID>; Thomas Burr, *Scott Matheson Named to 10th Circuit Appellate Court*, SALT LAKE TRIB. (Mar. 3, 2010), [http://www.slttrib.com/ci\\_14506179](http://www.slttrib.com/ci_14506179); Letter from Judge Michael McConnell, Tenth Circuit Court of Appeals, to President Barack Obama (May 5, 2009).

134 *See supra* note 125 and accompanying text. *But see* sources cited *supra* notes 31, 83; *infra* note 135.

135 158 CONG. REC. S5642 (daily ed. July 30, 2012); Chris Casteel, *Republican Opposition in Senate Kills Move to Confirm Oklahoman to Appeals Court Post*, OKLAHOMAN (July 31, 2012), <http://newsok.com/republican-opposition-in-senate-kills-move-to-confirm-oklahoman-to-appeals-court-post/article/3696782>; Jim Myers, *Court Vacancy Causes Stir*, TULSA WORLD (May 23, 2010), [http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20100523\\_16\\_a1\\_washin822076](http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20100523_16_a1_washin822076); Carl Tobias, *The Senate's "Dr. No" Delivers a Surprise "Yes,"* L.A. TIMES (Mar. 14, 2012), <http://articles.latimes.com/2012/mar/14/opinion/la-oe-tobias-judges-20120314>; Editorial, *A Poor Excuse to Block Judges*, N.Y. TIMES (July 29, 2012), <http://www.nytimes.com/2012/07/30/opinion/a-poor-excuse-to-block-judges.html>; Editorial, *Bacharach Confirmation to 10th Circuit Needs (Finally) to be Completed*, OKLAHOMAN (Jan. 6, 2013), <http://newsok.com/bacharach-confirmation-to-10th-circuit-needs-finally-to-be-completed/article/3743147>; sources cited *supra* note 79.

was a hearing for one nominee the entire final month during the last Congress's initial session and another convened respecting Liu, even though the party had comprehensively interrogated the nominee with a daunting marathon session, and returned Liu to the chief executive, the identical year.<sup>136</sup> Nevertheless, the minority assiduously kept holding over numerous prominent submissions absent explanations, producing short confirmation delays. Therefore, Republicans must decrease the procedure's invocation while seeking additional time only when clearly necessary. An example was a pragmatic request in the 112th Senate's earliest meeting propounded by Senator Charles Grassley (R-Iowa) to delay numbers of votes, which arguably provided Senator Mike Lee (R-Utah), a new member, rather effective opportunities for treating candidates.<sup>137</sup>

If the panel dramatically slows processing, senators possess numerous ways to speed assessment. The committee may expand ballots with relatively truncated analysis, one idea which Hatch, the ex-Chair, used, or discontinue hearings for noncontroversial people.<sup>138</sup> Much tradition and some recent practice suggest distinguished nominees who lack controversy merit hearings and ballots, yet ideological criticisms protracted selection.<sup>139</sup>

Nonetheless, the floor was the bottleneck. Restricted debates and votes explain the minuscule number of confirmations. Reid might propel action by initiating nominee consideration more swiftly following panel approval. The senator expeditiously pursued numerous debates and ballots regarding circuit aspirants; however, McConnell often directly rejected the importuning, essentially imposing filibusters. To the extent controversy which involves nominees means they languish across significant periods, Democrats should confine regular filibuster deployment by encouraging additional prompt rigorous chamber debates.<sup>140</sup>

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136 Goodwin Liu Hearing, *supra* note 40; Lee Ross, *Second Senate Hearing for Professor Liu*, FOXNEWS.COM (Mar. 2, 2011), <http://politics.blogs.foxnews.com/2011/03/02/senate-holds-second-hearing-controversial-judicial-pick-goodwin-liu>; *supra* notes 40, 123; *infra* text accompanying note 140; see Editorial, *The Values of Professor Liu*, WASH. POST (Mar. 6, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/06/AR2011030603169.html>.

137 Senate Judiciary Comm., Exec. Business Mtg., Feb. 3, 2011. In 2012, most GOP members voted no on two district choices for no reason and a circuit pick for unpersuasive ones. See *id.*, Mar. 8, 2012. In 2011, Grassley replaced Sessions as Ranking Member. Dean Friedman, *Grassley Hits Stride on Panel*, NAT'L J., June 20, 2012.

