

ADVICE AND CONSENT FOR FEDERAL JUDGES: A NEW ALTERNATIVE BASED ON CONTRACT LAW

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It will come as no surprise that there is a serious problem regarding the number of vacancies in the United States federal courts, both in the courts of appeals and the district courts. Approximately 11% of the available judicial seats are vacant.¹ In 2010, a position in the Court of Appeals for the Fourth Circuit was filled after remaining vacant since 1994.² This causes an obvious detriment to the efficiency of the courts.

This problem is not new and not confined to any one party. In December 2000, there were sixty-seven vacancies; in December 2001 this increased to 101 vacancies; December 2010 showed ninety-two vacancies.³ It is clear that this problem persists whether the President is a Democrat or Republican and whether there is a Democratic or Republican majority in the Senate. Indeed, President Obama is having trouble getting judicial nominations approved even with a Democratic Senate.⁴

There have been many proposals about how to remedy the situation, and numerous articles have addressed the Senate's duty and obligations regarding the nomination and confirmation of judges. While some articles argue that the Senate should have a role in the nomination process,⁵ others argue that the Senate should have

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1. *Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx> (last visited Apr. 16, 2011).

2. *See Archive of Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx> (last visited Apr. 16, 2011).

3. *See id.*

4. David Ingram, *Slow Going in Senate for DOJ, Judicial Nominees*, LEGAL INTELLIGENCER, Jan. 5, 2010; *see also* IAN MILLHISER, CTR. FOR AM. PROGRESS, *FALLING OFF A CLIFF: JUDICIAL CONFIRMATION RATES HAVE NOSEDIVED IN THE OBAMA PRESIDENCY 2* (2010), available at http://www.americanprogress.org/issues/2010/07/judicial_confirmations.html.

5. *See, e.g.*, David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution and the Confirmation Process*, 101 YALE L.J. 1491 (1992).

none.⁶ This Article will briefly discuss the two points of view, and propose a compromise: if the President accepts advice from the Senate, through one of the senators of a state that has an open seat, the Senate would be required to timely vote on the nomination. If the President does not accept one of the suggested nominees, and the President is always free to nominate anyone, the Senate can take its time deliberating the qualifications of the nominee.

One issue regarding the Senate's role is whether the Constitution requires the Senate to timely vote on a nominee. This issue will be discussed in the context of whether the Constitution is a contract. Some commentators argue that the Constitution is a contract, and thus, contract law should apply in its interpretation. Indeed, at least one state has determined that its state constitution is a contract between the government and the people of the state.⁷ While this analogy has not always been accepted, it is a good starting point to discuss whether the Senate has certain obligations to timely vote on a nominee.

This Article examines these issues and proposes a solution for timely voting on judicial nominations in the United States courts of appeals and the United States district courts.

I. THE SENATE'S "ADVICE AND CONSENT" ROLE IN THE APPOINTMENT OF FEDERAL JUDGES

The nomination and appointment of federal judges is governed by the Constitution. Article II, Section 2, Clause 2 states as follows:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme 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

6. See, e.g., John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633 (1993).

7. *Myers v. City of McComb*, 943 So. 2d 1, 7 (Miss. 2006).

inferior Officers, as they think proper, in the President alone, in the Courts of Law, or the Heads of Departments.⁸

The Appointments Clause “is among the significant structural safeguards of the constitutional scheme.”⁹ Under the Appointments Clause, the President of the United States has exclusive power to select the principal officers of the United States.¹⁰ This prevents congressional encroachment upon the executive and judicial branches.¹¹ This arrangement was designed to ensure a higher quality of appointments because it was anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism.¹²

The President’s power to select officers of the United States was not left unguarded. Article II requires the advice and consent of the Senate.¹³ The Advice and Consent Clause serves to both curb executive abuses of the appointment power and to promote a judicious choice of persons who would be filling the various offices. By requiring the joint participation of the President and Senate, the Appointments Clause was designed to “ensure public accountability for both the making of a bad appointment and the rejection of a good one.”¹⁴

