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## THE JUDICIAL VACANCY CONUNDRUM IN THE NINTH CIRCUIT\*

*Carl Tobias*<sup>†</sup>

The United States Court of Appeals for the Ninth Circuit must resolve the largest and most complicated caseload of the twelve regional appellate courts. Congress has authorized twenty-eight active judges for the circuit, while the Judicial Conference of the United States has recommended that Congress approve nine additional judgeships for the court. The Ninth Circuit currently has seven vacancies, four of which are considered "judicial emergencies" because the openings have remained unfilled for eighteen months, even as the size and complexity of the court's civil and criminal dockets continue to increase. President Bill Clinton submitted the names of nominees for seven vacancies during 1997; however, the Senate had confirmed no one for the court when the first session of the 105th Congress recessed in mid-November. The large number of empty seats and their prolonged character as well as burgeoning appeals have required the Ninth Circuit to cancel 600 oral arguments and to rely on many appellate and district judges who are not active members of the court when staffing panels. The factors above mean that the situation in the Ninth Circuit may have reached crisis proportions. These circumstances warrant analysis; this essay undertakes that effort.

I first examine how conditions in the Ninth Circuit became so critical, emphasizing caseload expansion and judicial openings. The second part evaluates recent developments that have led to vacancies in one-quarter of the total complement of active judgeships which Congress has authorized for the court.

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Finding that the growing number and complexity of civil and criminal appeals filed in the Ninth Circuit and that the remote possibility of expeditiously confirming judges for all of the present openings seriously threaten appellate justice, I afford suggestions which could remedy this conundrum.

## I. ORIGINS AND DEVELOPMENT OF THE CONUNDRUM

The origins and development of the judicial vacancy dilemma which currently exists in the Ninth Circuit might seem to warrant comparatively limited examination in this essay because numerous aspects of the relevant history have been explored elsewhere.<sup>1</sup> Nevertheless, somewhat detailed treatment is required because that type of assessment should enhance understanding of exactly how the present circumstances arose and how they might be addressed.

The substantial number of openings which the Ninth Circuit now has and those empty seats' protracted nature exemplify considerably broader phenomena that have detrimentally affected much of the federal court system. Nearly all of the appellate courts and many of the federal districts have experienced what may be characterized as a persistent vacancies problem for approximately two decades. This difficulty, which can be attributed principally to political phenomena, has apparently resulted from the inability of presidents to nominate, and the Senate to confirm, judges with sufficient expedition to fill all of the existing openings.

The persistent vacancies problem traces its origins to the 1960s when Congress began enlarging federal court civil and criminal jurisdiction.<sup>2</sup> Increases in the number of civil causes of action and federal crimes prompted significant growth in civil and criminal district and appellate caseloads. Congress responded to these mounting dockets by authorizing many

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<sup>1</sup> See, e.g., Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319 (1994); Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. No. 2 (May 1998). See generally SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997).

<sup>2</sup> See, e.g., Bermant, *supra* note 1, at 323-33; Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1270 (1996).

additional district and appeals court judgeships. However, Chief Executives and the Senate have encountered substantial difficulty in approving federal judges for all of the empty judicial seats partly because the bench's expansion has led to greater numbers of openings which have arisen with increasing frequency. For example, throughout much of the administrations of President Bill Clinton and former President George Bush, federal courts experienced numerous vacancies, there are now more than eighty empty judgeships.

This persistent vacancies dilemma has applied with considerable force to the Ninth Circuit for several reasons. The court has encountered the largest appellate caseload since 1980, when Congress divided the former Fifth Circuit into two appeals courts.<sup>3</sup> Moreover, a 1978 statute authorized all regional circuits with more than fifteen active judges to adopt special procedures, namely administrative units and limited en banc mechanisms, which would facilitate resolution of their growing dockets.<sup>4</sup> Another aspect of that legislation approved ten new judgeships for the Ninth Circuit, while former President Jimmy Carter undertook special efforts to fill the judicial positions authorized and appointed thirteen members of the court in 1979 and 1980.<sup>5</sup> Congressional passage of an additional judgeships bill in 1984 brought the Ninth Circuit to its present strength of twenty-eight active members,<sup>6</sup> which means

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<sup>3</sup> See Act of Oct. 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994 (current version at 28 U.S.C. § 41 (1994)). See generally DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED—THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM* (1988); HARVEY COUCH, *A HISTORY OF THE FIFTH CIRCUIT 1891-1981* (1984).