138 Helen Dewar, *Republicans Push Speedy Action on Court Picks; Partisan Acrimony Marks Senate Panel's Hearing on Judiciary Nominations*, WASH. POST, Jan. 30, 2003; Neil A. Lewis, *Senate Panel Backs Appeals Court Nominee*, N.Y. TIMES (Jan. 30, 2003), <http://www.nytimes.com/2003/01/30/politics/30CND-JUDG.html>; see Michael L. Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 305 (2012); Tobias, *supra* note 9, at 766, 774–75.

139 See Tobias, *supra* note 9, at 764–65, 774–75. See generally Michael J. Gerhardt, *Merit vs. Ideology*, 26 CARDOZO L. REV. 353 (2005); Hatch, *supra* note 8, at 1039; *supra* note 22; *infra* text accompanying notes 143–49.

140 Debates are useful exchanges. 143 CONG. REC. S2515 (daily ed. Mar. 19, 1997); 148 CONG. REC. S7651 (daily ed. July 31, 2002); see *supra* text accompanying note 53. Hamil-

Accordingly, the GOP needs to cooperate. It must jettison stalling pertinent floor activity on capable uncontroversial nominees. McConnell should enter greater numbers of ballot agreements while correspondingly requesting less debate time and many fewer roll call votes when individuals present strong profiles and do not engender controversy. If McConnell actually keeps remaining adamant, as evidenced by his June decision effectuating the Thurmond Rule, Democrats could hold the party accountable. Leahy championed the viewpoints that all nominees whom the committee unanimously reports deserve immediate floor ballots while others approved have robust debates comparatively soon, but these rather ambitious concepts appear unrealistic, especially given the modern chamber's poisonous straits.<sup>141</sup>

Democrats have properly applied conciliatory approaches, notably meaningful consultation with Republicans and the nomination of choices whom the minority favors, yet it did reciprocate less than was appropriate. Should the GOP persistently depend on confrontational alternatives which slow talented noncontroversial candidates, perpetuating the seventeen-judge-ship opening rate, Democrats may aggressively employ cloture and institute related solutions. They could also contemplate drastic alterations, namely revamping procedures, specifically the 2011 determination which changed anonymous holds or the chief executive's recent proposition that urged merits votes ninety days after making choices.<sup>142</sup> Insofar as limited confirmations suggest partisan efforts to undercut the White House or retribution for quickly appointing the Supreme Court nominees and Democrats' rejection of Bush possibilities, the majority should consider adoption of certain tools

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ton's filibuster failed but Liu's and Halligan's succeeded. *Id.*; 157 CONG. REC. S3144 (daily ed. May 19, 2011); *id.* at S8346 (daily ed. Dec. 6, 2011); see Maura Dolan, *Goodwin Liu Blended in Easily on California's Supreme Court*, L.A. TIMES (Oct. 22, 2012), <http://articles.latimes.com/2012/oct/22/local/la-me-justice-liu-20121023>. If the GOP employs more filibusters, a group, like the "Gang of 14," may limit filibuster use. *Text of Senate Compromise on Nominations of Judges*, N.Y. TIMES (May 24, 2005), <http://www.nytimes.com/2005/05/24/politics/24text.html>; Dahlia Lithwick, *Extraordinary Hypocrisy*, SLATE (May 19, 2011), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/05/extraordinary\\_hypocrisy.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/05/extraordinary_hypocrisy.html); Packer, *supra* note 43; Jonathan Weisman, *The Senate's Long Slide to Gridlock*, N.Y. TIMES (Nov. 24, 2012), <http://www.nytimes.com/2012/11/25/us/politics/new-senates-first-task-will-likely-be-trying-to-fix-itself.html?pagewanted=all>; see 158 CONG. REC. S5094 (daily ed. July 18, 2012).

141 Leahy urged Chief Justice John Roberts to follow Rehnquist. JOHN ROBERTS, YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2010); 156 CONG. REC. S904, *supra* note 43; *supra* text accompanying notes 26, 116, 131.

142 157 CONG. REC. S296 (daily ed. Jan. 27, 2011); Gerard N. Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 303 (2011); Editorial, *Not Too Late to Curb the Filibuster*, N.Y. TIMES (May 14, 2012), <http://www.nytimes.com/2012/05/15/opinion/not-too-late-to-curb-the-filibuster.html>. For many similar concepts, see 158 CONG. REC. S8647 (daily ed. Jan. 2, 2013); Stras & Scott, *supra* note 7, at 1896–1910; Russell Wheeler, Op-Ed., *The Case for Confirming District Court Judges*, POLITICO (Sept. 18, 2012, 9:39 PM), <http://www.politico.com/news/stories/0912/81354.html>; *supra* text accompanying notes 17–18, 59, 127–28, 131.



like the assertive concrete notions previously assessed, which the executive could apply.

