

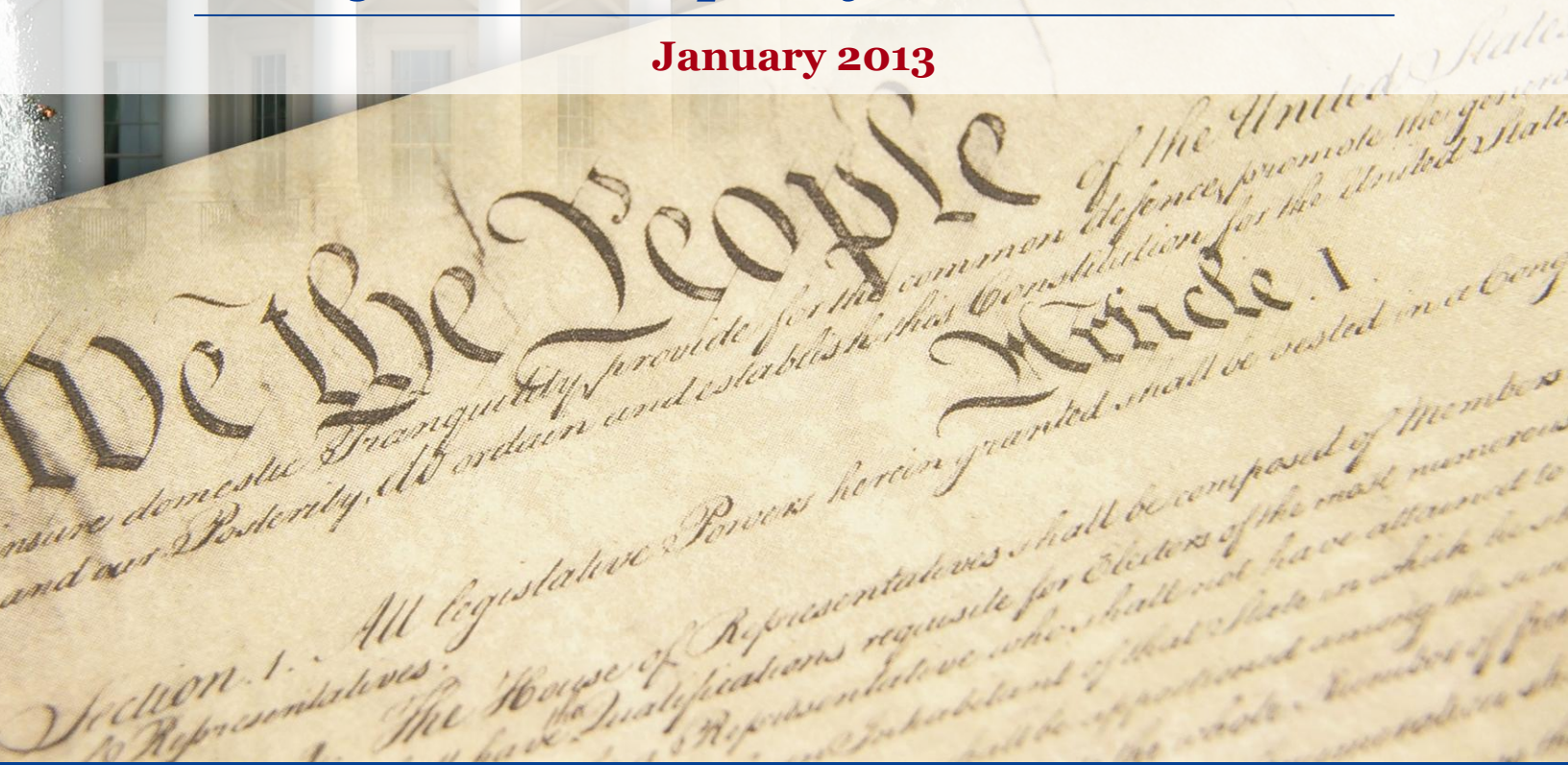


AMERICAN  
CONSTITUTION  
SOCIETY FOR  
LAW AND POLICY

## **Toward a More Perfect Union: *A Progressive Blueprint for the Second Term***

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**“Is Our Dysfunctional Process for Filling  
Judicial Vacancies an Insoluble Problem?”**

*by Russell Wheeler*

# **Toward a More Perfect Union:**

## ***A Progressive Blueprint for the Second Term***

“Toward a More Perfect Union: A Progressive Blueprint for the Second Term” is a series of ACS Issue Briefs offering ideas and proposals that we hope the administration will consider in its second term to advance a vision consistent with the progressive themes President Obama raised in his second Inaugural Address. The series should also be useful for those in and outside the ACS network – to help inform and spark discussion and debate on an array of pressing public policy concerns. The series covers a wide range of issue areas, including immigration reform, campaign finance, climate change, criminal justice reform, and judicial nominations.

*All expressions of opinion are those of the author or authors.  
The American Constitution Society (ACS) takes no position on specific  
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# Is Our Dysfunctional Process for Filling Judicial Vacancies an Insoluble Problem?

*Russell Wheeler\**

## I. Introduction

The time and effort devoted to the Obama administration's first-term achievements may help explain why its judicial appointments record was a mixed bag. It got two Supreme Court justices confirmed and shifted somewhat the party-of-appointing-president make-up among active circuit judges, but the first term was also marked by fewer nominations, unexceptional confirmation rates, and more vacant judgeships.

### A. The Continuing Breakdown of the Process

Here are the basic nomination and confirmation facts of the first term:<sup>1</sup>

- President Barack Obama submitted 171 district nominations, compared to 177 by President George W. Bush and 196 by President William Clinton. Unlike Clinton and Bush, though, Obama made a large number of nominations (almost ten percent) after August of his fourth year, precluding confirmation in that year.
- The Senate confirmed 141 district nominees, for a confirmation rate of 82% —or 90% discounting the late-year nominations. The Senate confirmed 168 first term Bush nominees (97% of pre-September nominees) and 169 Clinton nominees (87%).
- The administration's confirmation record for circuit nominees was not out of line with those of the two previous administrations' first terms. The Senate confirmed 30 Obama circuit nominations (71% of his 42 nominees), versus 34 of Bush's (67% of 56 nominees) and 30 of Clinton's (77% of 39 submissions).
- Vacant district judgeships climbed from 43 when Obama took office to 63 in early January, and would have climbed higher but for an

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<sup>1</sup> Most of the nomination and confirmation data reported here and throughout the paper come or are updated from RUSSELL WHEELER, JUDICIAL NOMINATIONS AND CONFIRMATIONS IN OBAMA'S FIRST TERM (Brookings Institute Dec. 13, 2012), <http://www.brookings.edu/research/papers/2012/12/13-judicial-nominations-wheeler>.



unprecedented 13 confirmations after the November 2012 elections. (District vacancies declined by nine and 31 in the first Clinton and Bush terms.) Circuit vacancies inched up by three, to 17; they increased by five in Clinton's first term and declined by nine under Bush.