<sup>4</sup> The statute reads:

Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc court as may be prescribed by rule of the court of appeals.

Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633, *supplemented* by Act of Oct. 15, 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1981).

<sup>5</sup> *Id.* § 3, 92 Stat. 1632. See generally GOLDMAN, *supra* note 1, at 236-84.

<sup>6</sup> See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 201, 98 Stat. 333, 347 (1984).

that the court has a much larger complement of judges than any of the regional circuits and experiences considerably more frequent vacancies.

There is also a current impasse over filling the approximately eighty present openings on the federal appellate and district bench. The existing situation shares certain characteristics of the persistent vacancies problem but differs in some important respects. The current conundrum seems attributable principally to political factors which derive substantially from different political parties' control of the presidency and the Senate. The dilemma also partially results from the inability or unwillingness of officials in the Executive Branch and the Senate to discharge their respective responsibilities for nominating and confirming candidates to the federal courts.

Regardless of who created, or might have prevented, the persistent problem and the present impasse, both of these developments have meant that there are now more than eighty vacancies on the federal appellate and district courts and seven openings on the Ninth Circuit, half of which constitute judicial emergencies. The permanent conundrum and the current problem have imposed many disadvantages. Numerous federal district courts have experienced backlogs on their civil dockets, while some district judges have not conducted a single civil trial in the last two years.

Most of the regional appeals courts have had to depend more often on judges who are not active members of the courts, a phenomenon which can undermine collegiality and even erode consistency in circuit precedent. Appellate court judges have also placed greater reliance on support staff to help them. Almost all of the appeals courts have correspondingly limited the percentage of oral arguments and published decisions that they have afforded, while a few have even postponed oral arguments.

The longstanding judicial vacancies difficulty and the current dilemma have had some of the detrimental effects which I described above and additional deleterious impacts on the Ninth Circuit. I examine in the next section the large number, and protracted character, of unfilled seats in the Ninth Circuit.

## II. RECENT DEVELOPMENTS

For much of the period since 1978, when Congress authorized a substantial increase in the number of judgeships on the Ninth Circuit, the court has experienced comparatively few vacancies. The openings only rose to significant levels and the seats remained empty for prolonged periods during 1995 when filling those judgeships became inextricably intertwined with proposals to split the Ninth Circuit.

In May 1995, Republican Party senators who represent states of the Pacific Northwest mounted the fifth serious effort since 1983 to divide the court.<sup>7</sup> The Senate members introduced a bill that would have placed the five Northwestern states in a new Twelfth Circuit and would have left the remaining states and territories of the existing Ninth Circuit in that court.<sup>8</sup> Soon after the measure's introduction, Senator Conrad Burns (R-Mont.) announced that he would place a hold on all nominees to the Ninth Circuit until Congress bifurcated the court.<sup>9</sup> Senator Burns only removed this hold in early 1996 when the Senate confirmed Judge A. Wallace Tashima and Judge Sidney Thomas to the court. However, no judges received appointments to the Ninth Circuit in the remainder of the 1996 presidential election year or throughout 1997, the first year of the Clinton Administration's second term.

During 1996 and 1997, eight active judges on the court decided to assume senior status or to retire, thus creating vacancies. Both Democratic and Republican presidents had appointed the jurists. Some of the judges were apparently following or attempting to honor an informal tradition of assuming senior status or resigning during the administration of a Chief Executive of the same political party as the president who named the judges. For example, this phenomenon could explain why a few Democratic appointees assumed senior sta-

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<sup>7</sup> See S. 956, 104th Cong. (1995); see also S. 853, 104th Cong. (1995); Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917 (1990). See generally Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. 1357 (1995).

<sup>8</sup> See S. 956, 104th Cong. (1995); see also S. 853, 104th Cong. (1995).

<sup>9</sup> See *Montana Senator Jeopardizes Candidacies for 9th Circuit*, S.F. DAILY J., June 8, 1995, at 1.

tus rather early in 1996, thereby ostensibly enabling President Clinton to name their successors. Several Republican appointees who may have awaited the 1996 election returns to ascertain whether a Republican might capture the White House could have decided correspondingly to assume senior status once that eventuality failed to materialize, rather than wait an additional four years.<sup>10</sup>

Several reasons explain why only two judges have secured appointment to the Ninth Circuit from May 1995 until 1998. First, the Senate did not confirm any nominees to the court in 1995 after Senator Burns placed his hold on confirmation because one member of that body can delay the entire Senate's action under the chamber's unanimous consent procedure. When Senator Burns lifted his hold in early 1996, the Senate confirmed Judges Tashima and Thomas.