There has been much discussion as to whether the Appointments Clause gives the Senate the power to advise on a nomination and to consent on the appointment, or whether the Senate’s role is limited to consent. The Constitution in itself seems to separate the two clauses by a comma: “[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint”¹⁵ Some scholars argue that this gives the Senate an obligation to advise on a nominee.¹⁶ Professors David Strauss and Cass Sunstein argue that the Constitution contemplated an active and independent role by the Senate.¹⁷ Thus, to Strauss and Sunstein, “[t]hese words

8. U.S. CONST. art. II, § 2, cl. 2.

9. *Edmond v. United States*, 520 U.S. 651, 659 (1997).

10. *See Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam).

11. *See id.* (citations omitted).

12. *See id.* at 129–32.

13. *See* U.S. CONST. art. II, § 2, cl. 2.

14. *Edmond*, 520 U.S. at 660.

15. *See* U.S. CONST. art. II, § 2, cl. 2.

16. Strauss & Sunstein, *supra* note 5, at 1493.

17. *Id.* at 1494 (“The Constitution fully contemplates an independent role for the Senate in the selection of Supreme Court Justices.”).

assign two distinct roles to the Senate—an advisory role before the nomination has occurred and a reviewing function after the fact.”¹⁸

Unfortunately, the Constitution is not a model of clarity. The use of both words—“advice” and “consent”—seems to indicate a dual role for the Senate. Also, the use of the comma, which seems to separate the two clauses, could indicate that the President will nominate with the advice of the Senate and appoint with the consent of the Senate. This, however, makes the “consent” aspect superfluous. If the Senate has already advised the President on a nominee, it could be assumed that the Senate would also consent to the appointment.

Strauss and Sunstein point to specific instances where the advice of the Senate was received before the nomination was made.¹⁹ In 1869, President Grant nominated Edwin Stanton after receiving a petition signed by a majority of both houses of Congress.²⁰ In 1932, President Hoover met with a senator who requested that he appoint a liberal justice to replace Oliver Wendell Holmes; Hoover appointed Benjamin Cardozo, who had previously been at the bottom of the President’s list of preferred nominees.²¹

The actual procedure for getting advice from the Senate before a nomination has proved problematic and not entirely practical. In the case of Justice Cardozo, it appeared that two senators influenced President Hoover to appoint Cardozo to the bench. This appointment was not based on advice from the entire Senate but merely two of its members. It seems unlikely that the Framers would have envisioned two senators requesting a nomination to be considered advice from the Senate.

Professors Strauss and Sunstein offer several simple options on how the President may get advice from the Senate.²² One of these is for the President to solicit a list of preferred candidates.²³ Key senators could then review and comment on choices, or there could be ongoing discussions between certain senators and the White House.²⁴

18. *Id.* at 1495.

19. *See id.* at 1501.

20. *See id.*

21. *See id.*

22. *Id.* at 1518–20.

23. *Id.* at 1518.

24. *Id.*

Strauss and Sunstein's suggestions have been rebutted by professor John O. McGinnis.²⁵ Most significantly, Professor McGinnis argues that "[t]he Appointments Clause assigns no prenomination role of a constitutional dimension to the Senate. To the contrary, the Framers wanted to assure accountability in appointments by making the President alone constitutionally responsible for the act of nomination."²⁶ Professor McGinnis points out that anyone, including senators, may make recommendations, but the President alone makes the nomination.²⁷

Professor McGinnis concludes as follows:

The Appointments Clause serves this function precisely because it assigns fundamentally different responsibilities to the President and the Senate in the appointment of a Justice of the Supreme Court. The structure of the Appointments Clause gives the President a substantial advantage in obtaining the confirmation of his nominees but nevertheless the Senate may be in a position periodically to resist that advantage, thus creating the possibility of a lustral contest between competing interpretations of the republic's fundamental document. By suggesting that the Senators urge the President to nominate a compromise nominee under the cloak of prenomination pressure, Professors Strauss and Sunstein undermine the republican architecture of the Constitution as a whole.²⁸

The Constitution provides a very brief procedure for how a judge is nominated and appointed. However, this process and the obstacles to appointment need to be addressed.²⁹ The Appointments Clause was a compromise between those who wanted the President to have unfettered power to make appointments and those who wanted the Congress, specifically the Senate, to have appointment power.³⁰ The compromise purported to balance "efficiency, accountability, expertise, and quality assurance."³¹

25. See generally McGinnis, *supra* note 6.

26. *Id.* at 635.