Viewing these data—and the much longer wait times under Obama from district vacancy to nomination and to confirmation—many ask what can be done to “solve” the problematic federal judicial nomination and confirmation process? The process may not be amenable to a “solution” if that means a return to the days of prompt and virtually controversy-free confirmations. It may be pointless to expect the White House once again (subject to ABA and Justice Department investigations) to delegate most district nominee selections to home-state senators or other in-state leaders of the president's party, who in turn will largely defer to the White House as to appellate vacancies in the state. Combined district and circuit confirmation rates in the ninety percent range are unlikely to return any time soon, nor are confirmations measured in days after nomination, rather than months. Equally unlikely to reappear are the Clinton first-term phenomena of a voice vote confirmation of every district nominee who made it to the Senate floor and of all but two circuit nominees. White House tussles with home state legislators of both parties appear to be the coming norm, and senators not of the president's party no longer accede routinely to White House nominees from their states or vote to confirm nominees routinely in return for the same deference that their predecessors knew those on the other side of the aisle would provide when the shoe was on the other foot.

## B. Some Possible Solutions

Technical and procedural adjustments to the process of filling federal judicial vacancies will not reverse the effects of the pervasive political polarization that has infected many other aspects of American politics. Even 70 years ago, though, Reinhold Niebuhr described democracy as “a method of finding proximate solutions for insoluble problems.”<sup>2</sup> In the business of staffing the federal courts of the early twenty-first century, our best hope may be what Niebuhr called “indeterminate creative ventures.”<sup>3</sup>

In this Issue Brief, I first provide a quick summary of today's less attractive work environment for federal judges, which heightens the need for an expeditious and effective nomination and confirmation process. Then I describe several proposals to increase the number of judicial nominations in Obama's second term and decrease the time between vacancy and nomination. They include revamping the executive branch nomination machinery, setting nomination deadlines, senators' use of vetting committees to screen potential nominees, making public the status of senatorial recommendations for judicial

<sup>2</sup> REINHOLD NIEBUHR, *THE CHILDREN OF THE LIGHT AND THE CHILDREN OF THE DARKNESS* 118 (1944).

<sup>3</sup> *Id.* at 144.

nominations, and reconsidering the current “blue-slip” policy. Third, I look at two proposals to achieve more second term confirmations, more quickly: changes to the filibuster rules—even while recognizing the Senate’s hoary traditions and commitment to protecting the minority’s ability to call many of the legislative shots—and more persuasive messaging about the need for more expeditious confirmations. Fourth, I summarize very briefly three longer-term but still modest proposals for improving the district court nomination process—scaling back the Senate Judiciary Committee questionnaire, eliminating hearings, and rules changes to produce quicker Senate votes. They provide a glimpse of small steps that could improve the process.

Finally, given the near impossibility of achieving significant changes in the midst of the second term’s confirmation battles, the administration might consider the tried-but-sometimes-true Washington institution of a task force—tripartite and bipartisan—to put on the table some modest changes that the next administration and the incoming 2017 Senate might consider—and that aspirants for those positions might debate in the 2016 elections. But for even slight improvements to have any chance of adoption, the Senate and the administration, Democrats and Republicans both, will have to conclude that it is in their self-interest—put aside the national interest—to change an increasingly dysfunctional process for filling judicial vacancies.

## II. Why It Matters: The Health of the Federal Bench

Filling judicial vacancies is one part of a larger and more important task: sustaining or restoring a quality federal bench. Reasonable people will disagree on what defines a “quality federal bench,” but most would acknowledge that by and large it provides what Rule One of the Federal Rules of Civil Procedure promises: “the just, speedy, and inexpensive determination of every action and proceeding.” That requires judges who are professionally competent, able to deal with new forms and subjects of litigation, and able to manage a docket effectively as well as analyze competing legal claims. In addition, judges should be diverse enough demographically that the bench looks something like the population it serves, and judges should bring an array of professional backgrounds that provide perspectives they can apply to their work and that they can use when engaged with colleagues in collective problem solving. Their work should be intellectually and professionally challenging. The number of judgeships should keep some rough pace with the increased work. Judicial compensation, in all its forms, should be at least minimally adequate to the difficulty and importance of the work performed.

Today’s judiciary is certainly more diverse, demographically, than it was twenty years ago. About three-fourths of President George H.W. Bush’s appointees were white males (as were all of President Dwight Eisenhower’s). Obama’s appointees, enhancing trends in the Clinton and second Bush administrations, are 43 and 30% white male (district and circuit respectively) and include proportionately, many more women,

African Americans, Hispanics, and Asian Americans. There has also been a pronounced shift among district judges away from those who came to the bench from the private practice of law and a corresponding increase in those from the state and term-limited federal judiciaries. Those judges' judicial experience means they are in many ways well-equipped for the job, but they may lack the perspective of those recently in private practice. Two-thirds of Eisenhower's district appointees and almost half of H.W. Bush's came from private practice, a figure that dropped to less than 40% of Bush's and Obama's first-term district appointees. This long term trend has worried some observers, including Chief Justice William Rehnquist and Chief Justice John Roberts, Jr. Roberts has asserted that it "changes the nature of the federal judiciary when judges are no longer drawn primarily from among the best lawyers in the practicing bar."<sup>4</sup> Rehnquist and Roberts may have had in mind lawyers from top firms specializing in commercial law and related areas, but the practicing bar also includes lawyers specializing in such areas as criminal defense, civil rights, and environmental law. Those who may not worry about a decline in judges drawn from the corporate world may nevertheless worry about a dearth of judges drawn from other segments of the bar.

There are serious challenges in attracting a diverse and talented pool of federal judges. First, the federal judicial workload has changed significantly over the last twenty years.<sup>5</sup> Filings per district judgeship have increased from 392 in 1991 to 536 in 2011, and appellate filings have gone up even more, 197 per judge in 1991 to 308 last year. (Congress has created few district and no appellate judgeships since 1990.) So, caseloads have gone up over the past two decades, but authorized judgeships to handle them have basically stayed static (and the near ten percent vacancy rate doesn't help). Trials, which many judges relish, have declined per judge from 31 in 1991 to 21 last year. The proportion of drug and immigration criminal cases in the district courts has doubled, from six to 13% of the docket nationally, and is much higher in some districts. Although they have abated nationally in recent years, cases from the Board of Immigration Appeals, many with poor records, constitute about 12% of court of appeals filings (up from three percent in 2001) and are still a fourth of the caseload for the appellate courts in the Second and Ninth Circuits. These cases are, by and large, not what attract good would-be judges to the bench.