However, the Senate approved no additional nominees for the Ninth Circuit during 1996.<sup>11</sup> Perhaps the most important explanation for inaction was that a presidential election occurred in 1996. This meant that during the first five months of the year, Senator Robert Dole (R-Kan.), who was serving as Senate Majority Leader and attempting to secure the Republican presidential nomination, was apparently reluctant to schedule floor votes on appellate court nominees lest he evince a lack of confidence in his own presidential aspirations.

Once Senator Dole resigned from the Senate and Senator Trent Lott (R-Miss.) succeeded him, there ensued a period when Senator Lott was apparently proceeding with caution in mastering his responsibilities as Majority Leader. By the time that the new Senate Majority Leader was prepared to schedule floor debate and floor votes on nominees, it was mid-summer of an election year when the confirmation process has traditionally slowed in anticipation of the presidential election. Republican Party hopes that Senator Dole might capture the White House and afford the GOP the opportunity to fill existing judi-

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<sup>10</sup> An active judge becomes eligible to assume senior status when the sum of the judge's age and years of service equals eighty. *See* 28 U.S.C. § 371 (1994).

<sup>11</sup> A few nominees received Committee hearings or Committee votes, but none received full Senate consideration.

cial vacancies and Senator Lott's reluctance to exhibit insufficient confidence in the Dole candidacy by promptly processing judicial nominees may have additionally delayed confirmation.

In any event, during the summer, the Republican and Democratic leadership in the Senate reached an agreement on the confirmation process whereby the Senate would consider one nominee per day until the Labor Day recess. That agreement enabled the Senate to confirm thirteen judges for the district court bench. Some appeals court nominees did have Judiciary Committee hearings in 1996, but none of the judges receiving appointment were named members of any appellate court, including the Ninth Circuit.

During March 1996, proponents of the proposal to bifurcate the Ninth Circuit concluded that they lacked the requisite votes to pass the measure.<sup>12</sup> These Republican senators, therefore, agreed on a compromise proposal which would have authorized a national commission to evaluate appellate courts. The measure easily passed the Senate, but the proposal languished in the House. Congress did appropriate \$500,000 for the study; however, it failed to enact authorizing legislation.<sup>13</sup>

In 1997, several study commission bills were introduced in the House and the Senate.<sup>14</sup> On June 3, the House approved proposed legislation which would have authorized a study.<sup>15</sup> In late July, the Senate passed an appropriations rider that would have divided the Ninth Circuit.<sup>16</sup> In November, Congress adopted and President Clinton signed a measure which provided for a national study of the appellate courts, with particular reference to the Ninth Circuit.<sup>17</sup>

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<sup>12</sup> I rely in this sentence and the next on Carl Tobias, *Why Congress Should Not Split the Ninth Circuit*, 50 SMU L. REV. 583, 589 (1997); see also 142 CONG. REC. S2219-S2303 (daily ed. Mar. 18, 1996).

<sup>13</sup> See 142 CONG. REC. H11,859 (daily ed. Sept. 28, 1996).

<sup>14</sup> See, e.g., S. 248, 105th Cong. (1997); S. 283, 105th Cong. (1997); H.R. 639, 105th Cong. (1997).

<sup>15</sup> See H.R. 908, 105th Cong. (1997); see also Carl Tobias, *House Authorizes Appellate Court Study Commission*, 80 JUDICATURE 292 (1997).

<sup>16</sup> See S. 1022, 105th Cong., § 305 (1997).

<sup>17</sup> See Pub. L. No. 105-119, § 305, 111 Stat. 2440, 2491-92 (1997); see also Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 FLA. L. REV. 189 (1997); Carl Tobias, *Congress Authorizes Appellate Study Panel*, 81 JUDICATURE 125 (1997). The authorization of that study should temporarily eliminate the issue of splitting the court as an obstacle to the confirmation of judges for the Ninth Circuit.



