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# JUDICIAL VACANCIES: AN EXAMINATION OF THE PROBLEM AND POSSIBLE SOLUTIONS*

*Gordon Bermant***
*Jeffrey A. Hennemuth****
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## I. INTRODUCTION

There is no doubt that persistent vacancies in the membership of the federal judiciary are, and are perceived to be, an important issue among federal judges.[1] Under Judicial Conference policy, a court with a vacant judgeship for eighteen months or longer is in a state of "judicial emergency."[2] In 1992, more than sixty-one percent of the federal judges responding to a Federal Judicial Center survey rated delay in filling judicial vacancies as a "grave" or a "large" problem – no other problem received as much stated concern.[3] And Chief Justice Rehnquist recently noted:[4]

> The President and the Senate should be commended for confirming 28 new Article III judges during the First Session. That action still leaves 113 vacancies on the Article III bench – representing more than 13 percent of all authorized judgeships. Sixty-four of these vacancies have been left unfilled for over 18 months, some as long as four years. There is perhaps no issue more important to the judiciary right now than this serious judicial vacancy problem. Were it not for the dedication of our hard working senior judges, the courts would be addressing an even more serious

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* This Article is derived from a research paper that the authors prepared for the Committee on Long Range Planning of the Judicial Conference of the United States. The authors wish to acknowledge the valuable comments and assistance received from various members of the Committee and agency colleagues. Nevertheless, the ideas expressed herein are those of the authors and do not necessarily reflect the official views of the Judicial Conference, the Long Range Planning Committee, the Federal Judicial Center, or the Administrative Office.

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1. The discussion in this Article of judicial vacancies and appointments is limited to judgeships whose incumbents serve during "good Behaviour" and with undiminished compensation under Article III, Section 1 of the United States Constitution. Apart from Justices of the Supreme Court, this refers to circuit judges on the 13 United States courts of appeals, district judges on the 91 United States district courts, and the judges of the Court of International Trade.

2. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 31-32 (Mar. 15, 1988). At the time of this writing, 49 vacancies exist that create "judicial emergencies" in 35 courts. *Judicial Boxscore As of August 1, 1994*, THE THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Aug. 1994, at 6. In addition, because of persistent vacancies and increasing workload, two courts of appeals have declared "emergencies" to enable panels to hear cases with less than two active judges from those courts. *See* Chief Judge's Order Declaring an Emergency under 28 U.S.C. § 46(b) (10th Cir. Mar. 29, 1994); Chief Judge's Order Declaring an Emergency under 28 U.S.C. § 46(b) (5th Cir. Oct. 28, 1991).

3. FEDERAL JUDICIAL CENTER, PLANNING FOR THE FUTURE: RESULTS OF A 1992 FEDERAL JUDICIAL CENTER SURVEY OF UNITED STATES JUDGES 3, 25, 47, 69, 91 (1994).

4. William H. Rehnquist, *Chief Justice's 1993 Year-end Report Highlights Cost-saving Measures*, THE THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Jan. 1993, 1, at 3-4.

> backlog today. I hope that in the coming year the executive and legislative branches will take the necessary steps to fill these vacancies.[5]

To aid and encourage efforts to solve the vacancy problem, we provide an overview of its causes and possible solutions. First, the background of the problem is presented briefly in historical, legal, and political contexts. Next, there is a statistical breakdown showing the number and length of vacancies over the past two decades, the effect of vacancies on the judiciary's workload capacity, and the extent to which vacancies are prolonged through delay in the nomination and confirmation stages of the appointment process. Finally, we identify and analyze a variety of methods for reducing the length of vacancies or mitigating their impact on the operation of the federal courts.

## II. BACKGROUND

The starting point for examination of this problem is the constitutionally prescribed mechanism for appointing judges of the federal courts. The Appointments Clause of the U.S. Constitution reads as follows:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[6]

Although the next clause of that section empowers the President to fill vacancies unilaterally during Senate recesses,[7] the requirements of the Appointments Clause must be met to make other than temporary appointments to the offices it covers.[8]

The rationale for requiring senatorial advice and consent for the appointment of the nation's most important officers was provided by Alexander Hamilton in *The Federalist:*

> [T]he necessity of their concurrence would have a powerful, though, in general a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. And, in addition to this, it would be an efficacious source of stability in the administration.[9]

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5. *Id.* Despite the increasing assumption of federal court workload by senior circuit and district judges, their contributions have not been able, in recent years, to offset the loss of functional capacity in the courts caused by judicial vacancies. *See* Henry J. Reske, *Keeping Pace with Judicial Vacancies*, 80 A.B.A. J. 34 (July 1994).

6. U.S. CONST. art. II, § 2, cl. 2.

7. "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. CONST. art. II, § 2, cl. 3. *See infra* notes 52-65 and accompanying text.

8. *See infra* note 73 and accompanying text.

9. THE FEDERALIST No. 76, at 513 (Alexander Hamilton) (J. E. Cooke ed., 1961).

The role of the Senate in judicial selection has been an active one from the "earliest days" of the nation, because the senators have a substantial stake, for several reasons, in affecting, and appearing to affect, the appointing process.[10] The advice and consent language of the Constitution cannot convey the reality of complex political accommodation that must operate between the executive and legislative branches during the early stages of the appointing process if it is to work efficiently. When Lawrence Walsh was Deputy Attorney General in the Eisenhower administration, he observed that "it is virtually impossible to have a person confirmed for a federal judgeship if one of the Senators from his state is either openly or secretly opposed to the nomination."[11] Moreover, there is a very long tradition of senatorial involvement in *selecting* judicial nominees, especially at the district court level. When one or both senators from a state are of the same political party as the President, the latter typically will nominate a candidate for district judge put forward by the senator(s).[12]

Concern about the numbers, causes, and consequences of judicial vacancies is not a recent development. Examples of delay and recommendations for change have been reported from time to time during at least the last four presidential administrations.[13]

In sum, the appointment of judges is in its essence a political process. When there is tension between the President and one or more influential senators, and in particular if a senator from the Judiciary Committee is in tension with the President's likely candidate, both sides of the disagreement are likely to behave tactically in order to gain advantage and prevail on the point of who will, or will not, be nominated and confirmed. It has been very well documented that both sides have used intentional delay as a tactical device.[14]

The intentional use of delay as a tool of practical politics will not be easily modified by an initiative for delay reduction coming from within the judiciary. The reason is that neither the executive nor the legislature would be very likely to relinquish control of a powerful tool voluntarily, unless the political benefits of doing so made the trade-off worthwhile. What the beneficial trade-off would be is not immediately clear, and there is a risk that an attempt by the judiciary to gain

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10. HAROLD W. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS 7 (1972).

11. Lawrence E. Walsh, *The Federal Judiciary—Progress and the Road Ahead*, 43 J. AM. JUDICATURE SOC'Y 155 (1960), *quoted in* CHASE, *supra* note 10, at 9.

12. *See* CHASE, *supra* note 10, at 35-47.

13. *See, e.g.*, COMMITTEE ON FED. CTS., *Remedying the Permanent Vacancy Problem in the Federal Judiciary—The Problem of Judicial Vacancies and Its Causes*, 42 REC. ASS'N B. CITY N.Y. 374 (1987); Victor Williams, *Solutions to Federal Judicial Gridlock*, 76 JUDICATURE 185 (1993); Judith Havemann, *Federal Vacancies Becoming Drags on Policymaking; Top-Level Administration Appointees Outnumbered by Holdovers and Empty Chairs*, WASH. POST, Mar. 18, 1989, at A10; Bill McAllister, *Byrd Undercuts Harris on Selection of Judges*, WASH. POST, May 12, 1977, at B3; Leslie M. Werner, *Needless Delays in Selecting Judges Snarl Federal Courts*, N.Y. TIMES, Apr. 1, 1985, at A15.

14. Harold Chase devotes his book, *see supra* note 10, to close analysis of the process in the Eisenhower, Kennedy, and Johnson administrations. He notes that delay by the President has been used to gain concessions from a senator with particular interest in a nomination. CHASE, *supra* note 10, at 14, 40. Delay by the Senate is especially likely as presidential election time approaches and there is a reasonable chance that the party in the White House will change.

control of the appointment process could have a negative effect on relations with the other branches.

Not all delays in the nomination and confirmation processes are intentional in the political sense just described. It may be that recommendations coming from the judiciary to the other branches that address delay in judicial appointments arising from administrative sources (any source that is not freighted by partisan political considerations) would be more acceptable to the other branches. Some of the suggestions reviewed below are of that sort.

Tension between the executive and legislative branches, with attendant delay, seems inevitable so long as the appointing process proceeds with a requirement for senatorial consent. There appear to be two routes leading out of that requirement. One requires constitutional interpretation, the other constitutional amendment.

The question for interpretation is whether judges are among the "other [or 'principal'] officers of the United States" who must be appointed by the President with Senate confirmation, or are instead "inferior officers" as contemplated in the Appointments Clause.[15] If the latter, then at least in principle Congress could vest appointment power in, among other places, "the President alone" or "the Courts of Law."[16] Our discussion of this question in part IV does not attempt to advance the analysis of who may or may not be an "inferior" or "principal" officer for purposes of appointment. It does, however, note the more recent case law and commentary that address the point. As explained in text and notes below, the better view of the applicable legal precedent, and certainly of custom, does not favor the treatment of judges as "inferior" officers.

If judges cannot be appointed as "inferior" officers, then removing either the President or the Senate from the appointing process would require constitutional amendment.[17] Certainly, no proposal to allow temporary (other than "recess") appointments to the bench can be implemented without changing the Constitution. Although such amendments may provide a ready solution to the vacancy problem, pursuing that course of action could have other, less desirable consequences. Efforts to modify the provisions of Article II or Article III to remedy delays in

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15. U.S. CONST. art. II, § 2, cl. 3. Professor Peter G. Fish opened his treatise on federal court administration with the assertion that "the Constitution defined judges of the inferior courts as 'superior' officers subject to Senate approval." PETER G. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 3 (1973). He could provide no law on the point, for there is none that is dispositive, though Justice Story opined as much in his commentaries of 1833. *See infra* note 77. During the 1930s, Professor Burke Shartel of Michigan Law School argued that judges of the lower federal courts could be characterized as inferior officers for Appointments Clause purposes, and that Congress could accordingly vest the appointment of such judges in the Chief Justice acting either alone or with the approval of a court. Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities under the Constitution*, 28 MICH. L. REV. 485, 528-29 (1930).