And, tiresome as it is to hear, federal judicial salaries have fallen well below the pace of inflation. A federal district judge today would need an annual salary of \$211,459

<sup>4</sup> Quoted in Russell Wheeler, *Changing Backgrounds of U.S. District Court Judges, Likely Causes and Possible Implications*, 93 JUDICATURE 140, 143 (2010).

<sup>5</sup> Caseload data comes from the ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR, 1991 AND JUDICIAL BUSINESS OF THE UNITED STATES COURTS, FISCAL YEAR 2011 (2012), <http://www.uscourts.gov/Statistics/JudicialBusiness.aspx#appTables>, (principally tables B-3, C-2, C-7, and T-1).

to match the buying power, nationally, of 1991's \$125,100 salary.<sup>6</sup> District judges in some parts of the country can live quite well on 2012's \$174,000 salary, but its buying power is a different thing in high-cost markets. A continuing decline in buying power is a legitimate source of concern for judges and would-be judges in major metropolitan areas who are not independently wealthy and who are in, or are considering entering, what is supposed to be a life-time job with strict limits on outside earned income. Federal judges enjoy prestige and authority, as well as strong staff support and a well-funded physical and technological infrastructure, although staff furloughs and other cutbacks may be in the offing as part of government spending reductions.<sup>7</sup>

This snapshot is hardly a complete report card on the judiciary's health.<sup>8</sup> It's too early to say whether we are seeing what Andrew Cohen called "signposts on the road to third-world justice,"<sup>9</sup> but the figures are not encouraging. They are, moreover, consistent with the growing but hushed talk about the increasing numbers of lawyers who, unlike counterparts of some years ago, are disinterested in a federal judgeship and sometimes dismal numbers of applications for vacancies.

### III. What's an Administration to Do? More Nominations and Confirmations, Sooner

The administration can only do so much about these conditions. It can't stop prosecuting drug and immigration offenses or try to force parties to go to trial simply to accommodate judges' workload preferences. And although the Judicial Conference has had before Congress for several years an omnibus bill to add or make permanent nine circuit and 79 district judgeships, it's hard to imagine such legislation getting enacted, even if the judiciary could identify spending cuts to offset the additional judgeships' costs under the "PAYGO" principle, which demands spending cuts that match any spending increases. Finally, amid all the talk of drastic reductions in federal spending, the administration can't argue for meaningful increases in federal judicial salaries, which are in the top percentiles of salaries nationally. Congress would go ballistic at any such proposal, partly because most legislators insist on linking their salaries to those of judges, and Congress is not going to give itself a pay hike as it debates debt reduction. Federal judges want to file a class action suit to extend to all of them the back pay that the Court

<sup>6</sup> Based on the BUREAU OF LABOR STATISTICS CPI INFLATION CALCULATOR, [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) (last visited Jan. 14, 2013).

<sup>7</sup> See, e.g., *Court System Braces for Layoffs as Clock on Fiscal Crisis Ticks*, FOX NEWS (Dec. 10, 2012), <http://www.foxnews.com/politics/2012/12/10/court-system-braces-for-layoffs-as-clock-on-fiscal-crisis-ticks>; Daniel Wiessner, *Federal Courts Facing Fiscal Cliff Braced for Layoffs*, REUTERS (Dec. 13, 2012), [http://newsandinsight.thomsonreuters.com/Legal/News/2012/12\\_December/Federal\\_courts\\_facing\\_fiscal\\_cliff\\_braced\\_for\\_layoffs/](http://newsandinsight.thomsonreuters.com/Legal/News/2012/12_December/Federal_courts_facing_fiscal_cliff_braced_for_layoffs/).

<sup>8</sup> A much more extensive discussion of how that health might be measured is F. COFFIN AND R. KATZMANN, TOWARD OPTIMAL JUDICIAL WORKWAYS, IN WORKWAYS OF GOVERNANCE, MONITORING OUR GOVERNMENT'S HEALTH 121-143 (R. Davidson, ed., 2003).

<sup>9</sup> Andrew Cohen, *Federal Judges Are, in Fact, 'Job Creators'*, ATLANTIC, Mar. 18, 2012, available at <http://www.theatlantic.com/politics/archive/2012/03/federal-judges-are-in-fact-job-creators/254670/>.

of Appeals for the Federal Circuit recently awarded six judge and former judge plaintiffs. The court said that Congress's refusal to provide judges annual inflationary adjustments that a 1989 statute promised them violated the Constitution's judicial compensation clause.<sup>10</sup> On the merits, the judges probably have the best of it but not on the optics of judges' giving themselves a pay raise while the country teeters on multiple fiscal cliffs.<sup>11</sup> Corresponding Congressional cutbacks in other judicial budget accounts are not unimaginable, weakening the federal judicial infrastructure.

What does all this have to do with the nomination and confirmation process? Two things: First, these changes enhance the need for a process that can find, nominate, and confirm diverse members of a shrinking pool of high quality potential district and circuit judges who want the jobs despite the deteriorating working conditions. Second, the changes that make the job less attractive than it was several years ago elevate the importance of a selection process that is not itself an impediment that discourages good people from considering federal judicial service. The immediate need is a more aggressive nomination effort by the administration and finding ways to persuade senators in the minority that their long-term interest does not lie in opposing or foot dragging on nominees simply because they can and because they want payback for what they see as their counterparts' obstructionism in earlier Senates.

#### A. More Nominations and Sooner

President Ronald Reagan submitted more circuit and district nominees in his second term than in his first.<sup>12</sup> Clinton submitted more circuit nominees but fewer district nominees. Bush submitted fewer of both. Whatever the precedents, an aggressive Obama second-term nomination strategy is important for two reasons. If the confirmation rate operates consistently, more nominations mean more confirmations. And more nominations can keep Senate Republicans from pointing to the slow pace of nominations to deflect complaints about the slow pace of confirmations.

More nominees are obviously crucial to reducing vacancies. Reducing the elapsed time between vacancy and nomination is important as well. In addition to depriving the courts of judge power, long pre-nomination hiatuses can discourage potential nominees,

<sup>10</sup> *Beer v. U.S.*, No. 2010-5012 (Fed. Cir. Oct 5, 2012), *available at* <http://www.ca9c.uscourts.gov/images/stories/opinions-orders/10-5012.pdf>, *on remand from*, 131 S.Ct. 2865 (June 28, 2011), *petition for cert. filed sub nom.* *United States v. Beer* (U.S. Jan. 14, 2013), *available at* <http://online.wsj.com/public/resources/documents/judges.pdf>.

<sup>11</sup> *See, e.g.*, Brent Kendall, *Judges Rule for Judges on Pay*, WALL ST. J. L. BLOG (Oct. 6, 2012), <http://blogs.wsj.com/law/2012/10/06/judges-rule-for-judges-on-pay/>; Jesse Holland, *Federal Judges Go to Court over Pay*, WASH. POST (Dec. 17, 2012), [http://www.washingtonpost.com/politics/federal-judges-go-to-court-over-pay/2012/12/16/d6482af6-47b2-11e2-b6f0-e851e741d196\\_print.html](http://www.washingtonpost.com/politics/federal-judges-go-to-court-over-pay/2012/12/16/d6482af6-47b2-11e2-b6f0-e851e741d196_print.html).