During 1997, no judge secured appointment to the Ninth Circuit. The inability or unwillingness to approve judges for the court can be ascribed to numerous individuals and entities with responsibility for judicial selection. Some observers have attributed the delay in naming judges to the machinations which involved proposals for splitting the Ninth Circuit,<sup>18</sup> although it is impossible to prove that senators who favor division may have been employing delay or refusal to confirm judges as a tactic for imposing pressure on the court and fostering its bifurcation. For example, the larger number of openings that the court experiences and the longer that they remain open, the more the court's judges might feel that they should accede to division and the greater difficulty they will encounter in promptly processing appeals.

Another explanation for the dearth of judges appointed to the Ninth Circuit is the current impasse over the approval of federal judges for all eighty openings. For example, President Clinton may have submitted at a regular pace an insufficient number of nominees whom Republican senators considered acceptable, especially early in 1997. Senator Orrin Hatch (R-Utah), chair of the Senate Judiciary Committee, could have permitted too few hearings and Committee votes on the candidates whom the Chief Executive tendered. Senator Lott, for his part, appeared to schedule infrequently floor votes and debates on nominees who had received favorable Committee votes. In short, all who were responsible for judicial selection probably could have done more to expedite the process.

These ideas apply with greater specificity to the Ninth Circuit. For example, on January 7, 1997, President Clinton renominated three individuals whom the Senate had earlier failed to confirm.<sup>19</sup> However, the administration did not submit another nominee until late June, and a fifth person during late July, while tendering the names of two additional people in November.<sup>20</sup> In fairness, the Chief Executive may have

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<sup>18</sup> See, e.g., Carol M. Ostrom, *Fuming Senators Ready to Carve Up 9th Circuit-NW States Would be in New District*, SEATTLE TIMES, Nov. 2, 1997, at A1; David G. Savage, *Debate Rises Over Proposal to Break Up Appeals Court*, L.A. TIMES, Sept. 21, 1997, at A3.

<sup>19</sup> They were Professor William Fletcher, Margaret McKeown, and District Judge Richard Paez. See The White House, Office of the Press Sec'y, *President Clinton Nominates Twenty-two to the Federal Bench* (Jan. 7, 1997).

<sup>20</sup> The late June nominee was District Judge James Ware and the late July

seen little reason to nominate more individuals promptly, given the slow pace at which the Senate was processing candidates. The Senate Judiciary Committee correspondingly conducted hearings on one of the seven nominees for the court who subsequently requested that his name be withdrawn from consideration<sup>21</sup> and on a second person whom the Committee approved but on whom the Senate failed to vote before it recessed.<sup>22</sup>

There have also been disputes over filling particular vacancies. For example, Republican senators from Arizona and Washington argued that they must participate in recommending candidates for openings in their states and have even insisted that they are entitled to make the suggestions.<sup>23</sup> These machinations seriously delayed nominations for vacancies in Arizona and Washington, although accord was apparently reached and the Chief Executive submitted nominees for both empty seats in November.<sup>24</sup>

The large number and protracted nature of the openings have had numerous detrimental effects. The vacancies have imposed enormous pressure on active appeals court judges, the appellate judges who have assumed senior status, and the active and senior district judges who sit in the Ninth Circuit. For

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nominee was Oregon Supreme Court Justice Susan Graber. See The White House, Office of the Press Sec'y, *President Clinton Nominates Ware to the Appellate Bench* (June 27, 1997); The White House, Office of the Press Sec'y, *President Clinton Nominates Graber to the Appellate Bench* (July 30, 1997); The White House, Office of the Press Sec'y, *President Clinton Nominates Silverman to the Appellate Bench* (Nov. 8, 1997); The White House, Office of the Press Sec'y, *President Clinton Nominates Gould to the Appellate Bench* (Nov. 8, 1997).

<sup>21</sup> This was Judge Ware. See *supra* note 20; see also David G. Savage & Maura Dolan, *Judge Admits Tale of Brother's Death Was a Lie*, L.A. TIMES, Nov. 7, 1997, at A1.

<sup>22</sup> This was Magistrate Judge Silverman. See *supra* note 20; see also *infra* notes 24, 29-30 and accompanying text. The Senate confirmed Judge Silverman in January 1998. See *Arizonan Gets 9th Circuit Seat*, TUCSON CITIZEN, Jan. 30, 1998, at 2C.