27. *Id.*

28. *Id.* at 668.

29. See generally David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 *CARDOZO L. REV.* 479 (2005) (providing a comprehensive history of judicial selection).

30. *Id.* at 482.

31. *Id.*

Presidents may use any criteria they see fit in choosing judicial nominees. They generally use a mixture of “merit, party loyalty, personal friendship, demographic diversity, and . . . ‘agreement with the [P]resident’s basic political and constitutional philosophy’”³² Of course, a President cannot know everyone who may make an appropriate judicial nominee. The President usually receives input from the party leaders of the state that contains the vacancy. While the amount of influence that Presidents and senators have is variable, “[h]istorically, senators have enjoyed considerable influence over both district and circuit court appointments within their respective states.”³³

In most states, judges are recommended to the President by state party leaders (of the same party as the President), whether the ranking senator, a representative, or the governor.³⁴ Home state senators also enjoy a veto privilege over the appointment of judges called the “blue slip” procedure.³⁵ Simply put, the Chairperson of the Senate Judiciary Committee gives the senators from the nominee’s home state a blue slip of paper.³⁶ If both senators do not return the slip of paper, there is no hearing on the nomination.³⁷

Another potential obstacle for the nomination is a filibuster, by which a senator derails a nomination by continuously speaking. It takes sixty votes to end the filibuster.³⁸ Both the blue slip and the filibuster can be used to stop a nomination for any reason the senator sees fit. The need for an end to this problem has long been recognized. Most recently, the Supreme Court’s *2010 Year-End Report* noted that

[o]ver many years . . . a persistent problem has developed in the process of filling judicial vacancies. Each political party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes. This has created acute difficulties for some judicial districts. Sitting judges in those dis-

32. *Id.* at 484.

33. *Id.* at 487.

34. See Rebecca Love Kourlis, *The Politics of Choosing Judges*, DENVER POST, Aug. 10, 2008, at D-03.

35. *Law*, *supra* note 29, at 493–96.

36. *Id.* at 494.

37. See *id.* at 496.

38. RICHARD S. BETH ET AL., CONG. RESEARCH SERV., RL 30360, FILIBUSTERS AND CLOTURE IN THE SENATE 9 (2010).

tricts have been burdened with extraordinary caseloads There remains . . . an urgent need for the political branches to find a long-term solution to this recurring problem.³⁹

A discussion of the exact constitutional requirements of the Senate's role in providing advice is largely beyond the scope of this Article. However, the issue is useful in analyzing our proposal for the appointment of federal judges.

II. THE CONSTITUTION AS CONTRACT

While "constitutional scholars have thus far failed to engage in a systematic examination"⁴⁰ of whether acceptance or rejection of the notion of the Constitution as a contract furthers our understanding of the Constitution, scholars have made arguments on both sides. That a constitution is a political contract is not a novel theory. Accordingly, recent scholarship has applied contractual assumptions to the realm of constitutional concerns.⁴¹ Indeed, much of originalism's force is based on the notion of the Constitution as a contract.⁴² As Professor Samuel Issacharoff has pointed out, one feature of originalism is the "underlying idea that a constitution is indeed a pact, a social contract designed to create legitimate governing institutions responsive to the political and social divides of a society."⁴³

Moving from theory to a more discrete level, for a constitution to be a contract, it "must have terms of agreement, terms of enforcement, and legitimacy that is drawn from the instrument that compels future performance by the affected parties."⁴⁴ The import of such a theory is that the contract freezes obligations into place—hence the importance of understanding what the Framers intended—and binds each side to those obligations as set out in the terms.⁴⁵

39. SUPREME COURT OF THE UNITED STATES, 2010 YEAR-END REPORT 7-9 (2010).

40. Edward A. Fallon, *Charters, Compacts, and Tea Parties: The Decline and Resurrection of a Delegation View of the Constitution*, 45 WAKE FOREST L. REV. 1067, 1068 (2010) (citations omitted).