<sup>12</sup> DENNIS RUTKUS AND MITCHEL SOLLENBERG, CONG. RESEARCH SERV., RL31635, JUDICIAL NOMINATION STATISTICS: UNITED STATES DISTRICT AND CIRCUIT COURTS, 1977-2003 (2004), *available at* <http://www.senate.gov/reference/resources/pdf/RL31635.pdf>.



especially with the likelihood that the rumor mill will reveal that they are under consideration. The longer the wait, the greater is the potential embarrassment if the nomination goes to another person. And attorneys' practices can wither as potential clients wonder if and when their would-be lawyers will get caught up in the confirmation maelstrom.

Obama submitted district nominees, on average, 406 days after the date of the vacancy, versus 276 days for Bush and 370 for Clinton.<sup>13</sup> Various factors contribute to the elapsed time between vacancy and nomination, including external and internal investigations of prospective nominees. But some of it is due to the time it takes home state senators to submit prospective nominees to the White House—or to react to White House-proposed nominees (especially in the case of senators in the minority)—and to White House-senatorial bargaining to achieve agreement on a nominee. The ace card possessed by home state senators, Democratic and Republican, is “senatorial courtesy,” embodied in the “blue slip”—the short message from the Senate Judiciary Committee chair seeking the home-state senators’ views on the nominee and noting that the committee will not process the nominee until the senators return the blue slips.<sup>14</sup> Although home-state senators cannot dictate the nominees, the threat of an unreturned blue slip gives them a powerful bargaining tool if they wish to use it. The entire Senate Republican caucus laid down a marker before Obama had submitted any nominations, telling the White House by a March 2009 letter that “if we are not consulted on, and approve of, a nominee from our states, the Republican Conference will be unable to support moving forward on that nominee. . . .”<sup>15</sup> In fact, in Obama’s first term, states with two Republican senators saw a smaller percentage of nominees to both district and circuit vacancies and longer average elapsed times from vacancy to nomination than did states with two Democratic senators or with split delegations.<sup>16</sup>

### 1. Reorganization and Deadlines?

The most effective second-term step the administration could take would be to replicate the Bush administration’s well-oiled judicial nominating machinery, ably documented by Sheldon Goldman and his colleagues.<sup>17</sup> Bush submitted 168 first term district nominees before September of the presidential election year, Obama 156. Bush

<sup>13</sup> “Date of the vacancy” is the date the incumbent publicly announced she would leave active judicial service at some future date; if no such announcement, it is the date the vacancy came into being; if the vacancy was created during the previous administration, it is Inauguration day.

<sup>14</sup> The origin and operation of the blue-slip phenomenon is discussed throughout SARAH BINDER AND FORREST MALTZMAN, *ADVICE & DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY* (2009).

<sup>15</sup> Manu Raju, *Republicans Warn Obama on Judges*, POLITICO (Mar. 2, 2009), <http://www.politico.com/news/stories/0309/19526.html>.

<sup>16</sup> See *supra* note 1.

<sup>17</sup> Sheldon Goldman, Sara Schiavoni, and Eliot Slotnick, *W. Bush’s Judicial Legacy: Mission Accomplished*, 92 JUDICATURE 258 (2009).

submitted 56 first term circuit nominees, Obama 42. And Bush submitted them earlier. He sent the Senate 55% of his district nominees by the end of his second year in office, and 93% by the end of his third year. Obama's comparable figures were 46% and 78%. Bush submitted 55% of his circuit nominees by the end of his first year in office; Obama submitted 29% of his. The effect of pushing back nominations into the second two years of Obama's first term was to shift the confirmation battles closer to the presidential election year with its slow-downs and stoppages, not to mention that the Senate Republicans were a larger minority. Although the flurry of lame-duck district confirmations mitigated the harm caused by back-loading nominations into the second two years, that back-loading still delayed getting vacancies filled.

The administration has telegraphed an aggressive second-term effort, sending 15 district nominations to the Senate after August 2012. None were confirmed in 2012, but all have had their Justice Department investigations and have been rated by the American Bar Association's Standing Committee on the Federal Judiciary. That more aggressive effort continued on Day One of the new Congress with renominations of all 15, plus nine other 2012 and 2011 nominees.<sup>18</sup> It also renominated seven stalled circuit nominees, three of whom had been first submitted prior to 2012. Among the 31 were two district and one circuit nominee for whom one or both home-state senators had blocked Senate Judiciary Committee hearings, and a nominee to the District of Columbia circuit's court of appeals whose nomination Republican senators killed once before by a filibuster.

To get more nominees, more quickly, one observer has proposed creation of a single-issue office within the White House concerned only with judicial nominations, somewhat akin to the Council on Environmental Quality or the Office of National Drug Policy.<sup>19</sup> There is no doubt that selecting nominees and preparing them for confirmation battles is requiring greater amounts of personnel time in both the Justice Department and the White House,<sup>20</sup> but given Congressional sniping about White House "czars" and the cost-cutting mantras pervading government, such an office would be a hard sell.

The idea of timetables has also resurfaced. Both Bush and Obama proposed timetables for up-or-down votes on judicial nominations, and Bush proposed timetables as well for making nominations and holding hearings.<sup>21</sup> Most senators, especially other-party senators, were not receptive to these proposals, and probably would be as

<sup>18</sup> Press Release, The White House, President Obama Re-nominates 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>. In addition to the 31, Obama renominated two candidates for the Court of International Trade.

<sup>19</sup> David Fontana, *Judging Obama's Second Term*, HUFFINGTON 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).

<sup>20</sup> Michael Shenkman, *Decoupling District from Circuit Bench Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 263 (2012).

<sup>21</sup> *Id.* at 222-23.

unenthused in a second term about ceding some of their prerogatives. One major editorial page has made a looser call, urging senators to make nominee recommendations to the White House “within a reasonable period, like within 60 days of an opening,” and calling for the White House and Justice Department “to verify and nominate candidates for confirmation within, say, 60 days of receiving names.”<sup>22</sup> Absent any enforcement mechanism, though, it’s hard to see how any such promises would stand up to the actual pressures of vetting and clearing potential nominees, and it’s hard as well to see Senate or White House approval of any enforcement mechanisms. And what would such mechanisms look like—a rule that nominees who don’t get a vote within 180 days go to the back of the line? That might spur some home-state senators to plead with colleagues to allow a vote, but if they were unsuccessful—and such home-state senator pleadings were often unsuccessful in the first term—the court would be stuck with an even longer vacancy.