16. U.S. CONST. art. II, § 2.

17. The chief judge of the Second Circuit recently suggested that the "political branches" consider amending the Constitution to authorize judges to fill vacancies in their ranks whenever the President fails to nominate a new judge within one year after a vacancy arises. Honorable Jon O. Newman, Remarks at the Second Circuit Judicial Conference (June 17, 1994) (transcript obtained from the circuit executive); *see also* Al Kamen, *Judicial Vacancies Spur Amendment Call*, WASH. POST, June 20, 1994, at A13; Deborah Pines, *Newman Proposes Allowing Judges to Fill Old Vacancies*, N.Y. L.J., June 17, 1994, at 1; Gail Appleson, *Judge Says Courts, Not Congress, Should Fill Posts*, REUTERS, June 17, 1994, *available in* LEXIS, News Library, CURNWS File.

judicial appointments, in addition to being difficult to achieve politically, could also serve to focus congressional and public attention on essential features of the federal judicial office – tenure during good behavior and protection against diminution of compensation – that may not always enjoy broad and vigorous support elsewhere in the government or among the public.

## III. Statistical Analysis of Judicial Vacancies from 1970 to 1992

This part presents a statistical analysis of the growth in judicial vacancies over the past two decades. The analysis shows that over this period vacancy rates almost doubled in the courts of appeals and more than doubled in the district courts. In addition, the largest proportion of delay in judicial appointments occurs during the period between creation of a vacancy and a nomination to fill the judgeship – the stage of the process largely (though not exclusively) controlled by the executive branch.[18]

### *A. Courts of Appeals*

Figures 1 and 2 provide information on judicial vacancies in the regional U.S. courts of appeals for statistical years [hereinafter SY] 1970 through 1992.[19] As shown in Figure 1, the number of authorized judgeships in the courts of appeals increased from ninety-seven in SY 1970 to 167 in SY 1992.[20] During the same period, however, the number of sitting circuit judges increased from a low of eighty-eight in SY 1971 to a high of 151 in SY 1991.[21] This difference between judgeships that were authorized and those that were filled is reflected in the judicial vacancy rate shown in Figure 2. Over the entire period from SY 1970 to SY 1992, vacancies in the courts of appeals averaged 7% and varied from a low of 1% in SY 1976 to a high of 21% in SY 1979. As can be seen from Figure 2, these vacancies followed a generally cyclical pattern over the period, with peaks occurring after judgeship bills were enacted in 1978, 1984, and 1990,[22] and troughs occurring in between. Figure 2 also provides information on the general trend in circuit vacancies over this period.[23] The overall increase in this trend was 80%

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18. *See supra* notes 10-12 and accompanying text.

19. For purposes of this Article, "statistical year" denotes a 12-month reporting period ending June 30 of the indicated year. In 1992, the federal judiciary shifted to a statistical reporting year that ends September 30. Report of the Proceedings of the Judicial Conference of the United States 13 (Mar. 16, 1992).

20. These statistics do not include the United States Court of Appeals for the Federal Circuit or either of its predecessors, the Court of Customs and Patent Appeals and the Court of Claims.

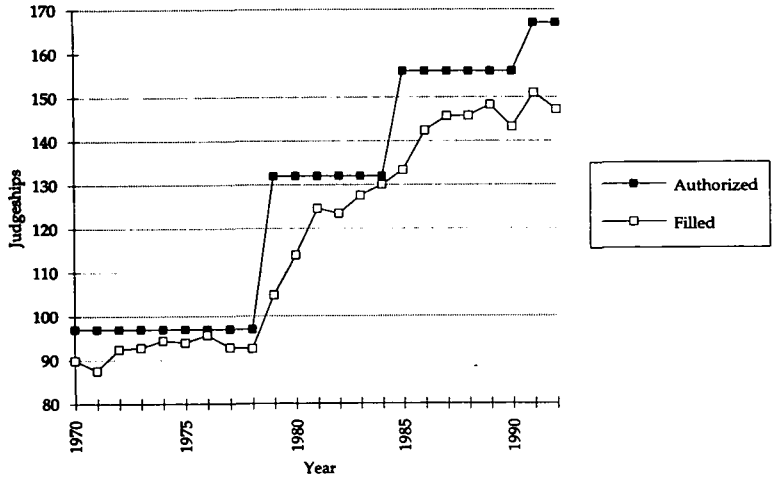
21. Throughout this part, the number of "sitting judges" or "filled judgeships" in a given year is derived by taking the number of circuit or, as the case may be, district judgeships then authorized by law and subtracting the annual number of vacant circuit or district judgeship months divided by 12.

22. Federal Judgeship Act of 1990, Pub. L. No. 101-650, § 202, 104 Stat. 5089, 5098 (11 circuit judgeships); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 201, 98 Stat. 333, 346 (24 circuit judgeships); Act of Oct. 20, 1978, Pub. L. No. 95-486, § 3, 92 Stat. 1629, 1632 (35 circuit judgeships).

23. In this case (and those following), trend lines are computed using Ordinary Least Squares [hereinafter OLS] regression analysis. The equation employed is $Y_t = a + b(T)$, where $Y_t$ is the value of the series being estimated (e.g., the judicial vacancy rate) for a particular time period, and $T$ is the time period (e.g., 1970 is period one, 1971 is period two, etc.).

from SY 1970 (a 5% vacancy rate) to SY 1992 (a 9% vacancy rate). The increase is not statistically significant, however.[24]

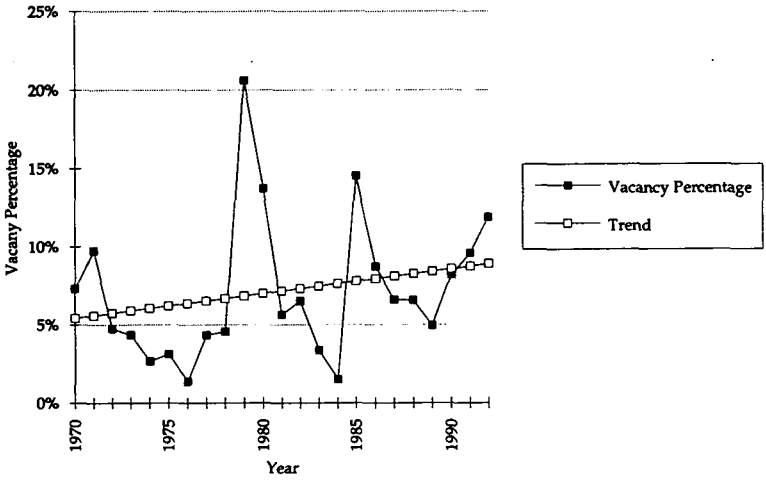
*Figure 1*
Judgeships in the Courts of Appeals: SY 1970-1992




Data Source: Federal Court Management Statistics, Administrative Office of the United States Courts, 1970-1992 editions

24. Although this trend line (and others hereinafter described) represent the best possible estimates of average change over time, they are presented for heuristic purposes only, and thus no strong inferences should be drawn from them. The functions depicted by these trends are not always statistically significant due to the limited number of observations involved and the generally high degree of variance in those observations. In the instant example, the F-statistic for the trend line is 1.19. Because this falls below the critical value for the F-statistic at the 95% confidence level (4.32), the increase depicted by the trend is not statistically significant.

*Figure 2*
Judicial Vacancies in the Courts of Appeals: SY 1970-1992




Data Source: Federal Court Management Statistics, Administrative Office of the United States Courts, 1970-1992 editions

### *B. District Courts*

In Figures 3 and 4, information is presented on judicial vacancies in the U.S. district courts for the period from SY 1970 to SY 1992. The number of authorized judgeships in the district courts increased from 401 in SY 1970 to 649 in SY 1992. As shown in Figure 3, however, the number of sitting judges increased from a low of 352 in SY 1971 to a high of 567 in SY 1991. Figure 4 provides information on the average judicial vacancy rate that was generated by this difference between judgeships that were authorized and those that were filled. Over the entire period from SY 1970 to SY 1992, vacancies in the district courts averaged 8%, and varied from a low of 3% in SY 1973 to a high of 17% in SY 1992. As can be seen from Figure 4, these vacancies also followed a cyclical pattern over the period with peaks occurring after each of the judgeship bills enacted in 1978, 1984, and 1990,[25] and troughs occurring in between. Figure 4 also provides information on the general trend in district vacancies over this period. The overall increase in this trend was 120% from SY 1970 (a 5% vacancy rate) to SY 1992 (an 11% vacancy rate). Once again, this increase is not statistically significant.[26]

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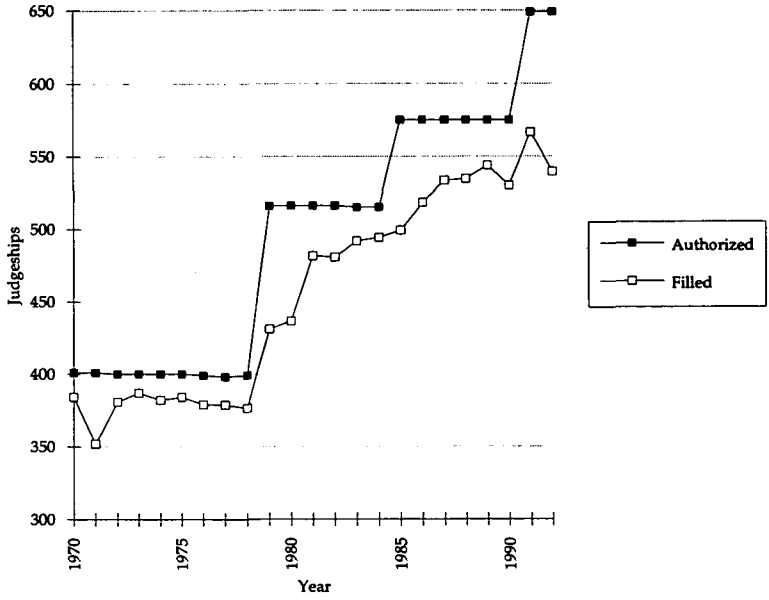
25. Federal Judgeship Act of 1990, Pub. L. No. 101-650, § 203, 104 Stat. 5089, 5099 (74 district judgeships); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 202, 98 Stat. 333, 347 (59 district judgeships); Act of Oct. 20, 1978, Pub. L. No. 95-486, §§ 1-2, 92 Stat. 1629 (117 district judgeships).

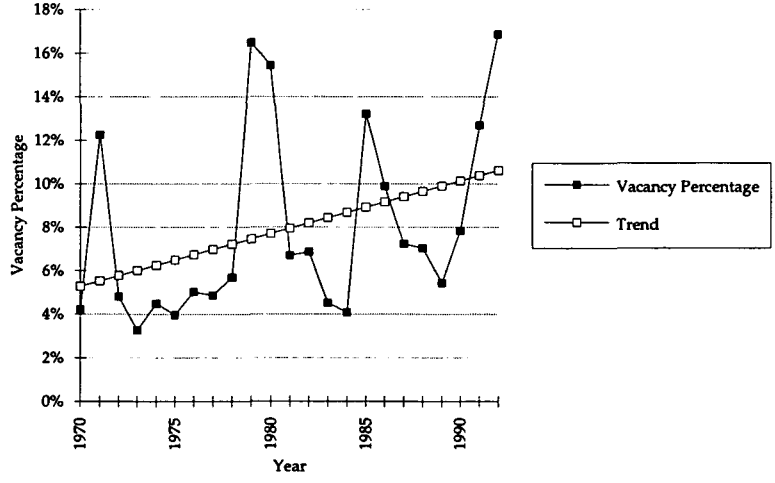
26. The F-statistic for this trend line is 3.52. Because this falls below the critical value for the F-statistic at the 95% confidence level (4.32), the increase depicted by the trend is not statistically significant.