41. See, e.g., Symposium, *Original Ideas on Originalism*, 103 NW. U. L. REV. 491 (2009).

42. Samuel Issacharoff, *Pragmatic Originalism?*, 4 N.Y.U. J.L. & LIBERTY 517, 525 (2009) ("[T]he strongest argument for originalism in my view comes from the idea that a constitution is essentially a contract."). Issacharoff also noted that a precondition of originalism is that it is "a faithful form of public contract law," carrying on the consensus that created the constitutional enterprise. *Id.* at 521.

43. *Id.* at 520.

44. *Id.* at 525.

45. See *id.*

Issacharoff, however, addressed problems with viewing the Constitution as a contract. This approach, he argued, “cannot . . . overcome the tremendous interpretive difficulties in trying to . . . fill[] in gaps without substituting judicial conjecture.”⁴⁶ His fear was that such gap-filling would be tinged with all of the “questions currently debated in contract law” – that is, the scope of default rules, which terms gap-filling should affect, and whether efficient breach is an appropriate theory.⁴⁷ However, these questions would be “played out against the more difficult normative objectives . . . across the broad domain of political agendas, rather than the simpler metric of wealth maximization.”⁴⁸

The arguments against interpreting the Constitution as a contract generally involve the notion that a contract made two hundred years ago by people that are long dead should not bind people today.⁴⁹ When one analogizes to corporate law, however, this idea no longer seems apt. Contracts between corporations remain valid as long as the corporations are in existence, even if the specific contracting individuals are no longer with the corporation. In addition, many contracts are binding on the heirs and assignees of contracting parties. As Judge Easterbrook has pointed out, contractual rights often outlast the lives of the contracting parties, and are inheritable.⁵⁰ To show this, Easterbrook uses the simple example of a mortgage, explaining, “If I buy a house with borrowed money, the *net* value of the house is what my heirs inherit; they can’t get the house free from the debt. This is so whether my heirs consent to the deal or not; contractual rights are passed from one generation to another as written.”⁵¹ The fact that the people who made the contract are no longer parties does not make the Constitution any less of a contract.

Another argument against the idea that the Constitution is a contract is that contracts require all parties to manifest assent to the contract, and constitutions can be founded on less-than-unanimous con-

46. *Id.* at 528.

47. *Id.*

48. *Id.*

49. Brian Tamanaha, *A Truly Poor Metaphor: “The Constitution is a Contract,”* BALKINIZATION (Dec. 30, 2006, 11:59 AM), <http://balkin.blogspot.com/2006/12/truly-poor-metaphor-constitution-is.html>.

50. Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121 (1998).

51. *Id.* (emphasis in original).

sent.⁵² However, this argument fails to recognize the corporate analogy: a corporation may enter into contracts without the manifest assent of its shareholders, who are nonetheless bound by terms of the contract. Though the American public may not have manifestly assented to the terms of the Constitution, assent is implicit in continued citizenship within the United States.

The Constitution varyingly operates as a both a charter of delegated powers—as at the founding—and as a compact—a more recent view.⁵³ The view that the Constitution is a “concrete compact between the federal government and the state governments, with the people of the United States as beneficiaries. . . . conceptualizes the Constitution in standard contractual terms and places primacy on notions of consent.”⁵⁴

One state, Mississippi, has explicitly analyzed whether their state constitution is a contract. In *Myers v. City of McComb*,⁵⁵ the Supreme Court of Mississippi held that “[t]he Mississippi Constitution is a contract between the government and the people of this State, and is instituted solely for the good of the whole.”⁵⁶ This is the only reported case in which a court has held directly that a constitution, state or federal, is a contract. The Mississippi Supreme Court, however, failed to analyze how exactly it arrived at that conclusion. Two federal courts have touched on the issue of whether the Constitution is a contract, but both found that the arguments were not adequately developed by the factual allegations of the respective parties.⁵⁷

Congressman Ron Paul argued that “[t]he Constitution, although now generally dismissed, provides that contract between the people and the government.”⁵⁸ Thus, there are arguments, not only from scholars, to be made that the Constitution is a contract. A complete discussion on this topic, however, like the discussion of whether the

52. Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 617–18 (2009).