## 2. Vetting Committees and Fast-Tracking?

At the outset of the Obama administration, senators (and in a few instances House members) in 20 states and the District of Columbia maintained, reactivated, or created committees to vet candidates for district judgeships and recommend prospective nominees that the senators could pass on to the White House. Those 21 jurisdictions (up from about seven during the Bush administration) accounted for two-thirds of Obama’s district nominees. Legislators who use these committees praise them routinely when introducing committee-endorsed nominees. Committee supporters argued in 2009 that bipartisan committees would produce more qualified candidates; sitting judges and others with little political clout, for example, might apply to a committee more readily than to a senator or staffers. Supporters also thought that a committee’s seal of approval would speed nominees through the nomination and confirmation processes. If the committees had that effect, the administration might consider encouraging more senators to create and use them.

These were reasonable and good faith assumptions, embraced by the American Bar Association in 2008.<sup>23</sup> I shared those assumptions when, five years ago, I proposed a fast-track for nominees recommended by bipartisan committees.<sup>24</sup> My Brookings colleague, Sarah Binder, an astute observer of congressional operations, has more recently suggested that the Senate might “consider new ‘fast track’ confirmation

<sup>22</sup> *Judges Needed for Federal Courts*, N. Y. TIMES, Dec. 12, 2012, <http://www.nytimes.com/2012/12/13/opinion/judges-needed-for-federal-courts.html>.

<sup>23</sup> See Report #118 in Summary of Recommendations, American Bar Association House of Delegates, 2008 Annual Meeting, *available at* <http://www.abanet.org/leadership/2008/annual/docs/SummaryofRecommendations.doc>. Full disclosure: I was closely involved in developing the report.

<sup>24</sup> RUSSELL WHEELER, PREVENT FEDERAL COURT NOMINATION BATTLES: DE-ESCALATING THE CONFLICT OVER THE JUDICIARY (Brookings Institute Nov. 2007), *available at* <http://www.brookings.edu/research/papers/2007/11/20-judiciary-wheeler-opp08>.

rules. . . . For judicial nominations, fast-track consideration might be given to candidates recommended by bipartisan commissions in their home states. If the White House nominates a candidate approved by such a commission, the Senate would fast-track the nominee to a confirmation vote.”<sup>25</sup> A variation on the theme is for the president “informally [to] appoint his own nomination committees in each state” and if senators don’t come up with nominees within some deadline, “presidentially nominated home state committees will step up to fill the void.”<sup>26</sup>

Binder concedes that her proposal would likely not succeed. Her caution is well-taken, based on developments over the last several years. For one thing, the committees in place are all over the lot as to size, operations, transparency, and claims of bipartisanship.<sup>27</sup> A bipartisan committee might be three strong Democrats, three strong Republicans, and two committed independents, or seven Democrats and a centrist Republican. Whether to grant fast-track treatment would spawn satellite controversies over whether the respective vetting committees were “bipartisan” and met whatever other criteria the Senate rules specified. Moreover, there is little reason to believe that senators who oppose a nominee would be likely to honor a fast confirmation track agreement simply because the nominee had a committee’s blessing. It’s hard to imagine Republican senators giving fast-track approval to Louis Butler because Wisconsin’s long-standing committee endorsed him. Local party leaders kept him from a floor vote on the argument that he “lost a state-wide election, held by the people of Wisconsin, to continue serving on Wisconsin’s Supreme Court.”<sup>28</sup> (We’re in trouble when losing a state supreme court election—especially one that the Associated Press called “one of the nastiest in [Wisconsin] state history”<sup>29</sup>—becomes a disqualification for federal judicial confirmation.) Edward Chen of California was endorsed by the committee that senators established in that state, but his confirmation was in limbo for several years (based on fairly flimsy objections). And in 2007, California Democrat Barbara Boxer refused to return the blue-slip for a Bush nominee, former Republican Congressman James Rogan, who was approved by the bipartisan White House-senatorial vetting committee then in operation in California. Boxer, whom an aide said never promised to support nominees based simply on the committee’s endorsement, claimed Rogan was “out of the mainstream,” although many suspected his role in the Clinton impeachment was the

<sup>25</sup> Sarah Binder, *Three Reforms to Unstick the Senate*, CNN (Nov. 29, 2012), <http://www.cnn.com/2012/11/29/opinion/binder0filibuster/index.html>.

<sup>26</sup> See e.g., David Fontana, *Judging Obama’s Second Term*, *supra* note 19.

<sup>27</sup> See RUSSELL WHEELER AND REBECCA LOVE KOURLIS, *OPTIONS FOR FEDERAL JUDICIAL SCREENING COMMISSIONS* (Brookings Institute, 2d ed. 2011), *available at* [http://www.brookings.edu/~media/research/files/reports/2011/9/13%20judicial%20screening/0913\\_judicial\\_screening.pdf](http://www.brookings.edu/~media/research/files/reports/2011/9/13%20judicial%20screening/0913_judicial_screening.pdf).

<sup>28</sup> Diana Merrero, *Sensenbrenner Criticizes Butler Judicial Nomination*, MILWAUKEE JOURNAL SENTINEL, Oct. 1, 2009, <http://www.jsonline.com/blogs/news/63146732.html>.

<sup>29</sup> *Gableman Beats Supreme Court Justice Butler*, MILWAUKEE JOURNAL SENTINEL, Nov. 5, 2008, <http://www.todaystmj4.com/news/local/45624362.html>.



reason for her opposition.<sup>30</sup> In any event it's hard to see any fast-track arrangement that would have gotten Rogan confirmed.

Perhaps most importantly for this discussion, a comparison of times to nomination and to confirmation, and of nominees, in the jurisdictions where these committees were in place and those in other states in Obama's first term, suggests that early hopes for their positive impact, hopes that I shared, have not materialized overall.<sup>31</sup> Despite a major editorial page's recent call for senators "to put in place more effective steps for making timely recommendations (like setting up merit selection committees),"<sup>32</sup> during the first Obama term, the non-committee states produced proportionately more nominees (as a proportion of vacancies) and produced them faster. Nor did apparent committee endorsement necessarily speed confirmation. Average days to confirmation for committee state nominees were 230, versus 209 for other nominees. The confirmation *rate* for both sets of (pre-August 2012) nominees was the same, but ten percent of committee state nominees received ten or more negative confirmation votes, compared to six percent of other nominees.

There are limits to these quantitative comparisons, and I believe legislators should use committees if structured with due concern for bipartisanship and transparency. The committees well may produce unmeasurable benefits, but the comparisons above make it difficult to argue they would be a ticket to fast confirmations.