*Figure 3*
Judgeships in the District Courts: SY 1970-1992




Data Source: Federal Court Management Statistics, Administrative Office of the United States Courts, 1970-1992 editions

*Figure 4*
Judicial Vacancies in the District Courts: SY 1970-1992




Data Source: Federal Court Management Statistics, Administrative Office of the United States Courts, 1970-1992 editions

### C. Workload Impact

Figure 5 provides information on the general trend in filings per circuit judge over the period encompassing SY 1970 through SY 1992.[27] Two trend lines are displayed. One depicts the general trend in appellate filings per sitting circuit judge. This measure reflects the average workload faced by circuit judges over the period based on the number of authorized judgeships that were actually filled. The other line depicts the general trend in appellate filings per authorized circuit judgeship. This measure reflects the average workload that would have been faced by circuit judges over the period if all authorized judgeships had been filled (i.e., a 0% vacancy rate).[28] Both trends are statistically significant.[29] Comparing the filings per circuit judge from each trend line for SY 1992 reveals that workload in the courts of appeals would have been reduced by 9% (from 295 to 269 filings per circuit judge) had the courts of appeals been at full judicial staffing levels.

In Figure 6, similar statistics are presented for the district courts.[30] In this figure, one line depicts the general trend in total civil and criminal filings per district judge given the number of authorized judgeships that were actually filled, and the other line depicts the general trend in total civil and criminal filings per district judge that would have occurred had all authorized judgeships been filled. Once again, both trends are statistically significant.[31] In this instance, a comparison of filings per district judge from each trend line for SY 1992 reveals that workload in the district courts would have been reduced by 10% (from 566 to 509 filings per district judge) had the district courts been at full judicial staffing levels.

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27. These trends are computed using raw, unweighted, appellate filings for SY 1970 through SY 1992.

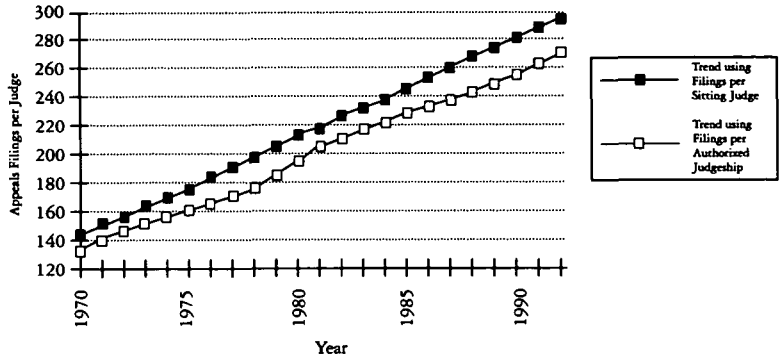
28. We recognize, of course, that a 0% vacancy rate is a practical impossibility. The point of using it is to establish a uniform baseline against which to measure the losses in work capacity caused by various judicial vacancy rates.

29. The F-statistic for the trend in appeals filed per sitting circuit judge is 530.73. Because this falls above the critical value for the F-statistic at the 95% confidence level (4.32), the increase depicted by the trend is statistically significant. The F-statistic for the trend in appeals filed per authorized circuit judgeship is 187.09. Because this falls above the critical value for the F-statistic at the 95% confidence level (4.32), the increase depicted by the trend is statistically significant.

30. These trends are computed using the total of all raw, unweighted, civil and criminal filings for SY 1970 through SY 1992.

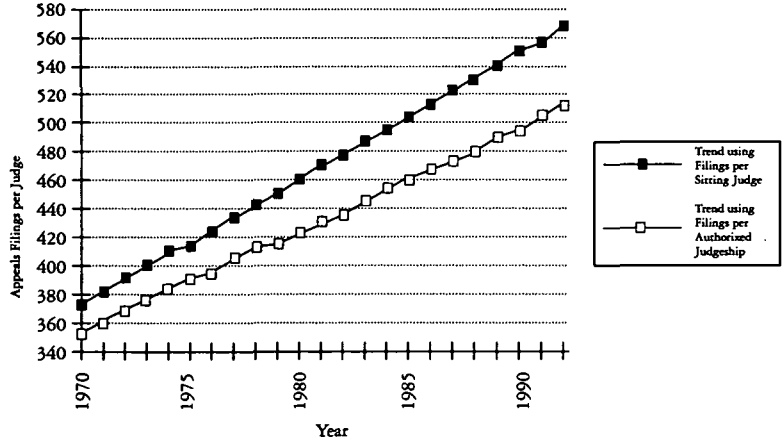
31. The F-statistic for the trend in civil and criminal filings per sitting district judge is 27.02. Because this falls above the critical value for the F-statistic at the 95% confidence level (4.32), the increase depicted by the trend is statistically significant. The F-statistic for the trend in civil and criminal filings per authorized district judgeship is 16.04. Because this falls above the critical value for the F-statistic at the 95% confidence level (4.32), the increase depicted by the trend is statistically significant.

*Figure 5*
Appeals Filed per Circuit Judge: SY 1970-1992




Data Source: Federal Court Management Statistics, Administrative Office of the United States Courts, 1970-1992 editions

*Figure 6*
Total Civil and Criminal Filings per District Judge: SY 1970-1992




Data Source: Federal Court Management Statistics, Administrative Office of the United States Courts, 1970-1992 editions

### D. The Appointment Process

One obvious explanation for the general increase in judgeship vacancy rates in both the courts of appeals and district courts has to do with the time required to fill vacant judgeships. For any given rate of attrition, the longer it takes to fill vacant judgeships, the greater the overall vacancy rate will be. Figures 7 through 10 provide information on the length of time required to fill judicial vacancies in the courts of appeals and district courts during the period from 1979 to 1992.[32]

Figure 7 presents information on the total time taken to fill judicial vacancies in the courts of appeals during the years 1979 to 1992. For the period as a whole, the average time required to fill judicial vacancies was 418 days. The averages for individual years ranged from a low of 258 days in 1982 to a high of 797 days in 1989. In addition, an analysis of the trend line shows a 62% increase in the average time required to fill judicial vacancies from 1979 (319 days) to 1992 (517 days).[33] This increase is not, however, statistically significant.[34]

Figure 8 presents similar information for the district courts. There, the average time required to fill judicial vacancies, during the period as a whole, was 412 days. The averages for individual years ranged from a low of 194 days in 1984 to a high of 715 days in 1989. In this case, the trend line reveals a 48% increase in the average time required to fill judicial vacancies from 1979 (332 days) to 1992 (492 days).[35] Once again, however, this increase is not statistically significant.[36]

Figure 9 breaks down the total time to fill judicial vacancies in the courts of appeal during the 1979-1992 period according to the proportions accounted for by (1) the time between vacancy and nomination—the stage primarily controlled by the executive branch; and (2) the time between nomination and confirmation—when the Senate is in control. During that period, the average time from vacancy to nomination was 344 days, and the average time from nomination to confirmation was seventy-five days. Based on these statistics, approximately 82% of the total time required to fill appellate vacancies during those years is attributable to the process by which nominees were selected, with the remaining 18% attributable to the Senate's review of nominations that had been made. The overall trends show a 52% increase in average time from vacancy to nomination between 1979

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32. These statistics are derived from data compiled on a calendar-year (not statistical-year) basis, and are computed as the average number of days from vacancy to confirmation for all judges confirmed in a given year.

33. Although there may be concern that frequent judgeship bills during the 1979-1992 period have induced a false upward bias in this trend, there are two reasons to believe otherwise. First, the largest increase in new judgeship vacancies occurred after the 1978 judgeship bill, which was at the beginning—not the middle or end—of the 14-year period. Second, because the time required to fill judicial vacancies is measured backward from the date of confirmation, the yearly averages include vacancies created over a period of years rather than in a single year.

34. The F-statistic for this trend line is 4.13. Because this falls below the critical value for the F-statistic at the 95% confidence level (4.75), the increase depicted by the trend is not statistically significant.

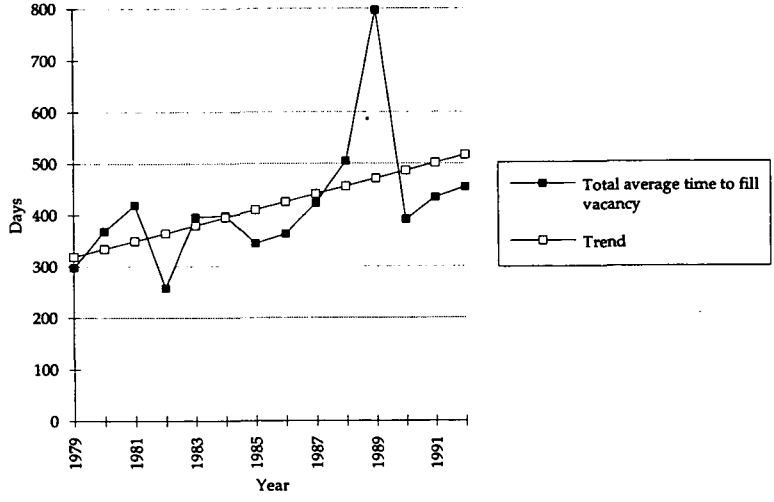
35. *See supra* note 33.

36. The F-statistic for this trend line is 2.63. Because this falls below the critical value for the F-statistic at the 95% confidence level (4.75), the increase depicted by the trend is not statistically significant.

(272 days) and 1992 (415 days), and a 115% increase in average time from nomination to confirmation between 1979 (47 days) and 1992 (102 days). The increase in time required for confirmation is statistically significant[37] while the increase in average time required to nominate a circuit judge is not.[38]

Figure 10 presents similar information for the district courts. During the 1979-1992 period, the average time from vacancy to nomination was 341 days, and the average time from nomination to confirmation was 71 days. This indicates that approximately 83% of the total time required to fill district court vacancies involved nominee selection, with the remaining 17% involving confirmation proceedings. Here, the overall trends show a 35% increase in average time from vacancy to nomination between 1979 (291 days) and 1992 (392 days), and a 143% increase in average time from nomination to confirmation between 1979 (41 days) and 1992 (100 days). For district judge appointments, however, neither the increase in average time for nominations[39] nor the increase in average time for confirmations[40] is statistically significant.