53. See Fallone, *supra* note 40, at 1069.

54. *Id.*

55. 943 So. 2d 1, 7 (Miss. 2006).

56. *Id.*

57. See *United States v. Novotny*, No. 91-1279, 1992 WL 121728, at *5 (10th Cir. June 5, 1992); *United States v. Orr*, No. 1:03CR35-M, 2008 WL 2465418, at *4–5 (N.D. Miss. June 12, 2008).

58. Congressman Ron Paul, Address Before the U.S. House of Representatives (Feb. 25, 1997), available at <http://www.nccs.net/newsletter/jun97nl.html>; Rodolphe J.A. de Seife, *The King Is Dead, Long Live the King! The Court-Created American Concept of Immunity: The Negation of Equality and Accountability Under Law*, 24 HOFSTRA L. REV. 981, 983 (1996).

Appointments Clause requires Senate advice, is left for another day.⁵⁹ Assuming the Constitution is a contract, the Appointments Clause does not mention a time limit within which the Senate must give its advice and consent. The question is whether such a time limit can be implied, and if so, what it should be.

III. THE IMPLIED TERMS OF THE CONSTITUTION

Regardless of whether the Constitution is definitely a contract, it is unquestionable that there are similarities—one of which is the inclusion of implied terms. Even those skeptical of whether the Constitution can be considered a contract admit that such “implied terms” do exist within the Constitution.⁶⁰ Barnett provides an example from the Takings Clause of the Fifth Amendment, which reads, “[N]or shall private property be taken for public use, without just compensation.”⁶¹ Though not stated explicitly, this provision clearly implies that private property may be taken for public use if just compensation is provided.⁶² Thus, the Constitution contains terms which are implied.

Under the general rules of contract interpretation, when a contract contains no specific time limits, the contract requirements must be performed within a reasonable time.⁶³ General rules of contract interpretation apply even to contracts to which the United States is a party.⁶⁴ Terms, such as time limits, are often implied into contracts to “give business efficacy to the contracts as written.”⁶⁵ “What constitutes a reasonable time . . . is . . . derivable from the language used

59. For a useful history of the interpretation of the Constitution and social contracts, see Paul Lermack, *The Constitution Is the Social Contract so It Must Be a Contract . . . Right? A Critique of Originalism as Interpretive Method*, 33 WM. MITCHELL L. REV. 1403, 1410–16 (2007) (crediting the social contract theories of Thomas Hobbes, John Locke, and Jean-Jacques Rousseau as the foundation of this methodology of constitutional interpretation). Ultimately, Professor Lermack rejects the idea that the Constitution is a contract. *Id.* at 1427–33 (positing that reading the Constitution as nothing more than a contract trivializes the document).

60. See Barnett, *supra* note 52, at 622.

61. U.S. CONST. amend. V.

62. See Barnett, *supra* note 52, at 622.

63. See *Thermo Electron Corp. v. Schiavone Constr. Co.*, 958 F.2d 1158, 1164 (1st Cir. 1992); see also 17 AM. JUR. 2d *Contracts* § 467 (2d ed. 2004).

64. *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 824 (Fed. Cir. 2010).