3. More Sunshine and a Reconsideration of the Judiciary Committee's Blue-Slip Policy?
  - a. Publicizing the Status of Senatorial-White House Nominee Negotiations

The White House can be more aggressive in putting forth names and more aggressive with senators who don't cooperate. One practical proposal to that end comes from Michael Shenkman, who worked on nominations on the Senate Judiciary Committee staff and in the Justice Department Office of Legal Policy (and is now a Columbia Law School Lecturer and Fellow). He has proposed several fixes to the district judge nominating process, including the administration's "publishing the status of pre-nomination negotiations, although not the names of the nominees themselves."<sup>33</sup> Citing precedent for similar disclosures in the Bush administration, Shenkman argues that they can mobilize the local bar, media, and others who monitor the nomination process to

<sup>30</sup> David Savage, *Rogan May be Denied Seat on Federal Bench*, L.A. TIMES, Dec. 4, 2007, <http://articles.latimes.com/2007/dec/04/nation/na-rogan4>.

<sup>31</sup> See *supra* note 1.

<sup>32</sup> *Judges Needed for Federal Courts*, N.Y. TIMES, Dec. 12, 2012, <http://www.nytimes.com/2012/12/13/opinion/judges-needed-for-federal-courts.html>.

<sup>33</sup> Shenkman, *supra* note 20, at 299.

pressure senators to get the process moving. Senators could call out what they regard as misleading information disseminated by the administration, bringing the dispute into the open for verification. All in all, “[l]ocal editorial pages across the country would be newly equipped to comment on who is holding up the filling of” district vacancies.<sup>34</sup>

The form of disclosure would resemble the Administrative Office of the U.S. Courts’ on-line list of “Current Judicial Vacancies,” which displays the vacancy and its date, the previous incumbent, the name of any formally submitted nominee, and the date of the nomination.<sup>35</sup> The administration web page would add to this information, for each vacancy without a nominee, the date on which the incumbent gave notice of the vacancy (or, we can presume, the date the vacancy was created in the absence of such notice), the date when the White House received senators’ recommendations, and an administration statement on whether it is still considering the unnamed, potential candidates or whether the administration has requested new names.<sup>36</sup> We can presume that in situations in which the administration initially provides names to senators for comment, the list could identify the date the names were provided, the date of any senatorial response, and, again, whether the administration is still considering the candidates. The administration list, to repeat, would include no names except those of the previous incumbents and those of nominees formally submitted to the Senate.

Shenkman acknowledges that candidates submitted to the White House who are identified in senatorial press releases or by the rumor mill could be embarrassed if they do not get the nomination, but argues the “Administration’s priority should be on the health of the overall process.” Senators might not like the light such a list would shed on their dealings with the White House, but Shenkman responds, basically, “too bad,” because the list would reduce senatorial ability to use long delays to frustrate timely nominations.

#### b. Loosening Up the Blue Slip Policy

This call for shedding more light on senatorial and White House pre-nomination negotiations raises as well the question of whether the Senate Judiciary Committee policy honoring unreturned blue slips needs modification. There was some speculation at the outset of the Obama administration that Committee chair Patrick Leahy of Vermont, as did some earlier chairs,<sup>37</sup> would loosen the blue-slip policy, so as to deprive home-state

<sup>34</sup> *Id.* at 302.

<sup>35</sup> ADMINISTRATIVE OFFICE OF THE U.S. COURTS, CURRENT JUDICIAL VACANCIES, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx> (last visited Jan. 14, 2013).

<sup>36</sup> Shenkman, *supra* note 20, at 300.

<sup>37</sup> Robert Kuttner, *How Obama Dropped the Ball*, THE AMERICAN PROSPECT, Dec. 14, 2012, available at <https://prospect.org/article/courts-how-obama-dropped-ball>.

senators, in particular senators in the minority, a veto over processing nominees.<sup>38</sup> That speculation has apparently proved groundless, driven, some say, by Leahy's respect for Senate tradition and concern that recalcitrant senators would find other ways to block nominations and use up floor time. The standstill over Nevada district court nominee Elissa Cadish, though, seems a passing strange indictment of adherence to a strict blue slip policy. Cadish, pushed by Majority Leader Harry Reid, could not get a hearing in 2012 because Republican Senator Dean Heller did not return the blue slip, apparently in deference to the National Rifle Association's objections to Cadish based on a questionnaire she answered as a state judge prior to the 2008 Supreme Court decision finding a Second amendment-protected individual right to firearms possession.<sup>39</sup> Cadish was one of the 24 opening-day 2013 district renominations, although Heller's office announced it would continue to oppose her.<sup>40</sup> Reid has stood behind Cadish and says he hopes something can be worked out for her nomination to proceed. And, according to press reports, senators on about ten occasions have told the White House they support a nominee but then failed to return the blue slip after the formal nomination.<sup>41</sup>

#### B. More Confirmations and Sooner

The Senate has not been any more of a graveyard for Obama nominees than it was for Bush and Clinton nominees, but Obama district nominees have waited much longer to whistle past it. Lame duck Senate confirmations boosted Obama's district court confirmation rate (for pre-August recess nominees) to 90%, slightly higher than Clinton's first-term 87% but below Bush's of 97%. The relative paucity of district nominations, though, means Obama's first term could not match either of his predecessor's number of confirmations, whatever the rate. Obama's 30 circuit confirmations matched Clinton's and were only four less than Bush's, and his confirmation rate was between those of Clinton and Bush.

The bigger difference in the Senate's processing of Obama nominations is the time to confirmation for district judges. Clinton's first-term district judges were confirmed, on average, 93 days after they were nominated, Bush's in 155 days, a figure that soared to 223 for Obama. And while Clinton and Bush district appointees spent more time waiting for hearings than waiting for confirmation after the hearings, Obama

<sup>38</sup> *Uncertain Blue Slip Policy Could Affect Fourth Circuit*, BLOG OF THE LEGAL TIMES (Feb. 13, 2009), <http://legaltimes.typepad.com/blt/2009/02/uncertain-blue-slip-policy-could-affect-4th-circuit.html>.

<sup>39</sup> See Steve Tetreault, *Reid will Continue to Push Cadish for Federal Bench*, LAS VEGAS REVIEW-JOURNAL, Dec. 10, 2012, <http://www.lvrj.com/news/reid-will-continue-to-push-cadish-for-federal-bench-182912081.html>; Press Release, National Rifle Assoc., Senator Heller Steadfastly Opposes Nomination of Anti-Gun Judge (Apr. 27, 2012), available at <http://www.nraila.org/news-issues/articles/2012/senator-heller-steadfastly-opposes-nomination-of-anti-gun-judge.aspx>.

<sup>40</sup> See *Obama Re-nominated Nevada Judge Opposed by Heller over Gun Answer*, RENO GAZETTE-J., Jan. 4, 2013, <http://www.rgj.com/viewart/20130103/NEWS19/301030058/Obama-re-nominates-Nevada-judge-opposed-by-Heller-over-gun-answer>.