*Figure 7*
Total Average Days to Fill Judicial Vacancies in the Courts of Appeals: SY 1979-1992




Data Source: Office of Legislative and Public Affairs, Administrative Office of the United States Courts

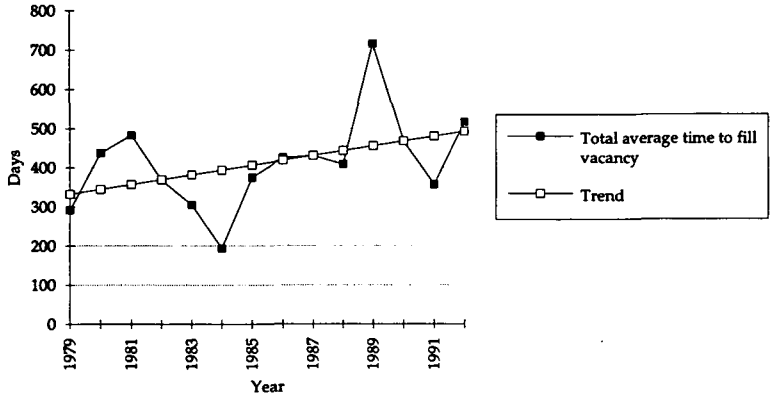
37. The F-statistic for this trend line is 5.01. Because this falls above the critical value for the F-statistic at the 95% confidence level (4.75), the increase depicted by the trend is statistically significant.

38. The F-statistic for this trend line is 2.01. Because this falls below the critical value for the F-statistic at the 95% confidence level (4.75), the increase depicted by the trend is not statistically significant.

39. The F-statistic for this trend line is 1.01. Because this falls below the critical value for the F-statistic at the 95% confidence level (4.75), the increase depicted by the trend is not statistically significant.

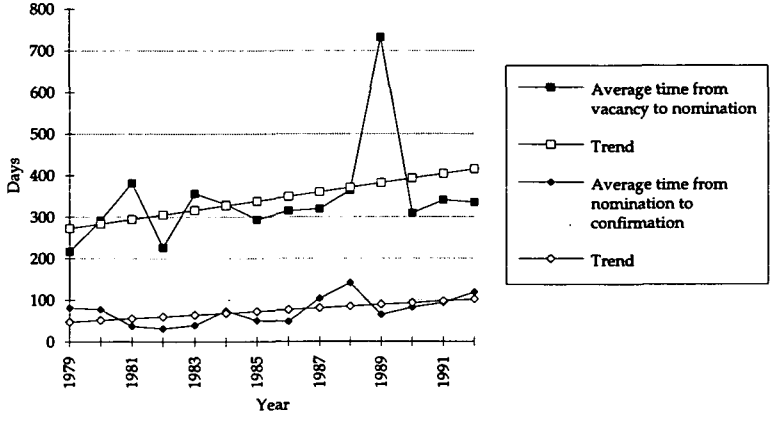
40. The F-statistic for this trend line is 3.92. Because this falls below the critical value for the F-statistic at the 95% confidence level (4.75), the increase depicted by the trend is not statistically significant.

*Figure 8*
Total Average Days to Fill Judicial Vacancies in the District Courts: SY 1979-1992



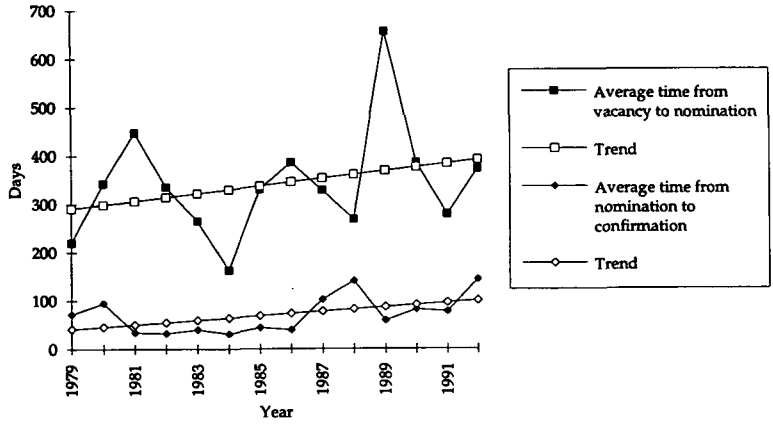

Data Source: Office of Legislative and Public Affairs, Administrative Office of the United States Courts

*Figure 9*
Average Time from Vacancy to Nomination and Nomination to Confirmation for Circuit Judges: SY 1979-1992




Data Source: Office of Legislative and Public Affairs, Administrative Office of the United States Courts

*Figure 10*
Average Time from Vacancy to Nomination and Nomination to Confirmation for District Judges: SY 1979-1992




Data Source: Office of Legislative and Public Affairs, Administrative Office of the United States Courts

### *E. Summary of Statistical Findings*

1. Courts of Appeals

- The average judicial vacancy rate from SY 1970 to SY 1992 was 7%.
- There was an 80% increase in the trend in judicial vacancies over the SY 1970-1992 period.
- Had the courts of appeals been fully staffed with active judges in SY 1992, filings per circuit judge would have been reduced 9% nationally.
- An average of 418 days was required to fill a judicial vacancy in the courts of appeals during the period from 1979 to 1992.[41]
- Time from vacancy to nomination – the part of the appointment process largely under executive branch control – accounted for approximately 82% of the total time required to fill a judicial vacancy in the courts of appeals during the 1979-1992 period.
- Time from nomination to confirmation – the part of the appointment process controlled by the Senate – accounted for approximately 18% of the total time required to fill a judicial vacancy in the courts of appeals during the period from 1979 to 1992.

41. By comparison, during the period from 1981 to 1991, the average length of vacancies in senior positions at eight executive branch agencies ranged from six months (approximately 180 days) to 20 months (approximately 600 days). GAO, POLITICAL APPOINTEES: TURNOVER RATES IN EXECUTIVE SCHEDULE POSITIONS REQUIRING SENATE CONFIRMATION 7-9 (Apr. 1994).

2. District Courts

- The average judicial vacancy rate from SY 1970 to SY 1992 was 8%.
- There was a 120% increase in the trend in judicial vacancies over the SY 1970-1992 period.
- Had the district courts been fully staffed with active judges in SY 1992, filings per district judge would have been reduced 10% nationally.
- An average of 412 days was required to fill a judicial vacancy in the district courts during the period from 1979 to 1992.
- Time from vacancy to nomination – the part of the appointment process largely under executive branch control – accounted for approximately 83% of the total time required to fill a judicial vacancy in the district courts during the 1979-1992 period.
- Time from nomination to confirmation – the part of the appointment process controlled by the Senate – accounted for approximately 17% of the total time required to fill a judicial vacancy in the district courts during the period from 1979 to 1992.

## IV. Solving the Vacancy Problem: Analysis of the Possibilities

Possible solutions to the judicial vacancy problem fall into two main categories: first, measures to expedite the filling of vacant judgeships; and second, measures to offset the impact of vacancies on the workload capacity of the affected courts. Since the details of implementation could be worked out in numerous ways, the possibilities can only be described in general terms. The objective of this exercise is to posit a range of potential solutions for further consideration. Although we examine the strengths and weaknesses of these ideas separately, some measures might be employed more productively in combination with others or in variations not specifically mentioned. Preferred solutions are no doubt those that can be implemented through informal practice or, at most, regulatory or statutory change.

### *A. Measures to Expedite the Filling of Vacant Judgeships*

Appointments to the federal bench can be expedited either by adopting policies and procedures to speed the traditional appointment process or by using alternative methods of appointing judges on a permanent or temporary basis. We consider these approaches separately.

1. Traditional Appointment Process

a. Ensure additional time for selection of judicial nominees through advance notice of judicial retirements – for example:

(1) judges provide notice at a prescribed time (e.g., six months to one year) before taking senior status or retiring from office on other than disability grounds; or

(2) the custodian of judicial personnel records provides notice whenever a judge comes within a prescribed time (e.g., six months to one year) before

attaining eligibility for senior status or retirement from office on other than disability grounds.

*Advantages*

The lengthiest delays in filling judgeships arise in the process of identifying and evaluating the suitability of potential nominees. If that process can be routinely commenced *before* a vacancy arises, the period of time in which a court is required to operate with a reduced complement of active judges could be shortened substantially. Although some departures from the bench or active judicial service cannot be anticipated (i.e., those resulting from death or sudden illness, disability, or other change in personal circumstances), decisions to retire to senior status or completely from the bench – the most common reasons for a judicial vacancy – are frequently made well in advance of the effective date.[42] Advance notice can be used to expedite the selection of a replacement judge in two ways: (1) directly apprising executive and legislative branch officials of the impending need for a judicial appointment; and (2) affording bar and civic organizations an opportunity to encourage and assist the President and the Senate toward prompt action on appointing a new judge.[43]

*Disadvantages*

Since vacancies occasionally arise from unforeseen events, advance notice of "planned" retirements would not entirely eliminate the problem. Even where vacancies can be anticipated, it may not always be possible to select a successor before the vacancy occurs. In the first place, advance notice depends on voluntary cooperation from individuals who, for various reasons, may not wish to make their retirement plans known in advance. Unless Congress imposes such notice as a prerequisite to retirement (an impractical step, given the sometimes sudden nature of retirement decisions), the only alternative would be to require the Administrative Office or court personnel officers to identify prospective vacancies based on eligibility for retirement. The difficulty with that approach is the pressure it might place on judges to retire as soon as they are eligible – a result contrary to the voluntary nature of judicial retirement. In addition, it is unlikely that any advance

42. A justice or judge of the United States is eligible to retire either completely from the judicial office or from regular active service (commonly known as "senior status" – involving retention of the judicial office with potential for further service) if he or she is at least 65 years old, has completed at least 10 years of service as such justice or judge, and the total of age and length of service equals 80 or more years. 28 U.S.C. § 371(a)-(c) (1988 & Supp. IV 1992). Whenever a justice or judge retires from office or to senior status, the President is authorized to appoint a successor "by and with the advice and consent of the Senate." *Id.* § 371(d).

43. Six years ago the Judicial Conference "[u]rged all judges nearing retirement to notify the President and the Administrative Office as far in advance as possible of a change in status – if possible, six to twelve months before the contemplated date of change in status." REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 31-32 (Mar. 15, 1988). While many retiring judges have been providing this kind of advance notice, compliance is by no means universal, a fact perhaps attributable to the intensely personal nature of these decisions. Another factor is lack of knowledge regarding the Conference policy: Although it is publicized formally at irregular intervals, *see Senior Judge Notification Sought*, THE THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Apr. 1994, at 2, judges who are not presently considering retirement may not attend to such advisories.

notice of a possible, but not clearly-anticipated retirement would prompt selection of a new judge until the incumbent provides actual notice of his or her intent to retire.

b. Establish a more formalized process for the selection of judicial nominees by:

(1) expanding presidential and/or senatorial reliance on commissions, committees, or staffs to maintain current lists of available, qualified candidates for federal judgeships; and

(2) ensuring that adequate financial and other resources are devoted to investigation and evaluation of the character and qualifications of potential judges.