65. *Black Horse Land Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 285 (3d Cir. 2000).

by the parties considered in context of the subject matter and the attendant circumstances”⁶⁶

Also, inherent in every contract is the implied covenant of good faith and fair dealing.⁶⁷ “[T]his duty requires a party to not interfere with another party’s rights under the contract The United States, no less than any other party, is subject to this covenant.”⁶⁸ This covenant includes the duty to cooperate.⁶⁹ The implied duty to cooperate imposes upon a party a duty “to do what is reasonably necessary” to enable the other party to perform.⁷⁰

The idea that the Constitution includes implied terms, including performing within a reasonable time and the duty to cooperate, goes directly to the usefulness of the Constitution as a governing document. If the President and the Senate are under no obligation to fill judicial vacancies within a reasonable time, then the obligation imposed by the Constitution lacks any real effectiveness. The Appointments Clause does not state that the President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint *at his leisure and convenience*. Rather, the clause places an affirmative obligation on the President and the Senate to fill the described appointments. Without the implication that this will be done in a reasonable time, this clause loses all effectiveness.

Similarly, the Constitution must be upheld and followed in good faith. Quite simply, the Appointments Clause cannot be effective if either the President or the Senate violate the duty to cooperate. When the President nominates a judicial candidate who is knowingly unacceptable, or when the Senate uses procedural tactics or a filibuster to delay the vote on the nomination of a judicial candidate, neither side can be said to be acting in good faith.

If one assumes that the Constitution is a contract, one can then imply terms that are unstated in the contract but comport with good faith and fair dealing. In the case of the Appointments Clause, this would permit imposition of a time limit for the Senate to act pursuant to the Constitution’s advice and consent requirement. Our proposal takes into account good faith and fair dealing in an effort to create a time limit for Senate action.

66. *Id.* (quoting *McGarry v. Saint Anthony of Padua Roman Catholic Church*, 704 A.2d 1353, 1357 (N.J. Super. Ct. App. Div. 1998)).

67. *Precision Pine*, 596 F.3d at 828.

68. *Id.*

69. See *PBI Elec. Corp. v. United States*, 17 Cl. Ct. 128, 133 (1989).

70. *W. End Welding & Fabricating, Inc.*, ASBCA No. 41213, 96-1 BCA ¶ 28,151.

The Constitution's effectiveness as a governing document requires it to include the implied terms of performance within a reasonable time and the covenant of good faith and fair dealing. As outlined in the proposal below, the recognition of these implied terms will facilitate an effective process for judicial appointments.

IV. PROPOSAL

As the Constitution has contractual roots, thereby binding the government to the people it serves, it compels certain duties of government officials. Among these duties is to keep the federal courts running efficiently by appointing and confirming federal judges quickly. This has not been the case in recent years. So, because of this imperative, we propose that the Senate adopt a timetable to move nominees along to overcome this obstacle. In light of other senatorial procedures relating to the judicial process, such as the blue slip, this is nothing out of the ordinary. And it is desperately needed. Of course, even if the Constitution is not a contract, there is nothing preventing both the President and the Senate from agreeing to a timetable within which all federal judicial nominations must be brought to a vote.

Indeed, the President and the Senate have made previous attempts to smooth out the advice and consent process. In the 109th Congress, fourteen senators agreed to an informal guideline called the *Memorandum of Understanding on Judicial Nominations*.⁷¹ In the memorandum, the signatories committed to vote for three nominees but did not commit to two other nominees.⁷² Regarding future nominees, the signatories agreed that nominees should only be filibustered under extraordinary circumstances.⁷³ However, the signatories agreed to oppose rule changes that would force a vote on the nomination of judicial nominees.⁷⁴ Finally, the signatories believed that the word "advice" included a consultation between the Senate and the President with regard to the use of presidential appointment power. The memorandum encouraged the President to consult with members of the Senate, both Democrat and Republican, prior to making judicial nominations.⁷⁵

71. See S. REP. NO. 109-369, at 104-05 (2006).

72. *Id.* at 104.