<sup>41</sup> Kuttner, *supra* note 37.

appointees cooled their heels longer waiting for floor action. Clinton and Bush district appointees got floor votes in 30 and 54 days, respectively, after hearings. Obama appointees waited an average of 142 days, largely because of the difficulty of securing unanimous consent to proceed to the confirmation votes, or, critics say, the Majority Leader's unwillingness to make the time available without White House support. (Despite the longer wait times, 72% of Obama's district appointees were confirmed by voice vote, unanimous consent, or on roll calls with no negative votes, and another 18% got 10 or fewer negative votes.)

Whatever the cause, this collective waiting period—81 days on average to get to the hearing, and 142 then to get to the floor—can work the same depressing effect on nominations as can the long delay from the vacancy to the nomination. For sitting judges, government lawyers, and law professors the problem is usually tolerable; they can continue their work while the Senate grinds on. But lawyers in private practice—from whatever segment of the profession—face a different dynamic because, more than during the pre-nomination phase, their practice is likely to suffer in an extended limbo as clients resist signing on with lawyers whose nominations are on the record and who may not be there for the duration of the case. The 50 district judges whom Obama appointed from private practice waited an average of 234 days, almost eight months, from nomination to confirmation. Moreover, while lawyers might accept, albeit reluctantly, having their practice in an eight month or longer hiatus if confirmation seems assured, they might well be less likely to do so if the chances are only four in five. That surely helps explain why the federal district bench is increasingly populated by former state judges and term-limited federal judges.

There have been some reports that the Obama administration believes—in general, not just as to judicial nominations—that Senate Republicans will be less likely to foot drag now that the president has won a second term, thus removing his defeat as an objective to foster by making him appear unable to produce results (such as reducing judicial vacancies). Republicans' consent to the 13 lame duck district confirmations may indicate a greater second-term willingness to process non-controversial nominations expeditiously, although those 13 waited longer for floor action, post-hearing, than did the other Obama district judges, 188 days on average versus 136. And, as several observers have noted, the administration's early first-term hopes that its willingness to compromise would produce more cooperation on the other side appears in retrospect as naive, providing little reason to expect different second-term results. And cynics, or realists, might argue that the splurge of late-term confirmations was aimed mainly at deflating pressure for a change in filibuster rules.

#### 1. More Sunshine—Changing Filibuster Rules?

It is for the Senate, not the administration, to make any changes to the rules governing its procedures. That said, making it easier for the Senate to take up



nominations (and other business) could ease the delay in moving from nomination to confirmation. As the 113<sup>th</sup> Congress got underway, what if any changes to the filibuster rules the Senate might adopt remained uncertain.<sup>42</sup>

As the 113<sup>th</sup> opened, the press reported that a group of Democratic senators claimed that they had close to a Senate majority to vote to change the rules substantially, eliminating motions to proceed to a nomination or bill (and thus filibuster threats on such motions) but not filibusters on the nominations and legislation themselves, and requiring “Mr. Smith Goes to Washington” filibustering on the Senate floor. A milder set of changes was in the works sponsored by a bipartisan group. Like most every other aspect of judicial nominations, which are only one part of the filibuster controversy, charges and counter-charges abound as to which party has been the greater rules-abuser and over the legitimacy of changing the filibuster rules by majority vote on the opening day of the 113<sup>th</sup> Senate,<sup>43</sup> a “day” that can be expanded beyond its standard 24 hours. Despite the claims by proponents of change, it is hard to see senators unilaterally giving up the procedural advantages that permeate the Senate’s unanimous consent mentality; Democrats as well as Republicans know that majority status is a fleeting commodity. Still, it is also hard to see how allowing senators to place anonymous holds on nominees, by threatening to deny unanimous consent for a motion to proceed, protects the rights of minorities as opposed to the interests of senators who operate best in the dark.

## 2. Exposing the Multi-Faceted Harm that Delay Causes

Much of the rhetoric about the need to fill vacancies cites litigants in civil rights cases who cannot get resolution because of overworked district and circuit judges. Early in the administration, eleven prominent law professors wrote the president to urge a faster pace of nominations and confirmations, because federal courts make “thousands of decisions each year on issues as wide-ranging as freedom from discrimination, due process, religious and expressive liberty, crime and punishment, the environment, immigration, workplace safety, privacy, and access to the political process.”<sup>44</sup> Others emphasize the judicial threat they perceive to signature Obama legislative achievements if the courts of appeals are not well-stocked with Democratic appointees.<sup>45</sup> The White House itself has generally used a more muted approach, emphasizing the need for

<sup>42</sup> *On Filibuster Reform, Advocates Claim Momentum*, HUFFINGTON POST (Jan. 4, 2013), [http://www.huffingtonpost.com/2013/01/03/filibuster-reform-senate\\_n\\_2405008.html](http://www.huffingtonpost.com/2013/01/03/filibuster-reform-senate_n_2405008.html).

<sup>43</sup> Alan Fram, *Dems, GOP Fight Brewing over Curbing Filibusters*, ASSOC. PRESS (Nov. 11, 2012), available at <http://bigstory.ap.org/article/dems-gop-fight-brewing-over-curbing-filibusters>.

<sup>44</sup> Reprinted in Geoffrey Stone, *Obama’s Judges*, HUFFINGTON POST (Mar. 2, 2010), available at [http://www.huffingtonpost.com/geoffrey-r-stone/obamas-judges\\_b\\_483042.html](http://www.huffingtonpost.com/geoffrey-r-stone/obamas-judges_b_483042.html).

<sup>45</sup> See, e.g., Fontana, *Judging Obama’s Second Term*, *supra* note 19.

diversity, the need for “dispens[ing] justice with unwavering integrity and impartiality,”<sup>46</sup> complaining that “[t]oo many of our courtrooms stand empty,”<sup>47</sup> and “urg[ing] the Senate to consider and confirm . . . nominees without delay, so all Americans can have equal and timely access to justice.”<sup>48</sup>

All these reasons for expeditious confirmations are well-taken, but the administration might stress a broader storyline. It’s unlikely that storylines themselves will sway senators who are committed to keeping Obama’s confirmation rates low and dragging out the process, but storylines may have some impact on editorial writers and other opinion-makers who in turn can have some effect on wavering senators who do not want to appear overly obstructionist. Andrew Cohen last March made a strong case that the real losers from federal court vacancies, especially in the district courts, are civil litigants, who have no constitutional right to a speedy trial. They are “corporations and small business owners, investors and merchants, employees and employers . . . [who] live with the financial uncertainty that pending litigation brings,” and some of whom could be, in his words, “job creators” with the resolution of that uncertainty.<sup>49</sup>

Of the nearly 368,000 cases filed in the most recent reporting year, almost 80% were civil, not criminal cases. Among those civil cases, one quarter were personal injury cases and another 15% involved contract and real property actions. Six percent involved labor laws, three percent were intellectual property cases, and another three percent involved consumer credit disputes. As to civil rights cases, five percent of the civil filings involved employment discrimination claims and six percent were classified as “other civil rights” (and 19% were prisoner petitions contesting convictions and protesting confinement conditions, few of which are meritorious by most any standard).<sup>50</sup>

A different take on messaging is one observer’s call for “the administration to create nomination hearings that have more human drama and less legal theory,” arguing that Second Circuit nominee Denny Chin might have sailed to confirmation much sooner had victims of Bernie Madoff, whom Chin as a district judge sentenced to a long prison term, been invited to “tell . . . their story.” The hearings “would have been more likely to make the evening news or the cable news networks [and] gone viral,” speeding his

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<sup>46</sup> Press Release, The White House, President Obama Nominates Judge Timothy Black, Gloria Navarro for District Court Bench (Dec. 24, 2009), *available at* <http://www.whitehouse.gov/the-press-office/president-obama-nominates-judge-timothy-black-gloria-navarro-district-court-bench>.