*Advantages*

At present, nominees for federal judgeships are selected through a variety of methods which depend on the type and geographic location of the positions to be filled, the decision-making styles of persons involved in the process, and the prevailing political realities. Although new judges occasionally are selected in a coherent, well-organized manner (e.g., reliance on established screening procedures, nominating commissions, etc.),[44] nominations to judicial office are too often the product of an unsystematic, indeed idiosyncratic, process to which insufficient staff or other resources are applied.[45] The impact of inefficient vetting is compounded if delays are occasioned in other elements of the selection process (e.g., FBI background investigations or American Bar Association [hereinafter ABA] qualification ratings).[46] Speedier, perhaps surer decisions would be possible—thus reducing the length of judicial vacancies—if more uniform, regularized

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44. The most widespread use of judicial selection panels occurred during the Carter Administration. *See, e.g.*, Exec. Order No. 12,059, 3 C.F.R. 180 (1979) (establishing U.S. Circuit Judge Nominating Commission); Exec. Order No. 12,097, 3 C.F.R. 254 (1979) (encouraging establishment of senatorial panels to screen potential district judge nominees); Exec. Order No. 11,992, 3 C.F.R. 124 (1978) (establishing Committee on Selection of Federal Judicial Officers); *see generally* LARRY C. BERKSON & SUSAN B. CARBON, THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES (1980); ALAN NEFF, THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES AND CANDIDATES (1981). Although those panels were abolished soon after Ronald Reagan became President, *see* Exec. Order No. 12,305, 3 C.F.R. 150 (1982), *reprinted in* 5 U.S.C. § 14 app. at 1182 (1988), some senators continue to utilize their own nominating panels in making recommendations on district judgeships. *See* W. Gary Fowler, *Judicial Selection under Reagan and Carter: A Comparison of their Initial Recommendation Procedures*, 67 JUDICATURE 265, 269-73 (1984); William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 41 (1990).

45. For a detailed description of the process traditionally employed in selecting and reviewing judicial nominees, see, e.g., ABA, STANDING COMMITTEE ON FEDERAL JUDICIARY—WHAT IT IS AND HOW IT WORKS (1983); CHASE, *supra* note 10. Sources of information on the judicial selection process in recent administrations include: CORNELL W. CLAYTON, THE POLITICS OF JUSTICE—THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY 61-66 (1992); Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282 (1993); Elliot E. Slotnick, *Federal Judicial Recruitment and Selection Research: A Review Essay*, 71 JUDICATURE 317 (1988); and R. Townsend Davis, Jr., Note, *The American Bar Association and Judicial Nominees: Advice Without Consent?*, 89 COLUM. L. REV. 550 (1989).

46. *See, e.g.*, Jon Jeter, *Judgeship Nomination on Hold; Williams Must Wait As Senate Considers Civil Rights Choice*, WASH. POST, Feb. 24, 1994, at M1; Al Kamen, *Vow on Federal Judges Still on Hold*, WASH. POST, Oct. 29, 1993, at A25.

methods for identifying, screening, and evaluating candidates for federal judicial office were adopted, and if greater financial and personnel resources were devoted to all stages of the judicial selection process.[47]

*Disadvantages*

While increased efficiency in nominee selection can help, in some cases, to shorten the time required to fill judicial vacancies,[48] adequate procedures and availability of resources are only part of the problem. Politics (in all of its personal, partisan, and institutional contexts) is a key element in judicial appointments that cannot be avoided through a more formalized vetting process. Barring the unlikely prospect of a "merit" selection system in which political leaders play no meaningful role, clashes between powerful individuals or interests will continue to play a role in delaying the appointment of federal judges.[49]

c. Establish norms under which

(1) the President nominates a new judge within a prescribed time after a vacancy arises; and

(2) the Senate acts on a judicial nomination within a prescribed time after it is received from the President.

*Advantages*

The establishment of fixed time periods for nominating and confirming judges would be salutary even where not legally binding. If generally recognized by national political leaders, the organized bar, and the news media, time limits would emphasize the importance of judicial appointments and foster public expectation that vacancies in the courts will be filled expeditiously. Specific "benchmarks" or "guidelines" could encourage executive and legislative branch personnel and others associated with the process (e.g., the ABA) to organize their work so that the various tasks involved in selection and review of judicial nominees would be completed promptly.

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47. *See, e.g.*, Williams, *supra* note 13, at 193 (recommending that "President Clinton and all future presidents . . . maintain an active waiting list of their approved judicial candidates" so that nominations can be made as soon as vacancies arise).

48. One problem with advance, pre-vacancy selection of judicial nominees is the timing of background investigations. Although it might be necessary to repeat such investigations if they are conducted too early, the value of maintaining "waiting" lists of potential judges could be diminished if no advance inquiries are made into possible conflicts of interest or other disqualifying factors.

49. Some commentators suggest that the Senate participates in judicial appointments to a degree beyond the framers' intent, and that the President should assert a "preemptive" role in selecting judges on a national basis, without reference to senatorial courtesy and state-based politics. *See* CHASE, *supra* note 10, at 204-05; Williams, *supra* note 13, at 192-93; Victor Williams, *Senators Cannot Be Choosers*, NAT'L L.J., Feb. 1, 1993, at 17. Not surprisingly, a current member of the Senate advocates the contrary view – that earlier consultation with the Senate on potential Supreme Court (and presumably lower court) nominees is appropriate. *See* Paul Simon, *The Exercise of Advice and Consent*, 76 JUDICATURE 189 (1993). Although debate on this point will undoubtedly continue, a marked shift in the balance of appointing power, toward either the executive branch or the Senate, is unlikely to occur in the foreseeable future.

*Disadvantages*

Informal guidelines aimed at timely judicial appointments are valuable only insofar as the relevant parties continue to observe them. Nevertheless, it may be a useless exercise to accord them legal force (i.e., by legislation, Senate rule, or administrative regulation). Unless deadlines for presidential or senatorial action can be enforced through litigation (an unlikely prospect, given the requirements of standing and justiciability that must be satisfied) or serve as a "trigger" for alternative appointment authority,[50] any time frame for filling vacancies might be ignored without adverse consequences.[51]

2. Alternative Methods of Appointment

a. Utilize the recess appointment power to avoid prolongation of judicial vacancies caused by delays in Senate action.

*Advantages*

As indicated above,[52] during periods when the Senate is not in session, the Constitution explicitly vests the President with authority to fill vacancies in offices to which appointment otherwise requires the Senate's "advice and consent."[53] These "recess" appointees are entitled to serve until a presidential nominee (typically the same individual) is confirmed, or until the end of the next session, whichever occurs first.[54] Although no judicial vacancy has been filled in this manner since 1980,[55] ample precedent for such appointments can be found in the first

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50. *See* discussion *infra* part IV.A.2.

51. The inefficacy of statutory time limits for official appointments is illustrated in the recent history of the Citizens' Commission on Public Service and Compensation – a panel authorized under the Ethics Reform Act of 1989 to review and adjust periodically the salaries paid to senior federal officials. *See* Pub. L. No. 101-194, § 701, 103 Stat. 1716, 1763-67 (codified at 2 U.S.C. §§ 351-364 (1988 & Supp. IV 1992)). Although the terms of the first set of commission members for the 1993 fiscal year were to "begin not later than February 14, 1993," 2 U.S.C. § 352(8)(A), only three of 11 commission appointments were made, and even those occurred months after the statutory deadline. *See, e.g.*, 139 CONG. REC. S13,230 (daily ed. Oct. 7, 1993). Ultimately, the issue became moot when Congress denied all funding for the Commission in the 1994 fiscal year. *See* Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 103-123, 107 Stat. 1226, 1239 (1993).

52. *See supra* note 7 and accompanying text.

53. U.S. CONST. art. II, § 2. Historically there has been disagreement as to whether recess appointments can be made to all offices that happen to be vacant during a Senate recess (i.e., regardless of when the vacancy arose), or merely to those that *become* vacant while the Senate is recessed. EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 189 (Harold W. Chase & Craig R. Ducat eds., 14th ed. 1978). Though Congress has never fully embraced the more expansive view, see Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758, 1786 & n.156 (1984), these appointments have been used frequently to fill offices that fell vacant *before* the recess began. In two instances, appointments to such pre-existing vacancies have been upheld at the appellate level. *See* United States v. Woodley, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986); United States v. Allocco, 305 F.2d 704, 709-14 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963).

54. U.S. CONST. art. II, § 2, cl. 3.

55. *White House Weighing Recess Appointments to Fill Federal Judgeships Before January*, WASH. INSIDER (BNA), Dec. 4, 1992, *available in* LEXIS, BNA Library, BNAWI File. The last judicial recess appointee was Judge Walter Heen who served on the U.S. District Court for the District of Hawaii from December 31, 1980, through December 16, 1981. *Woodley*, 751 F.2d at 1009.

188 years of American history.[56] Recess appointees provide a readily available means of maintaining the courts' working capacity at full (or at least greater) strength when vacancies are prolonged through tardiness in nominations or delays in Senate action based on political disputes or other difficulties.[57]

*Disadvantages*

The utility of recess appointments for filling judicial vacancies is clouded by political and legal concerns. If that power were used again in this context, questions would be raised about the appointee's decisional independence prior to confirmation,[58] as well as the Senate's ability to review meaningfully the nomination of that individual for a permanent appointment.[59] Thus, a return to frequent use of recess appointments of judges is likely to engender opposition in Congress and the

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56. Recess appointments to the federal bench began in 1789, when President Washington appointed three district judges between sessions of the First Congress, and have included such 20th century examples as Chief Justice Earl Warren; Associate Justice William Brennan; Circuit Judge (and later Associate Justice) Thurgood Marshall; and Circuit Judges Augustus Hand, Harrison Winter, and Griffin Bell. In all, 309 judges have served under recess appointments. *See* Appellee's Second Supplemental Brief, United States v. Woodley, 726 F.2d 1328 (9th Cir. 1983) (No. 82-1028) (containing a complete list of all recess appointments to Article III courts from 1789 through 1980), *vacated*, 751 F.2d 1008 (9th Cir. 1985) (en banc); *see also Woodley*, 751 F.2d at 1010-11; Williams, *supra* note 13, at 193; Curtis, *supra* note 53, at 1785; Virginia L. Richards, Note, *Temporary Appointments to the Federal Judiciary: Article II Judges?*, 60 N.Y.U. L. REV. 702, 703-04 (1985).