<sup>23</sup> See, e.g., Peter Callaghan, *Senators Agree on Selecting Judges*, TACOMA NEWS TRIBUNE, Aug. 12, 1997, at B1; Neil A. Lewis, *Clinton Has a Chance to Shape the Courts*, N.Y. TIMES, Feb. 9, 1997, at 1; see also 143 CONG. REC. S2538, S2541 (daily ed. Mar. 19, 1997) (statement of Sen. Biden) (suggesting GOP senators may have so intimidated).

<sup>24</sup> These nominees were Magistrate Judge Barry Silverman and Ronald Gould. See *supra* notes 20, 22; see also *infra* notes 30-31 and accompanying text.

example, the active and senior appellate judges have heard more oral arguments and authored more opinions than they would have were the court at full strength.

The circuit may also have had to invoke numerous measures that enable it to resolve expanding dockets with insufficient resources. For example, the deficient resources might have prompted the court to grant fewer oral arguments or to issue written decisions in a smaller percentage of cases. The situation concomitantly could have led judges to rely more substantially on court staff, such as staff attorneys and law clerks. Judges may even have had less time to review petitions and briefs, to prepare for oral arguments and to confer on, draft, circulate and finalize opinions.

Symptomatic of certain difficulties that are enumerated above is the Ninth Circuit's substantially increased reliance on judges who are not active members of the court to participate on three-judge panels. The Ninth Circuit has a long tradition of depending on its own senior appeals and district judges and active district judges as well as appellate and district judges who sit in other appeals courts, but has resorted to that practice with increasing frequency since 1995. Indeed, a judge of the Court of International Trade recently sat on the court. It is difficult to identify the effects of increasing reliance on judges who are not active members of the Ninth Circuit. However, dependence on these judges may undermine collegiality, a phenomenon which is said to expedite appellate dispositions. Reliance on "outside" judges correspondingly might have reduced coherence in the law of the circuit because they could be less familiar not only with one another but also with the court's substantive decisionmaking and its traditions.

The phenomena that I examined earlier might also delay the Ninth Circuit's disposition of appeals, thus complicating the efforts of a court which already experiences considerable difficulty in expediting resolution of its enormous docket. Any court that is attempting to operate with only two-thirds of its authorized complement will encounter even greater problems in promptly concluding appellate disputes. Indeed, numerous

factors which I considered already have compelled the Ninth Circuit to cancel 600 oral arguments at great cost to the court, lawyers, and litigants.<sup>25</sup>

In sum, the large number and lengthy character of the judicial vacancies which now exist in the Ninth Circuit have apparently had numerous disadvantageous effects on the court. These circumstances mean that all three branches of the federal government, but especially President Clinton and the Senate, must work cooperatively in attempting to appoint judges for all of the present openings as promptly as possible.

### III. SUGGESTIONS FOR THE FUTURE

Republican Party senators who comprise a majority in the upper chamber should institute numerous measures to expedite the filling of the nine vacancies which currently exist on the Ninth Circuit. The Senate Judiciary Committee and its chair, the Senate Majority Leader, and individual Republican senators, particularly lawmakers who represent states situated in the Ninth Circuit where openings exist, could implement these approaches. First, and perhaps foremost, they should no longer consider the controversy over the Ninth Circuit's possible bifurcation as an impediment to confirming judges, because congressional approval of a study commission which will emphasize the court removes the issue of Ninth Circuit division as a reason for delaying appointments.

The Judiciary Committee and Senator Hatch should continue employing the type of concerted efforts which they undertook between the time that the Senate returned from its August recess and the mid-November date on which the first session of the 105th Congress recessed. This work enabled the Senate to confirm three times as many judges during the final two and one-half months of the session as the Senate had approved between January and early September of the same year.

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<sup>25</sup> See, e.g., Viveca Novak, *Empty-Bench Syndrome*, TIME, May 26, 1997, at 37; *Chronic Federal Judge Shortage Puts Lives, Justice On Hold*, LAS VEGAS REVIEW-JOURNAL, Aug. 13, 1997, at A9; see also *id.* (stating that 6th Circuit canceled 60 arguments); Bill Kisliuk, *Judges' Conference Slams Circuit-Splitting, Vacancies*, THE RECORDER, Aug. 19, 1997, at 1.