73. *Id.*

74. *Id.*

75. *Id.*

Several problems are apparent in the *Memorandum of Understanding on Judicial Nominations*. First, other than the three judicial nominees specifically mentioned in the memorandum, the senators did not agree to do anything other than use their own “discretion and judgment” regarding future nominations.⁷⁶ The memorandum did not include a timetable establishing when nominees would be voted upon. Second, while the signatories believed that the Senate should consult with the President before the appointment, they provided no specific mechanism as to how that would be done.⁷⁷ Indeed, the President could consult with two or three members of the Senate, both Democrat and Republican, and still nominate somebody who would be objectionable to the vast majority of the Senate. Nonetheless, as will be discussed in detail below, consultations involving senators from both parties would perhaps be advisable.

President George W. Bush, remarking on the judicial confirmation process of October 30, 2002, suggested another proposal.⁷⁸ President Bush called on all federal judges to notify the President at least a year in advance of any retirement, if possible. This notification would give the President adequate time to institute a system for replacing the retiring judges.⁷⁹ Second, President Bush proposed that the President would submit a nomination to the Senate within 180 days of receiving notice of a federal court vacancy.⁸⁰ This would ensure that the Senate received nominations for federal judicial vacancies well before the actual vacancy came into effect. It also gives the President ample opportunity to vet the nominees.⁸¹ Third, President Bush requested that the Senate Judiciary Committee hold hearings within ninety days of receiving a nomination and called on the full Senate to commit to an up-or-down floor vote for each nominee no later than 180 days after the nomination.⁸² President Bush believed that this was a generous period to allow all senators to evaluate the nominees.⁸³ In addition, if these recommendations were followed, there would at least be a vote on the nominee prior to the actual vacancy.

76. *Id.*

77. *See id.*

78. *See* Remarks on Judicial Confirmation Process, 2 PUB. PAPERS 1929, 1930 (Oct. 30, 2002).

79. *See id.* at 1931.

80. *Id.*

81. *See id.*

82. *Id.*

83. *Id.*

Our proposal is a variation on President Bush's proposal. It calls for strict deadlines regarding the nomination and full Senate vote, but it also includes an aspect of pre-nomination advice from the Senate. Our proposal adopts President Bush's idea that any sitting federal judge, who knows retirement or senior status is imminent, must provide as much notice as possible to the President of the judge's planned departure. This proposal would give all involved parties sufficient time to evaluate, nominate, and vote on a judicial vacancy.

Additionally, our proposal makes a very broad assumption based on the most practical and reasonable avenue for identifying judicial candidates. The proposal assumes that any sitting senator has some knowledge of his respective constituents who would be appropriate judicial appointees, whether to the district or circuit courts. Even today, senators generally advise the President of proposed judicial appointments in their states. A senator is naturally in tune with local politics, and thus is much more likely than the President or senators from other states to have information regarding appropriate judicial nominees in his home state. This notion is simply common sense.

As noted, the first step is that sitting judges would advise the President as soon as possible of their planned retirement. This notification should give the President sufficient time to evaluate potential nominees and make a nomination with plenty of time to fill the vacancy. Next, the process would depend on whether the vacancy is for a district or circuit court.

A. District Judges

For a district judge nomination, the two senators of the state where the district is located would each submit nominees to the President. If both senators are from the same party, each senator would submit three nominees to the President. If the Senators are from different parties, then the senator that belongs to the same party as the President would submit four nominees, and the senator from the other party would submit two nominees.

Upon notification of the potential vacancy, the President should immediately request names from the respective senators. The senators would then have sixty days to provide the names to the President. Thus, sixty days after the announcement of the future vacancy, the President would have six potential nominees.

As noted above, senators should be able to quickly identify appropriate individuals for nomination. The senators should have

information about several possible nominees readily available and should be familiar with the leading legal scholars, lawyers, state judges, or others who may be appropriate to assume the federal bench. Even if neither senator is from the President's party, it would be in the senators' interest to recommend nominees that would be acceptable to the President. Also, the President would have an interest in nominating one of the recommended people, even if recommended by a senator from a different party, because it would be unlikely that any other candidate would be quickly confirmed.

Next, the President has sixty days to choose one of the nominees. Of course, the President is free to pick any nominee, including people not submitted by the senators. However, if the President opts to nominate a candidate of his own choosing for the vacancy, then there would be no assurances of a timely vote.