57. *See* Williams, *supra* note 13, at 193 (depicting judicial recess appointments as "necessary for the adjudication of the war on crime, the protection of the rights of criminal defendants and all civil litigants, and the future welfare of America's businesses").

58. Because recess commissions are of limited duration, *see supra* note 7, judges who are recess appointees do not enjoy lifetime tenure and effective protection against salary diminution. Although the Supreme Court has never addressed the constitutionality of recess appointments in the judicial context, the issue has been litigated twice in recent decades, resulting in two appellate decisions that affirm the validity of such appointments despite the tension between the Recess Appointments Clause and the guarantees of Article III, Section 1. *See Woodley*, 751 F.2d at 1009-14; United States v. Allocco, 305 F.2d 704, 708-09 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963).

Serious questions, however, remain about the impact on decisional independence of a judicial recess appointee's limited tenure and, in many cases, desire for a permanent appointment. While some commentators challenge the Second and Ninth Circuits' constitutional interpretation (and in particular, their reliance on historical practice to resolve the tension between Articles II and III; *see* Richards, *supra* note 55; Paul F. Solomon, Comment, *Answering the Unasked Question: Can Recess Appointees Constitutionally Exercise the Judicial Power of the United States?*, 54 U. CIN. L. REV. 631 (1985)), others emphasize the practical concerns raised when a judge exercises judicial power with "one eye over his shoulder on Congress." HARV. L. SCH. REC., Oct. 8, 1953, at 1, col. 5, *cited in Woodley*, 751 F.2d at 1014 (Norris, J., dissenting); *see also* Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1162 (1988) (The assertion that recess appointments of judges are unconstitutional "may be an unduly strict construction of the President's constitutional authority, but the argument calls into question the propriety of such appointments.").

59. *See* CHASE, *supra* note 10, at 15-16; Curtis, *supra* note 53, at 1785 n.153; WASH. INSIDER (BNA), *supra* note 55.

legal community.[60] In addition, doubts as to what constitutes a "recess" might easily convince a President that the only prudent course (i.e., one that avoids the disruption that a legal challenge to a judicial appointment would bring) is to exercise this power only during the brief intervals between annual legislative sessions.[61] Even those limited opportunities would be further diminished by the restrictions Congress has traditionally placed on salary payments to recess appointees.[62]

Beyond legal and political constraints, greater use of recess appointments would be of little practical value in ameliorating the judicial vacancy problem. Although the amount of time required for Senate review of judicial nominations has increased substantially in the past two decades (i.e., at more than three times the rate of increase in time required for nominee selection),[63] the period of time following nomination constitutes, on average, less than one-fifth of the average time needed to fill a judicial vacancy.[64] Since recess appointees typically are individuals who have already been selected for nomination, exercise of the power is unlikely

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60. Throughout most of our constitutional history, recess appointments have been used to fill judicial vacancies without stirring philosophical or political debate. *See* Curtis, *supra* note 53, at 1775-77, 1785-86. Indeed, opposition did not manifest itself until Presidents Eisenhower and Kennedy unleashed a relative flood of recess appointments to the bench (53 in all) during their administrations. *See Woodley*, 751 F.2d at 1015-16 (Norris, J., dissenting); *see also* CHASE, *supra* note 10, at 15-16; CORWIN, *supra* note 53, at 189; LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 141-43 (1988); Note, *Recess Appointments to the Supreme Court—Constitutional But Unwise?*, 10 STAN. L. REV. 124 (1957). Although congressional opponents generally accepted the President's constitutional authority in this matter (at least by force of history), *see* 106 CONG. REC. 18,130 (1960) (remarks of Sen. Philip Hart), this increasing use of judicial recess appointments came under criticism because of its tendency to undercut Senate scrutiny of nominees—especially with regard to the Supreme Court.

Ultimately, this perception that recess appointments were used too frequently produced a 1960 "sense of the Senate" resolution that recess appointments to the Supreme Court "may not be wholly consistent with the best interests" of the Court, the nominee, the litigants, or the people, and thus "should not be made except under unusual circumstances and for the purpose of preventing or ending a demonstrable breakdown in the administration of the Court's business." 106 CONG. REC. 18,145 (1960). Tellingly, no Supreme Court vacancies have been filled by recess appointment since that time, and only one such appointment has been made to any federal court since 1964. *See supra* note 55.

61. Although the President has undisputed authority to make recess appointments during "sine die" adjournments (i.e., between the annual sessions of Congress), there has been disagreement between the executive and legislative branches for decades over whether a "recess" may occur for appointment purposes when the Senate interrupts its meetings *within* a congressional session, particularly when the interruption is less than 30 days in duration. *See* Bill McAllister, *Recess Appointments: A Disputed Matter of Timing*, WASH. POST, July 19, 1993, at A13.

62. A recess appointee cannot be paid a salary prior to Senate confirmation if the vacancy in question existed during the preceding Senate session unless (1) the vacancy arose during the last 30 days of the session; (2) a nomination (other than of an individual who was a recess appointee during the preceding recess) was pending at the end of the session; or (3) a nomination (other than of the individual who is the present recess appointee) was rejected during the last 30 days of the session, *and* unless the President submits a nomination to fill the vacancy during the first 40 days of the next session. 5 U.S.C. § 5503 (1988). Prompted by successive presidents' broad interpretation of this power, *see supra* note 53, this statute was first enacted during the Civil War period. *See* Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646. At first, all recess appointees were required to remain unpaid until the Senate confirmed their appointments, *see, e.g.*, *id.*, but eventually Congress authorized the above-mentioned exceptions. Act of July 11, 1940, ch. 580, 54 Stat. 751; *see Allocco*, 305 F.2d at 714-15 ("The deterrent to abuse of power . . . was found to be unnecessary and incongruous in an era when the President, without the advice and consent of the Senate in many areas, may well have the power to control the destiny of all mankind.").

63. *See supra* part III.D.

64. *See supra* part III.D.

to reduce appreciably the length of judicial vacancies.[65] Indeed, it may only provide the Senate with impetus to delay final action on nominations to offices held by recess appointees.

b. Authorize alternative methods for filling vacant judgeships if inordinate delays arise due to inaction by the President and/or the Senate – for example:

(1) provide that the President can appoint judges without Senate confirmation (or that judicial nominations are automatically deemed confirmed) if the Senate fails to act on a nomination within a prescribed time after it is received;

(2) permit the Senate to make judicial appointments whenever the President fails to nominate a new judge (or make a recess appointment thereof) within a prescribed time after a vacancy arises; or

(3) authorize a judicial branch authority (e.g., the Chief Justice, the Judicial Conference, or a court) to fill a vacant judgeship by an interim or permanent appointment if –

(A) the President fails to nominate a new judge (or make a recess appointment thereof) within a prescribed time after a vacancy arises;

(B) the Senate fails to act on a judicial nomination within a prescribed time after it is received; or

(C) a court with a vacant judgeship demonstrates an urgent need to have the vacancy filled; for example, if the court's annual vacancy rate or average caseload for its active judges exceeds a prescribed level, or if a "judicial emergency" exists because the judgeship in question has been vacant beyond a prescribed time (i.e., the 18-month period established by Judicial Conference policy).

*Advantages*

Establishing one or more "backup" appointment mechanisms would put "teeth" in any statutory time limits that may be imposed on the President and/or the Senate. It not only could inspire adoption of more efficient procedures but also encourage resolution of political disputes that frequently postpone nominee selection and confirmation proceedings. Although the executive and legislative branches are unlikely to relinquish total control of judicial appointments to each other, even less to the judiciary, both might find it more acceptable to permit interim

65. An alternative would be to fill vacant judgeships temporarily with individuals who would not be considered for permanent appointment. That approach may permit a less extensive screening process and prompt less political opposition in Congress. Although few attorneys would be likely to relinquish their practices for a judicial "career" of six to 12 months, Congress might see fit to authorize other federal judicial officers (e.g., magistrate judges, bankruptcy judges, and judges of Article I "legislative" courts) to accept temporary appointments to the district or circuit bench while taking only a leave of absence from their regular positions.

appointments by a neutral "third party" (i.e., the judicial branch),[66] particularly if the authority is reserved for longstanding vacancies or other exigent circumstances.[67] Indeed, the prospect of ceding power to fill judgeships, even temporarily, to a nonpartisan entity might indirectly ensure observance of the prescribed time limits by the politicians who are principally responsible for judicial appointments.[68]

*Disadvantages*

*Political considerations.* Traditionally, both presidents and senators have viewed appointments of judges as key opportunities to influence the philosophical/ideological development of the law and, not inconsequentially, to exercise political patronage.[69] For that reason, any proposal that might deprive the executive branch or legislative branch, or both, of this valuable tool would face a stiff, uphill battle.

*Practical considerations.* Although holdups sometimes occur at later stages of the nomination and confirmation processes (particularly if political difficulties arise), much of the delay in filling judicial vacancies can be attributed to the preliminary screening, evaluation, and investigation of potential or actual nominees. If failure to nominate or confirm by a predetermined date were to trigger a shift of appointing authority to another branch, the inevitable pressure on the relevant principals and staff might result in hasty, ill-considered decisions that are especially unfortunate when appointments conferring substantial authority and lifetime tenure are involved.[70]

Moreover, the benefits to be achieved are by no means certain. As noted in regard to recess appointments, the elimination of Senate participation is unlikely to

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66. An analogy to this approach can be found in the statute providing for appointments to the office of United States Attorney. Under certain circumstances the district court is authorized to appoint a person to serve as U.S. Attorney for the respective judicial district until a vacancy in that position is filled in the ordinary manner. *See* 28 U.S.C. § 546 (1988). Of course, the appointment of an executive officer in this manner does not raise the same concerns about tenure, *see infra* note 72, and decisional independence, *see supra* note 58 and accompanying text. Also, it is easier to characterize a U.S. Attorney as an "inferior officer" for purposes of the Appointments Clause. *See infra* note 77 and accompanying text.

67. In a number of states the judiciary is authorized to fill court vacancies pending selection of more permanent successors by the other two branches or the electorate. *See* LARRY BERKSON, ET AL., JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS (1981); MARVIN COMISKY, ET AL., THE JUDICIARY— SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE 6-7 (1987).

68. Congress has provided a similar mechanism in the District of Columbia. Under that district's charter, Pub. L. No. 93-198, tit. IV, 87 Stat. 774, 785 (1973), *as amended by* Pub. L. No. 95-131, 91 Stat. 1155 (1977), *and* Pub. L. No. 99-573, 100 Stat. 3228 (1986), D.C. superior court and court of appeals judges are appointed by the President subject to Senate confirmation, but the President's nominees must be selected from a list of candidates submitted by a judicial nominating commission. *See* D.C. CODE ANN. tit. 11 app. § 433(a) (1989). If the President fails to nominate one of the listed candidates within 60 days after receiving the list, the commission is authorized to nominate and, with Senate approval, appoint one of those candidates to the judgeship. *Id.* § 434(d)(1).