Now that the second session of the 105th Congress has convened, the Committee and the chair should schedule hearings promptly for the nominees whom the Committee has investigated but did not accord hearings during 1997 and for the nominees whom President Clinton has proposed, or will submit, in 1998. This might require the Committee and Senator Hatch to alter somewhat the schedule that they followed in the first session and throughout the 104th Congress, whereby only one appeals court nominee testified at each hearing, which was typically held once a month.<sup>26</sup> The Committee may need to schedule multiple hearings every month or permit testimony of more than one appellate court nominee in a specific hearing. The Committee could consider holding a special hearing for several nominees to the Ninth Circuit or at least contemplate moving some of these individuals forward in the queue. The Committee might even eschew hearings for noncontroversial nominees because the proceedings are essentially ceremonial, although the symbolic and actual significance of appeals court judgeships may make some senators reluctant to follow this approach. The critical situation that currently exists in the Ninth Circuit may justify the invocation of these efforts.

The Committee and its chair should schedule hearings and Committee votes on all nominees, even if one or more senators object to specific candidates. These nominees should be permitted to testify and to have the Committee debate and vote on their fitness to serve. President Clinton is concomitantly entitled to forward the nominations of people whom he believes will be excellent federal judges, while both the President and the nominees should be able to expect that the individuals will receive hearings on the merits of their candidacies and fair votes. Subject to institutional constraints and traditional understandings of the Senate's role in giving advice and consent, the Committee and members can freely and rigorously question nominees and vote against those whom the lawmakers find unfit for federal appellate service. For example, senators

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<sup>26</sup> See Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309, 318 (1996); see also Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 744 (1997).

who are concerned that nominees might become activist judges if approved may want to probe in confirmation hearings individuals' potential to so behave once on the bench.<sup>27</sup>

It will generally be better to have issues, such as those enumerated above, aired in a public forum, particularly if specific nominees favor this approach. Nevertheless, some candidates may prefer that these questions be considered in private or the potential for embarrassment or waste of resources could make that public treatment less desirable. However, these situations should be the exception, and should be the subject of private negotiations between the chair, the Clinton Administration and the individual nominee.

The Senate Majority Leader must implement actions which will expedite full Senate consideration of nominees who secure Judiciary Committee approval. For instance, Senator Lott should schedule floor votes promptly after he is notified of favorable Committee action. To the extent that delay can be ascribed to controversy over specific candidates, particularly dissatisfaction of the Majority Leader or individual senators, Senator Lott might permit increased floor debate and final votes on these nominees. For example, the discussion which preceded Judge Merrick Garland's confirmation apparently fostered open and healthy interchange on the Senate floor.<sup>28</sup>

President Clinton could institute measures which might expedite the confirmation of judges for the numerous vacancies that presently exist on the Ninth Circuit. The Chief Executive expeditiously nominated persons for two empty seats once the Senate returned for the second session of the 105th Con-

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<sup>27</sup> See, e.g., *Hearings on Judicial Activism: Assessing the Impact Before the Senate Judiciary Constitution Subcomm.*, 105th Cong. (1997); 143 CONG. REC. S2515 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch).

<sup>28</sup> See 143 CONG. REC. S2515-41 (daily ed. Mar. 19, 1997); see also Eva M. Rodriguez, *Garland: A Centrist Choice*, LEGAL TIMES, Aug. 7, 1995, at 1. Insofar as the Senate Majority Leader has premised floor votes for judicial nominees on other contingencies, such as President Clinton's submission of names for the Federal Election Commission openings, the importance of filling court vacancies suggests that Senator Lott cease this practice. See Tobias, *supra* note 1, at 75.

gress.<sup>29</sup> The Clinton Administration should promptly nominate individuals for the two openings as to which no nominees have been tendered.

President Clinton can best facilitate the filling of the current vacancies by certain practices that he followed near the end of the first session of the 105th Congress. The administration must identify and nominate individuals with excellent qualifications who will prove acceptable to senators from the states in which the opening will be filled by conferring with those lawmakers about candidates. Illustrative are the nominations in Arizona of Magistrate Judge Barry Silverman, whom the state's two Republican senators seemingly found acceptable and of Ronald Gould, a distinguished practitioner from Seattle, Washington, whom Senator Slade Gorton (R-Wash.) apparently supported.<sup>30</sup> Indeed, the Chief Executive nominated Magistrate Judge Silverman in early November, the Judiciary Committee conducted a hearing on the nominee on November 9, and the full Committee voted favorably on Silverman three days later.<sup>31</sup> However, Congress recessed before the Senate could consider the nominee.<sup>32</sup>

President Clinton, therefore, must search for and nominate people who are intelligent, independent, industrious and have measured judicial temperament. The Chief Executive may want to consider nominating persons who have moderate political perspectives, as did most of his nominees during his first

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<sup>29</sup> See The White House, Office of the Press Sec'y, *President Clinton Nominates Berzon to the Appellate Bench* (Jan. 27, 1998); The White House, Office of the Press Sec'y, *President Clinton Nominates Wardlaw to the Appellate Bench* (Jan. 27, 1998).