In the end, senators must precisely calibrate the necessity for thorough scrutiny with promptly addressing the multitude of crucial appellate court vacancies and confirm impressive nominees. Democrats and Republicans can fruitfully question whether each might overemphasize ideology, just as both should have concomitantly eschewed the quixotic venture to ascertain if earlier nominees could be “judicial activists.”<sup>143</sup> The parties correspondingly assume that the other derailed multiple Clinton and Bush nominees’ circuit appointments by routinely criticizing ideologies which designees held.<sup>144</sup> Article II’s wording seemingly contemplates that politicians may review abilities, character, and temperament,<sup>145</sup> but the phraseology does not countenance stalling premised on how selections might resolve appeals because this erodes judicial independence.<sup>146</sup> Negligible disagreements with perspectives expressed through several cases or articles must infrequently eliminate individuals, views which numerous legislators have carefully espoused.<sup>147</sup> ACLU

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143 *Judicial Nominations 2001: Should Ideology Matter? Hearings before the Senate Judiciary Subcomm. on Admin. Oversight and the Courts*, 107th Cong. (2001); *Judicial Activism: Assessing the Impact, Hearings Before the Senate Judiciary Constitution Subcomm.*, 105th Cong. (1997) (testimony of Bill Pryor, Alabama Attorney General); see EVAN TSEN LEE, *JUDICIAL RESTRAINT IN AMERICA* (2011); KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM* (2006); Stefanie A. Lindquist & Frank B. Cross, *Judging the Judges*, 58 DUKE L.J. 1383 (2009); Geoffrey Stone, *When is Judicial Activism Appropriate?*, CHI. TRIB. (Apr. 13, 2012), [http://articles.chicagotribune.com/2012-04-13/news/ct-perspec-0413-restraint-20120413\\_1\\_judicial-activism-judicial-deference-judicial-restraint](http://articles.chicagotribune.com/2012-04-13/news/ct-perspec-0413-restraint-20120413_1_judicial-activism-judicial-deference-judicial-restraint).

144 See, e.g., Goldman et al., *supra* note 20, at 256; Gest & Lord, *supra* note 24; see also Ingram, *supra* note 8; Kendall, *supra* note 29; Oliphant, *supra* note 15; *supra* notes 14–26, 64, 90–91, 121, 127, and accompanying text.

145 E.g., 2001 Hearings, *supra* note 143; Douglas Laycock, Op-Ed., *Forging Ideological Compromises*, N.Y. TIMES, Sept. 18, 2002, at A31; see Stephen L. Carter, *A Devilish Look at the Confirmation Process (With Apologies to C.S. Lewis)*, 50 DRAKE L. REV. 369 (2002); Gerhardt, *supra* note 133; Ed Gillespie, *Judging Obama’s Nominee*, WASH. POST (May 20, 2009), [http://articles.washingtonpost.com/2009-05-20/opinions/36917221\\_1\\_nominee-senate-judiciary-committee-roberts-and-alito](http://articles.washingtonpost.com/2009-05-20/opinions/36917221_1_nominee-senate-judiciary-committee-roberts-and-alito).

146 See TASK FORCES OF CITIZENS FOR INDEPENDENT COURTS 1–75, 121–71, 205–42 (2000); *Symposium on Judicial Independence and Accountability*, 72 S. CAL. L. REV. 315, 315–809 (1999); see also Senate Judiciary Comm., Exec. Business Mtg., June 4, 2009 (statement of Sen. Ben Cardin); *id.*, Apr. 7, 2011 (statement of Sen. Dianne Feinstein); see generally Andrew Cohen, *False Equivalence Watch, Judiciary Edition*, ATLANTIC.COM (Apr. 9, 2012), <http://www.theatlantic.com/national/archive/2012/04/false-equivalence-watch-judiciary-edition/255527/>.