69. *See* CHASE, *supra* note 10 *passim*; CLAYTON, *supra* note 45, at 61 & n.98; Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. REV. 273, 279-80 (1989).

70. The National Commission on Judicial Discipline and Removal recently noted that a careful vetting of judicial candidates to ensure "select[ion of] only the most highly qualified and honest judges" might significantly reduce if not eliminate the likelihood of later judicial misconduct. REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE & REMOVAL 81 (1993). The Commission therefore recommended that "FBI full-field investigations of judicial candidates be as comprehensive as reasonably possible to ensure sound judgments about their integrity and qualifications." *Id.* at 82.

yield significant time savings. Nor would removing the President from the process make any appreciable difference: Identifying and screening possible appointees would require as much time and effort if either the Senate or a judicial branch entity assumed direct responsibility for those tasks. Although matters could be expedited if persons already in judicial office were appointed,[71] another FBI background investigation would still be required (at least to update the information on file) if the new appointment were more than temporary.

*Constitutionality.* Any legislation that reassigns the power to appoint federal judges, even on an interim basis,[72] faces the likelihood of constitutional challenge. As indicated above, judges in the federal courts are "officers of the United States" who must be appointed in accordance with the Appointments Clause of the Constitution.[73] Although Congress may vest "in the President alone, in the Courts of Law, or in the Heads of Departments" the power to appoint "such inferior officers as [Congress] think[s] proper," this does not allow Congress, either of its houses, or any congressional officer to appoint non-legislative personnel.[74] Therefore, short of constitutional amendment, the Senate cannot be authorized to appoint judges on its own initiative if the executive is dilatory in making nominations.

The constitutional issue does not end there. Despite the seeming breadth of Congress's power to authorize "inferior officer" appointments, significant questions exist about whether such appointments can include judges appointed to serve during good behavior.[75] First, there is reason to conclude that the framers specifically intended for judges to be appointed only in the manner prescribed for "principal" officers (i.e., by the President with the "advice and consent" of the Senate).[76] Second, it can be argued persuasively that officers of the rank, responsibility, and

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71. *See supra* note 65.

72. The constitutional guarantees of good behavior tenure and undiminished compensation for judges obviously would preclude Congress from authorizing interim (i.e., limited-term) appointments to the bench. U.S. CONST. art. III, § 1. Although a recess appointment is also limited in duration, *see supra* notes 7, 58, it is expressly authorized in the Constitution itself. United States v. Woodley, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc) ("We must therefore view the recess appointee . . . as the extraordinary exception to the prescriptions of article III."), *cert. denied*, 475 U.S. 1048 (1986); *see also* COMMITTEE ON FED. CTS., *supra* note 13, at 378-79.

73. U.S. CONST. art. II, § 2, cl. 2. For purposes of the Appointments Clause, "officers of the United States" include "any appointee exercising significant authority pursuant to the laws of the United States." Buckley v. Valeo, 424 U.S. 1, 126 (1976).

74. U.S. CONST. art. II, § 2, cl. 2. *See Buckley*, 424 U.S. at 132-33.

75. Inasmuch as the Appointments Clause explicitly provides that "judges of the [S]upreme Court" are appointed by the President with Senate confirmation, Congress is powerless to enact an alternative method for appointing the Chief Justice and Associate Justices. Yackle, *supra* note 69, at 320, 323-24.

76. The reported proceedings in the Constitutional Convention suggest that *all* of the judicial offices contemplated in Article III were included in the ultimate compromise – i.e., presidential nomination with Senate confirmation – between total executive and total legislative control of appointments. Although later versions of what became the Appointments Clause mention only "judges of the [S]upreme Court," earlier proposals and drafts refer to judicial appointments generically or else mandate legislative appointment of "inferior tribunals." *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 119-21, 126-28, 224-26, 230-31 (Max Farrand ed., 3d ed. 1966); 2 *id.*, at 37-39, 41-46, 71-83, 539-40, 599-600; JEFFREY ST. JOHN, CONSTITUTIONAL JOURNAL—A CORRESPONDENT'S REPORT FROM THE CONVENTION OF 1787, at 118, 199 (1987); *see generally* JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 19-24 (1953); Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1061-70 (1987). *But see* Shartel, *supra* note 15, at 519-24 (concluding that the Convention's discussion of judicial appointments consistently distinguished between the Supreme Court and other federal courts).

tenure of judges who serve on the courts of appeals, district courts, and Court of International Trade are not "inferior officers" as contemplated in the Appointments Clause.[77] If either interpretation is correct, no alternative method of filling judicial vacancies (recess appointments aside) could be adopted without

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77. Admittedly, an opposite conclusion might be reached. As some commentators observe, the courts of appeal, district courts, and Court of International Trade are "inferior" courts established by Congress under Article III, Section 1 of the Constitution. *See* CHASE, *supra* note 10, at 5, 205-06; CORWIN, *supra* note 53, at 187 n.139; Shartel, *supra* note 15, at 515. If "inferior" were defineable purely in a relational sense, *see* Morrison v. Olson, 487 U.S. 654, 719 (1988) (Scalia, J., dissenting) ("[I]nferior Courts" are mentioned in the Constitution in ways that "plainly connote [ ] a relationship of subordination."); THE FEDERALIST No. 81, at 546 note, 551 note (Alexander Hamilton) (Jacob E. Cooke ed., 1961), Congress might be justified in treating judges who sit on courts below the Supreme Court level as "inferior" officers. *See* Shartel, *supra* note 15, at 499-519; Yackle, *supra* note 69, at 282, 323-24. But that interpretation finds no historical support: "[F]rom the early days of the Republic '[t]he practical construction has uniformly been that [judges of the inferior courts] are not . . . inferior officers.'" Weiss v. United States, 114 S. Ct. 752, 768 n.7 (1994) (Souter, J., concurring) (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 456 n.1 (1833)); *see also* 28 U.S.C. §§ 44(a), 133(a) (Supp. IV 1992); FISH, *supra* note 15, at 3. *Cf. In re* Sealed Case, 838 F.2d 476, 481 (D.C. Cir.) ("Among the officers who must be appointed by the President with the advice and consent of the Senate it seems most obvious to include the heads of departments and federal judges since they are specifically empowered (along with the President to whom they are linked in the clause) to appoint inferior officers."), *rev'd on other grounds sub nom.* Morrison v. Olson, 487 U.S. 654 (1988).

Indeed, basing "inferior officer" status on relative position in the government ignores whether an officer is subordinate or "inferior" to another in any way that is meaningful for purposes of the Appointments Clause. *See* Andrew Owen, Note, *Toward a New Functional Methodology in Appointments Clause Analysis*, 60 GEO. WASH. L. REV. 536, 553 (1992) (Such an approach "is overinclusive because every official in the federal bureaucracy can be said to be subordinate to another in some sense."). A recent Supreme Court interpretation of the Clause suggests that an "inferior officer" is not only "to some degree 'inferior' in rank and authority," but also "perform[s] only certain, limited duties," holds an office "limited in jurisdiction," and enjoys "limited . . . tenure." *Morrison*, 487 U.S. at 671-72. *See id.* (upholding court appointment of "independent counsels" under the Ethics in Government Act). Although the "inferior" federal courts are subordinate to the Supreme Court in the adjudicative hierarchy, it is difficult to reconcile the attributes of "inferior" status identified in *Morrison* with the broad decisional independence and authority of circuit, district, and Court of International Trade judges. *Cf.* Applicability of Antilobbying Statute (18 U.S.C. § 1913)—Federal Judges, 2 Op. Off. Legal Counsel 30, 32 (1978) (observing that "a federal judge . . . lacks any direct superior"), *quoted with approval in* 63 Comp. Gen. 624 (1984). By contrast, the longstanding authority of "Courts of Law" to appoint adjunct judicial officers and court staff is entirely consistent with the *Morrison* criteria. *See, e.g.*, Freytag v. Commissioner, 111 S. Ct. 2631, 2640 (1991) (special trial judges of the U.S. Tax Court); Go-Bart Importing Co. v. United States, 282 U.S. 344, 352-53 (1931) (United States commissioners); *In re* Hennen, 38 U.S. (13 Pet.) 230, 257-58 (1839) (clerks of court); Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 545 (9th Cir.) (en banc) (United States magistrate judges), *cert. denied*, 469 U.S. 824 (1984).

constitutional revision if it would remove the Senate from the appointment process[78] or transfer appointing authority to the judicial branch.[79]

### *B. Measures to Offset the Impact of Judicial Vacancies*

Ultimately, it may be more productive to address the effects of the vacancy problem as well as treat its various causes. To a large degree, delays occur in filling judgeships because of unavoidable political factors or unanticipated circumstances peculiar to a nominee. Whatever the reason, the impact of prolonged vacancies is the same: Courts are deprived of the requisite judge power to meet their workload requirements. Although some or all of the above-described measures might be used to expedite the appointment process, vacancies undoubtedly will continue to occur more rapidly than the system can fill them. The courts will be adversely affected unless they possess a reserve capacity to function well at less than full strength. Of course, the judiciary has shown a remarkable ability to absorb vacancy-imposed burdens through sharing of resources,[80] innovative procedures, and hard work; and this is likely to continue.[81] Nevertheless, the number and dura-

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78. A different question might be presented if judicial nominations could be confirmed without formal action, or if action of nominations became compulsory. Given the Senate's near-plenary authority to "determine the Rules of its Proceedings," U.S. CONST. art. I, § 5, cl. 2, it seems plausible that it might adopt a rule (or consent to legislation containing a provision) under which a nomination is either confirmed "automatically" or accorded priority over all other business (thus requiring formal approval or rejection) if the Senate does not act dispositively within a prescribed time after the nomination is received from the President.

79. At first glance one might question whether the Constitution's identification of "Courts of Law" in this context precludes Congress from vesting appointing authority in individual judges or judicial branch entities that are not denominated as "courts." If so, the implications go well beyond the present inquiry: In numerous instances, the power to appoint judicial branch officials has been conferred on a court's chief judge or a non-adjudicative body composed entirely of judges. *See, e.g.*, 28 U.S.C. §§ 152(a)(3), 154(b) (1988 & Supp. IV 1992) (chief circuit judge appoints bankruptcy judge or designates chief bankruptcy judge if a majority of the court of appeals cannot agree on whom to appoint or designate); *id.* § 332(e) (circuit judicial council appoints the circuit executive); *id.* § 601 (Chief Justice appoints the Director and Deputy Director of the Administrative Office); *id.* § 621(a)(2) (Judicial Conference elects members of the Federal Judicial Center Board); *id.* § 624(1) (Federal Judicial Center Board appoints the Director and Deputy Director of the Center); *id.* § 631(a) (chief district judge appoints magistrate judge if a majority of the court cannot agree on whom to appoint); *see also* Shartel, *supra* note 14, at 494-99 ("Whatever might be the proper reading of the appointment clause, as an original matter, the practical construction of it by Congress and the judiciary branch establishes conclusively the proposition that appointment by a single member of a court is appointment by a court of law.").