<sup>47</sup> Press Release, The White House, President Obama Nominates Seven to the United States District Courts (Nov. 14, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/11/14/president-obama-nominates-seven-united-states-district-courts>.

<sup>48</sup> Press Release, The White House (Jan. 3, 2013), *supra* note 18.

<sup>49</sup> Cohen, *supra* note 9.

<sup>50</sup> ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *supra* note 5, Tables C-2 and D. (Case types cited totaled 82% of all civil cases.)

confirmation.<sup>51</sup> The five months that Chin waited from his hearing to his 98-0 confirmation vote served no useful purpose, but routinely parading sympathetic witnesses at confirmation hearings could likely lead to more delay as opponents of nominees searched for sympathetic litigants or others who might, in response, testify about how nominees' decisions disserved their interests.

#### IV. Conclusion: Looking Ahead

##### A. Consider Treating District Courts Differently

Michael Shenkman, who suggested that the White House publicize the status of senators' district judge recommendations, has made three longer-term but still modest proposals that would create a different nomination and confirmation track for district judges than for circuit judges. In his words, “[b]eyond a high-profile compromise like the Gang of Fourteen agreement, it would be impossible to get a deal to deescalate on circuit judges.”<sup>52</sup> But, he points out, the job of district judge is different than that of circuit judge, and increased contentiousness over district nominees is largely a by-product of the escalated conflicts over circuit judges. In keeping with that observation, Shenkman would streamline the Judiciary Committee questionnaire that district nominees complete, eliminating, for example, the requirement to list all publications, which creates significant staff work and electronic searches to avoid a “gotcha” moment omission discovery later in the process. “[T]he only questions of consequence for a district judge are those describing cases decided as a judge and cases handled as a lawyer,” with relevant contact information. With that, “an able staffer can conduct reputation calls to determine a community consensus on how the nominee will perform on the bench.”<sup>53</sup>

Shenkman also proposes eliminating Judiciary Committee hearings for district judges because they have become at times “a procedural obstacle to moving district nominations through to confirmation” due to scheduling difficulties, while adding little of value to the record.<sup>54</sup> A few years ago, my colleague Benjamin Wittes proposed eliminating nominee testimony at Supreme Court nomination hearings on somewhat the same grounds: “one struggles to identify a single instance when a Supreme Court nominee’s testimony has proved genuinely revealing about his or her future career on the

<sup>51</sup> David Fontana, *Judging the Senate*, HUFFINGTON POST (Nov. 26, 2012), [http://www.huffingtonpost.com/david-fontana/judging-the-senate\\_b\\_2193627.html](http://www.huffingtonpost.com/david-fontana/judging-the-senate_b_2193627.html).

<sup>52</sup> Shenkman, *supra* note 20, at 298. The reference is to the temporary Senatorial truce during the Bush administration by which Democrats agreed to approve some controversial nominees while the Republican leadership agreed not to push the so-called “nuclear option” of simple majority rules changes to eliminate nomination filibusters. See also Michael Gerhardt and Richard Painter, *Extraordinary Circumstances: The Legacy of the Gang of 14 and Judicial Nominations Reform*, AMERICAN CONST. SOC. (Issue Brief, Nov. 2011), available at [https://www.acslaw.org/sites/default/files/Gerhardt-Painter\\_-\\_Extraordinary\\_Circumstances.pdf](https://www.acslaw.org/sites/default/files/Gerhardt-Painter_-_Extraordinary_Circumstances.pdf).

<sup>53</sup> Shenkman, *supra* note 20, at 30.

<sup>54</sup> *Id.*, at 273.

Court.”<sup>55</sup> Although televised Supreme Court hearings with nominee testimony have become so engrained a part of our judicial politics that Wittes’s proposal has little chance of adoption, one doubts that eliminating district nominee hearings would meet the same resistance.

Finally, Shenkman proposes Senate rules changes to facilitate a quick floor vote on district nominees. The majority leader, for example, “might be given the privilege, after a district judge nomination has laid over on the floor for one week, to call for an ‘expedited’ confirmation vote under a procedure requiring some higher threshold,” such as a 60-plus minimum yes-vote requirement.<sup>56</sup>

## B. The Virtue of Kicking the Proverbial Can Down the Road

The reason to describe these three proposals is not because they deserve immediate adoption, and certainly not because such adoption is feasible. They illustrate, however, what Niebuhr called “indeterminate creative ventures” that may have some promise of adoption rather than sweeping changes that do not. Still, it would be naive to expect the Senate to adopt Shenkman’s three proposals—modest as they seem—or similar changes at the outset of the 113<sup>th</sup> Congress or during Senate sessions that continue the confirmation contentiousness of recent years. President Bush’s October 2002 proposal for nomination-confirmation timetables went nowhere, in part because he offered it when mid-term elections were looming; Democrats saw it as an election year ploy to pressure them to confirm more of his nominees.

The Obama administration, however, might propose creation of a three-branch, truly bipartisan task force to develop a set of recommendations that could be implemented in 2017, when there will be a different set of players in the executive branch and some new faces in the Senate. Likelihood of adoption would depend on the proposals’ relative modesty and candidates’ willingness to endorse, or at least debate them, during the 2016 campaign. But a predicate to any serious debate and discussion is most actors’ realizing that it is in their self-interest to mitigate the confirmation mess—to avoid the time demands it creates, the ill-will it engenders, and the partisanship it encourages, all the while discouraging those with the potential to be good federal judges to step forward to be considered despite the changing landscape within the courts.

Some, impatient with the slow pace of vacancy filling in the first Obama term, will roll their eyes at such a proposal as merely “kicking the can down the road,” one of Washington’s in-vogue phrases. But “down the road” may be a more serene place to consider and adopt modest changes than today’s polarization-infested highways.

<sup>55</sup> BENJAMIN WITTES, *CONFIRMATION WARS* 119 (2006)

<sup>56</sup> Shenkman, *supra* note 20, at 309.