147 Senate Judiciary Comm., Exec. Business Mtgs., Jan. 28 & Feb. 4, 2010 (statements of Sens. Russ Feingold & Dianne Feinstein); Exec. Business Mtg., June 10, 2010, *supra* note 133; see Dana Milbank, *Lindsey Graham Stands Apart From Other Republican Senators on Kagan Vote*, WASH. POST (July 21, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/20/AR2010072005445.html>; Sheryl Gay Stolberg, *Senate Panel Backs Kagan Nomination, With One Republican Vote*, N.Y. TIMES (July 20, 2010), <http://www.nytimes.com/2010/07/21/us/21kagan.html>; Editorial, *Confirm Elena Kagan*, WASH. POST (July 4, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/03/AR20100703026>

participation and lawyering may rarely be considered disqualifiers, just as Federalist Society involvement curtailed few Bush aspirants' confirmation and nomination.<sup>148</sup> One constructive antidote for these complications might be a presumption that skilled uncontroversial picks receive speedy approval or expeditious yes or no confirmation votes.<sup>149</sup>

#### CONCLUSION

Appellate court vacancies undermine the delivery of justice. President Obama has implemented special endeavors to reduce partisan gridlock and stanch politicization with much vibrant consultation and the submission of competent diverse nominees, yet appointments have progressed less rapidly than is optimal. He should comprehensively examine and institute efficacious processes for hastening designee confirmation, while Republicans and Democrats must thoroughly cooperate with Obama and colleagues in seating judges. Each party needs to remember that it has fueled, and must concomitantly abandon, the counterproductive dynamics for the good of the appeals courts and the country.<sup>150</sup>

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94.html. *But see* Exec. Business Mtg., Feb. 4, 2010, *supra* note 105; Exec. Business Mtg., Apr. 7, 2011, *supra* note 146 (statements of Sens. Jon Kyl & Jeff Sessions); *supra* notes 52, 54, 85, and accompanying text.

148 *See* Letter from Prof. Bruce Ackerman et al., *supra* note 34; Jason DeParle, *Nomination for Supreme Court Stirrs Debate on Influence of Federalist Society*, N.Y. TIMES (Aug. 1, 2005), <http://query.nytimes.com/gst/fullpage.html?res=FB0F10FC355B0C728CDDA10894DD404482>; Savage, *supra* note 98; Savage, *supra* note 123; *see also* Nancy Scherer, *The Federalist Society's Influence on the Federal Bench*, 62 POL. RES. Q. 366 (2009); *supra* notes 52, 81, 123 and accompanying text. *But see* Tobias, *supra* note 9, at 766–67; Ron D. DeSantis, *Obama's Kindred Judicial Spirit*, HUMANEVENTS.COM (Mar. 10, 2011), <http://www.humanevents.com/2011/03/10/obamas-kindred-judicial-spirit/>.

149 Hamilton's process reflects this. *See supra* notes 53, 66, 140, 147 and accompanying text. *But see supra* note 140 (showing that Alaska Senator Lisa Murkowski was the only GOP senator to vote for cloture on Liu and Halligan). For many other ideas, see Shenkman, *supra* note 138; sources cited *supra* note 99.

150 The confirmation process worsened over Obama's term and the dynamics infected the district process for the first time, but the appellate level problems seemed more intractable, although the suggestions here similarly apply to both. Karlan, *supra* note 97; Packer, *supra* note 43; *see* MANN & ORNSTEIN, *supra* note 47; Shenkman, *supra* note 138; RUSSELL WHEELER, JUDICIAL NOMINATIONS AND CONFIRMATIONS IN OBAMA'S FIRST TERM, (Brookings Inst. (2012), available at [http://www.brookings.edu/~media/Research/Files/Papers/2012/12/13%20judicial%20nominations%20wheeler/13\\_obama\\_judicial\\_wheeler.pdf](http://www.brookings.edu/~media/Research/Files/Papers/2012/12/13%20judicial%20nominations%20wheeler/13_obama_judicial_wheeler.pdf)); David Leonhardt, *The Endless Battle Over Judicial Nominees*, N.Y. TIMES, June 23, 2013 at SR4. However, Obama's re-election and Democrats' Senate retention may alter the dynamics. JOHN ROBERTS, YEAR-END REPORT ON THE FEDERAL JUDICIARY 9–10 (2012); Manu Raju, *The New Senate: More Compromise, Less Filibuster*, POLITICO (Nov. 7, 2012), <http://www.politico.com/news/stories/1112/83458.html>; *see* Jeffrey Toobin, *Obama's Unfinished Judicial Legacy*, NEW YORKER (July 31, 2012), <http://www.newyorker.com/online/blogs/comment/2012/07/why-judges-matter.html>; *supra* text accompanying notes 121–23, 127–28.