Beyond the weight of historical precedent, a narrow construction seems contrary to the apparent intent of the "inferior officers" provision. By their use of the phrase "Courts of Law" in contrast to "the President alone" and "the Heads of Departments," the framers appear to refer collectively to the courts as an institution. *See* Buckley v. Valeo, 424 U.S. 1, 132 (1976) ("Congress may allow [inferior officers] to be appointed by . . . the Judiciary."). Without directly confronting the issue, the Supreme Court implicitly accepted this broader view in a decision upholding—on the basis of the "Courts of Law" provision—the authority of the chief judge of the United States Tax Court to appoint "special trial judges" for that court. *See Freytag*, 111 S. Ct. at 2644-46.

80. Existing law provides mechanisms for temporary reassignment of judges to assist other courts whenever the press of business requires additional judge power. *See* 28 U.S.C. §§ 291-294 (1988).

81. For example, workload demands exacerbated by vacancies might be met by assigning a greater proportion of district court business to magistrate judges or bankruptcy judges, or through increased use of special masters to conduct certain proceedings. Beyond a possible need for statutory or rule changes, *see* 28 U.S.C. § 157(b)-(c) (1988); FED. R. CIV. P. 53(b), the primary difficulty with that approach would be the limited tenure and compensation of these adjudicators—factors that, under existing law, preclude the exercise of full Article III jurisdiction by individuals lacking life tenure and salaries guaranteed against diminution. *See, e.g.*, Peretz v. United States, 111 S. Ct. 2661 (1991); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); CFTC v. Schor, 478 U.S. 833 (1986); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

tion of vacant judgeships are showing an upward trend that will strain the system beyond endurance unless something is done to alleviate the problem and its effects.

1. Adjust the workload formulas or other standards for creation of new judgeships to account for the chronic reduction in available resources caused by prolonged vacancies.

*Advantages*

Allocating judgeships to courts in sufficient number to offset anticipated vacancy rates would seem to be a straightforward, yet flexible response to the problem.[82] One approach would be to determine all judgeship needs through a workload formula that takes into account the average number and duration of vacancies nationwide.[83] Alternatively, the vacancy rates of individual courts might be factored into their respective requests for new judgeships (e.g., by increasing the number of requested positions by the same percentage). These details could be established informally, and thus revised from time to time or varied in specific cases without legislative action.[84] Although building in a vacancy "cushion" based on national statistics could result in judge power disparities among courts, it should be feasible for the judiciary and Congress to monitor the effects of the policy and eliminate unnecessary positions through attrition as new vacancies occur. In the meantime, any underutilized resources would be available to the system at large for temporary assignment to courts where workload burdens exceed the capacity of locally available judges.[85]

*Disadvantages*

The critical issue in evaluating this option is whether the benefit outweighs the cost. For example, would the creation of extra judgeships help the judiciary by ensuring the availability of resources, or would it simply exacerbate the problem by

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82. In its 1987 report on possible solutions to the judicial vacancy problem, a committee of the New York City Bar Association recommended the creation of additional judgeships based on anticipated vacancies as the only "practical means to bring the federal judiciary close to its authorized limits, and thereby speed the administration of justice." COMMITTEE ON FED. CTS., *supra* note 13, at 382.

83. The Judicial Conference makes requests to Congress for new circuit and district judgeships based in large part on predetermined ratios between workload and judges. For example, in the Conference's biennial surveys of judgeship needs between 1980 and 1992, the benchmark for considering a new district judge position was an average, five-year time-weighted caseload of more than 400 filings per authorized judgeship in a particular court. For the courts of appeal, the threshold was reached in the 1986 through 1992 surveys when the average number of "merits dispositions" (cases resolved on the substantive merits) for the five-year period exceeded 255 per authorized judgeship in a particular court. GAO, HOW THE JUDICIAL CONFERENCE ASSESSES THE NEED FOR MORE JUDGES 4-5 (Jan. 1993); HISTORY OF THE AUTHORIZATION OF FEDERAL JUDGESHIPS INCLUDING PROCEDURES AND STANDARDS USED IN CONDUCTING JUDGESHIP SURVEYS 5-6, 8-13 (1991) (unpublished report prepared by the Analysis and Reports Branch, Statistics Division, Adminsitrative Office of the U.S. Courts) (on file with the *Mississippi College Law Review*). If the average national rate of vacancies (i.e., vacant judgeship months as a percentage of total authorized judgeship months) is "X" percent over a five-year period, the Conference could reduce its judgeship workload benchmarks by the same percentage so that each court might have a built-in capacity to carry on its business despite the impact of future vacancies.

84. Of course, the creation of new judgeships would still require congressional approval. The difference is that the underlying methodology would not be written into law.

85. *See supra* note 80.

adding to the number of vacancies that must be filled? The budgetary impact alone might dissuade Congress from pursuing this remedy, at least while various means of reducing delay in the appointment process itself remain unexplored. There is also a risk to the judiciary that basing judgeship requests on so variable a factor could undermine the credibility of its entire methodology for determining judicial resource needs. Even if there was agreement in principle to consider anticipated vacancies when authorizing judgeships, it might be difficult in practice to reach consensus on *how* to account for them appropriately. In any event, this approach might produce greater delays in filling vacancies if the executive and legislative branches begin to perceive that prompt action is no longer necessary to meet judicial workload demands.

Finally, one should keep in mind that the judiciary's requests for additional circuit and district judgeships are based primarily on ratios of judicial workload to numbers of authorized judge positions.[86] While this approach may overestimate the functional capacity of courts with vacant judgeships, it also tends to underestimate the contributions of senior, visiting, and adjunct (e.g., magistrate) judges.[87] If the practical effect of judicial vacancies is recognized in this manner, the judiciary might be forced, in an era of growing dockets but tight budgets, to forgo additional life-tenured judges in favor of other, possibly less certain, resources.

2. Create an appropriate number of "floater judgeships" (i.e., judgeships not permanently allocated to specific courts) whose incumbents are always available for assignment to courts where workload capacity is diminished by vacancies.

*Advantages*

Since vacancies are a system-wide problem, it might be appropriate to mitigate their effect on the judiciary as a whole by maintaining a fixed number of judgeships that are not tied to a particular court.[88] This would allow the judiciary to deploy additional resources to courts with prolonged vacancies but avoid both the risks of altering the judgeship formulas and the possibility of overstaffing individual courts whose vacancies have been filled.

*Disadvantages*

*Theoretical concerns.* Federal judges have nearly always been drawn from, and identified with, the region or locality in which they serve. Use of "floater judgeships," even on a limited basis, would constitute a departure from tradition that may not be politically or philosophically acceptable. The only previous experi-

86. *See* GAO, *supra* note 83, at 4-5.

87. In surveying district judgeship needs, the Judicial Conference considers information on the availability of senior judges and magistrate judges. GAO, *supra* note 83, at 78. To date, however, the Conference has never declined to recommend creation of an additional judgeship based on availability of magistrate judges, and senior judge resources have affected the result only in borderline cases.

88. In September 1982, a Judicial Conference Committee on Judgeship Vacancies recommended further study of the idea that "floater" judgeships be created in sufficient number to offset the average rate of vacancies nationwide. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 117-18 (Sept. 22, 1982).

ment of that kind – the Commerce Court early in this century – was hardly an unqualified success.[89]

*Practical considerations.* It might be difficult to find qualified individuals who are willing to assume and remain in this kind of "roving" assignment.[90] Also, a judge not attached to a "home" court might pose administrative problems with regard to support staff and chambers, as well as questions concerning reimbursement of travel and living expenses.

## V. CONCLUDING THOUGHTS

As the foregoing indicates, clear-cut solutions to the problem of judicial vacancies may be elusive. In the first place, the more important determinants of change rest with the executive and legislative branches. Although the judiciary might suggest a number of options to those institutions, the reality is that outside recommendations about internal organizational change are often not well received. Moreover, an expedited appointment process for judges should not be achieved at the expense of thoroughness in reviewing the character and abilities of potential jurists. In the final analysis, a positive attitude and commitment from all three branches – a sense of urgency whenever a vacancy arises – will speed the process most reliably. For a number of years, the judiciary has felt the urgency on a daily basis. It may be hoped that other national leaders are beginning to sense the importance of the vacancy problem as well.[91]

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89. During its brief existence (1910-1913), the Commerce Court comprised five circuit judges whom the Chief Justice designated and assigned to serve on that court for five-year terms. Although the existing circuit judges were eligible to sit on that court, the enabling legislation authorized the President to appoint "five additional circuit judges no two of whom shall be from the same judicial circuit who shall hold office during good behavior and who shall be from time to time designated and assigned by the Chief Justice of the United States for service in the circuit court for any district, or the circuit court of appeals for any circuit, or in the commerce court." Act of Mar. 3, 1911, ch. 231, § 201, 36 Stat. 1147; Act of June 18, 1910, ch. 309, 36 Stat. 539-40. When the Commerce Court was abolished, the five extra judgeships remained in existence during the lives of the incumbents. Act of Oct. 22, 1913, ch. 32, 38 Stat. 208, 219. *See* STAFF OF SENATE COMM. ON THE JUDICIARY, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE UNITED STATES CIRCUIT COURTS OF APPEALS AND THE JUDGES WHO SERVED DURING THE PERIOD 1801 THROUGH MAY 1972, at 25-28 (Comm. Print 1972). Although the incumbents continued to serve on various courts of appeal and district courts for approximately 20 years, the "floater" judge idea apparently did not gain acceptance.

90. Rather than attempt to recruit new judges permanently for such positions, it might be more feasible to authorize the Chief Justice to assign existing judges to "floater" service for limited periods. To do so, however, would require Congress to allocate additional judgeships to one or more courts – in effect adopting the alternative remedy previously analyzed.

91. According to recent public statements, the filling of vacant judgeships has become a top priority for both the Clinton Administration and the Senate. *See Delaware-area Lawmakers: Highlights of their Agendas*, GANNETT NEWS SERVICE, Jan. 21, 1994, *available in* LEXIS, News Library, CURNWS File (quoting Senator Joseph R. Biden, Jr., chairman of the Senate Committee on the Judiciary); *New Justice Official to Focus on Crime Bill, Judges*, REUTERS, Apr. 7, 1994, *available in* LEXIS, News Library, CURNWS File (quoting Deputy Attorney General Jamie Gorelick); Attorney General Janet Reno, Remarks at the Ninth Circuit Judicial Conference 16-18 (Aug. 17, 1993) (transcript obtained from the Justice Department).