If the President nominates a recommended candidate, the Senate Judiciary Committee would guarantee that it would vote on the nomination within ninety days. The Senate Judiciary Committee would be free to develop its own criteria by which to evaluate a recommended nominee, and this proposal would not affect whether the committee would approve or disapprove of the nominee. The proposal would merely impose a time limit on the committee's vote.

Upon the vote of the Senate Judiciary Committee, the full Senate would have sixty days to conduct an up-or-down vote. While this seems like a short time, it is the duty of the various Senate Committees to screen candidates. Thus, the ninety days granted to the Senate Judiciary Committee to screen nominees would alleviate the need for a long Senate investigation. If the Senate believes additional time would be necessary to evaluate the nominee, however, a thirty-day extension could be granted. Under this proposal, if a nominee has been recommended by a senator from the state in which judicial the vacancy exists, the full Senate would guarantee an up-or-down vote within 150 days of receipt of the named nominee.

B. Circuit Judges

For nominations for circuit judges, the proposal would be that every senator from the states contained in the circuit for which the vacancy exists would provide two names for the vacant judgeship. Following the recommendations, the President would then be free to choose one of the recommended nominees or any other individual. If the President chooses one of the recommended nominees, the same timetable for district judges would be used for circuit judges.

That is, the Senate Judiciary Committee would have ninety days to fully investigate, hold hearings, and vote on the nominee, and then the full Senate would have sixty days in which to vote on the nomination.

It must be emphasized that this proposal would be an agreement between the President and Senate. The President would not have to choose one of the recommended nominees and could choose any individual. This proposal would only apply if the President chooses one of the individuals recommended by one of the identified senators. Likewise, this proposal would not deprive the Senate of its constitutional advice and consent role. Each senator would be free to vote for or against the nominee. This process would merely require an up-or-down vote for a recommended nominee. Furthermore, senators would agree not to filibuster a recommended nominee or use procedural tactics, such as a blue slip, to prevent a vote. If the President chooses someone other than a recommended nominee, the Senate would be under no obligation to comply with the timetable for committee or full Senate vote. In addition, all procedural rules regarding objections to judicial nominees, including filibuster, would apply to a non-recommended person.

This proposal may be objectionable to the party not in control of the White House, as it would have to permit a Senate vote on all recommended nominees and agree not to filibuster any recommended nominee. This proposal would, however, balance out when the White House switches parties. Thus, under the Obama administration, the Republicans may not like losing procedural road blocks to voting on a nominee, but this would be tempered by the knowledge that when a Republican is President, Democrats would not be able to use procedural tactics to delay voting for those judges nominated by the Republican President.

In sum, this proposal gives the Senate an advisory role in the nomination of federal judges but does not infringe on either the President's or the Senate's constitutionally defined roles. It merely provides that if the President accepts advice from the senator of the state or states involved, a timely Senate vote would be ensured.

CONCLUSION

Our proposal is a simple solution to the problems created by the length of time it takes the Senate to hold hearings on the President's judicial nominees. Ours is not a perfect solution, but it is one that ensures a timely, full Senate vote on any nominee who is recom-

mended by a senator from the state within which the district or circuit is located. The proposal would give the Senate, by virtue of the senators that represent the state from which the vacancy is located, a role in selecting nominees. If the President accepts such a recommendation, a full Senate vote would be required within 150 days of the time the nominee is sent to the Senate. The Senate, of course, is free to reject the nominee.

The President would still face pressure to choose a nominee acceptable to the Senate. If an appropriate nominee is chosen, the senators from both parties would be obligated to thoroughly investigate the nominee and may be held responsible by the voters if they reject a well-qualified nominee. In addition, the President could be held responsible by the voters for recommending an unqualified nominee. Thus, the checks and balances system contemplated by the Framers would still be in effect. This proposal simply ensures a full Senate vote, without any procedural maneuvering permitted to essentially shelve a nominee for years. Once judges are appointed in an expeditious manner, the federal judicial system will operate more efficiently as it will no longer be stymied by unnecessary vacancies.