<sup>30</sup> See *supra* notes 20, 24.

<sup>31</sup> I rely in this sentence and the next on *Senate Dems Put Judge Pick on Hold*, ARIZONA REPUBLIC, Nov. 15, 1997, at B1; see also Adrienne Flynn, *Arizona Lawmakers Post Wins as Session Ends; Actions Include Court Nominee, Key Bills Passed*, ARIZONA REPUBLIC, Nov. 13, 1997, at A2; *supra* notes 20, 24 and accompanying text.

<sup>32</sup> The Senate did confirm Judge Silverman shortly after the second session of the 105th Congress convened. See *Arizonan Gets 9th Circuit Seat*, THE TUSCON CITIZEN, Jan. 30, 1998, at 2C.

Administration,<sup>33</sup> because Senator Hatch and numerous other Republican senators have clearly stated that they will not confirm nominees who promise to be "activist judges."<sup>34</sup>

Prior judicial service, although not a prerequisite, is a desirable attribute which some nominees will possess. For instance, Judge Wallace Tashima was a highly-regarded judge of the Central District of California before his recent elevation to the Ninth Circuit, and Judge Susan Graber had been a distinguished member of the Oregon Supreme Court since 1990. Individuals who have previously served on the bench afford the advantage of that experience, while federal district judges have already received Senate confirmation. The Chief Executive may want to accord special consideration to presently-sitting district judges, such as Judge Sonia Sotomayor, whom Republican presidents appointed, because the Republican majority in the Senate may be inclined to view these individuals favorably.<sup>35</sup>

President Clinton should closely consult with Senator Hatch regarding potential nominees. The administration must seek the chair's counsel and suggestions, although it need not always follow his advice. The Chief Executive should also communicate with other members of the Judiciary Committee and senators who represent states in which openings exist, because the lawmakers can play important roles in the confirmation process, as they apparently did in Arizona and Washington.<sup>36</sup>

If the above approaches, which may fairly be characterized as conciliatory, do not prove efficacious, President Clinton may want to entertain and employ less cooperative measures. For instance, he might rely on the presidency as a bully pulpit to blame the Ninth Circuit vacancies on Republican senators, or for cajoling or shaming the legislators into expediting appointments. The Chief Executive may even force the issue of de-

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<sup>33</sup> See Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254 (1997); Ronald Stidham et al., *The Voting Behavior of President Clinton's Judicial Appointees*, 80 JUDICATURE 16 (1996).

<sup>34</sup> See, e.g., Orrin G. Hatch, *There's No Vacancy Crisis in the Federal Courts*, WALL ST. J., Aug. 13, 1997, at A15; *supra* note 27 and accompanying text.

<sup>35</sup> See The White House, Office of the Press Sec'y, *President Clinton Nominates Sotomayor to the Appellate Bench* (June 25, 1997); see also *supra* notes 20-21 and accompanying text.

<sup>36</sup> See *supra* notes 23-24, 30-31 and accompanying text.



layed selection by taking it to the American people. Related means for breaking the impasse might be the submission of nominees for all seven current openings or reliance on recess appointments,<sup>37</sup> each of which could pressure the Senate to process nominees by publicizing or dramatizing how protracted vacancies threaten justice and the importance of promptly choosing more judges.

## CONCLUSION

The Ninth Circuit currently has vacancies in seven of the court's twenty-eight active judgeships that Congress has authorized, while the appeals court confronts a docket which continues to increase in size and complexity. The failure or inability to fill these openings has threatened the delivery of appellate justice in the West. President Clinton and the Senate must work closely together so that they may expeditiously appoint judges to these empty seats.

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<sup>37</sup> See U.S. CONST. art. II, § 2. See generally Tobias, *supra* note 1, at 49-52.