I. Introduction

The number of vacancies on the federal bench has increased significantly since President Obama took office. While court of appeals vacancies have remained relatively stagnant, district court openings have risen by seventy percent and judicial emergencies have doubled. The result has been a federal bench strained with overworked judges, backlogged dockets, and frustrated lawyers and litigants. It has been a difficult four years for the judiciary.

While the President has appointed two Supreme Court justices, confirmed 185 circuit and district court judges, and nominated a record number of women and minorities, the vacancy crisis largely has overshadowed his record on judicial nominations. The shortage poses many challenges for judges and parties alike. Judges’ caseloads have risen steeply as their colleagues’ seats remain empty, senior judges often travel across the country to help other courts handle caseloads, and civil parties and some criminal defendants must wait longer for judicial action.

Because the Speedy Trial Act requires judges promptly to address criminal cases, civil litigants are hit hardest by the judicial vacancy crisis. Civil rights, discrimination, and personal injury plaintiffs can wait years for disposition of cases and may enter into unfavorable

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settlements to avoid such delays. Corporations and small business owners must also “live with the financial uncertainty that pending litigation brings.” This uncertainty has lasted increasingly longer as vacancies have risen. Rising criminal caseloads have exacerbated the judicial vacancy crisis, and courts have been forced to further delay the disposition of civil proceedings.

The President, however, cannot bear the blame alone. First, a much higher than usual number of judges took senior status in the first three years of his administration. Second, the Senate has “confirmed a lower percentage of Obama’s nominees than it did Clinton and Bush nominees.”

Article II, Section 2 of the Constitution gives the President the power to nominate federal judges and the Senate the power to confirm them. Because sixty votes are required to hold a vote on nominees and because any one senator can filibuster, the opposition party in the Senate can control a nominee’s fate. This makes for an uneasy partnership. While Abe Fortas, Robert Bork, and Clarence Thomas can surely attest to the turbulence of the Supreme Court confirmation process, the last decade has seen a similar level of conflict for lower court nominations as well.

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8 Id.

9 U.S. CONST. art. II §2. (“He 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 . . . .”)
In 2005, after Senate Democrats filibustered ten Bush court of appeals nominees, the Republican majority in the Senate threatened to change the Senate rules to eliminate the filibuster altogether. This maneuver was nicknamed “the nuclear option” because it would have provoked the Democrats to use procedural maneuvers to derail the President’s legislative agenda and “grind the Senate to a halt.” While a last-minute truce staved off disaster, similar threats have arisen recently over President Obama’s nominees.

The conflict between the President and the Senate largely is responsible for the judicial vacancy crisis. Ultimately, the blame can be shared. On the one hand, the Senate has contributed to delaying the President in nominating judges and has then prevented those nominees from receiving a vote. On the other hand, the President’s nominations have been too slow and too few.

This paper will examine the extent and impact of the judicial vacancy crisis. Part II will discuss the increase in vacancies and compare President Obama’s first four and a half years with his two immediate predecessors. Part III will examine the effects of this crisis. It will explore how it affects both judges and litigants, as well as its impact on the federal judiciary overall. Part IV will discuss the uneasy relationship between the President and the Senate, and will explore the causes behind the rise of vacancies since President Obama came to office.

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12 See infra Section IV.c.
13 See infra Section IV.b.
14 A brief disclaimer: One of the authors of this paper, David Ginensky, interned on Senator Leahy’s U.S. Senate Judiciary Committee staff during the judicial confirmation and nuclear option conflict in 2005. While the parties’ roles today are reversed (the Republicans controlled the White House and Senate then), many of the same arguments have resurfaced. To some degree, that experience may inform this paper.
II. Federal Court Vacancies and Judicial Emergencies Over Time

This section will discuss federal court vacancies and judicial emergencies during the Clinton, Bush, and Obama presidencies. The goal of this section is to provide relevant background information to put the remainder of this paper in proper, recent historical context. Unless otherwise specified, all data was compiled from the United States Courts website and all charts were created by filtering that data through Microsoft Excel and Microsoft Word.¹⁵

While the federal judiciary had fewer vacancies when President Obama took office than it did when either President Clinton or President Bush were inaugurated, Obama is the only one of those presidents to see the number of vacancies rise during his first term.¹⁶ This chart depicts the number of judicial vacancies in January of the three presidents’ inaugural years.

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As we will discuss in Section IV.b., Obama’s approach to nominating circuit and district court judges was markedly different from Bush’s. While Bush employed a “well-oiled judicial nominating machine”\textsuperscript{18} and while judicial appointments played a “central role . . . in the administration’s domestic policy agenda,”\textsuperscript{19} Obama took a different approach. He “moved more slowly and sought relatively moderate jurists who he hoped would not provoke culture wars that distracted attention from his ambitious legislative agenda.”\textsuperscript{20} Two early events compounded these delays. First, 92 judges took senior status during his first three years in office.\textsuperscript{21} Second, Justice Souter’s retirement and Justice Sotomayor’s confirmation deferred “considerable resources” and attention away from lower court nominees.\textsuperscript{22}

The Senate has also taken longer to confirm Obama’s district court nominees than it did for Clinton’s and Bush’s nominees.\textsuperscript{23} His nominees have faced longer delays both before and after nomination. While Clinton averaged 447 days from vacancy to Senate floor vote for district court nominees and Bush averaged 420, Obama has averaged 610 days from when a judgeship becomes vacant until when the Senate votes on a nominee.\textsuperscript{24} Pre-nomination conflicts with home-state senators play a significant role in these delays.\textsuperscript{25}

These factors have all contributed to the recent rise in judicial vacancies and judicial emergencies. To provide perspective, the following charts demonstrate the trends in district and circuit court vacancies during the Clinton, Bush, and Obama administrations.

\textsuperscript{18} Wheeler, \textit{Dysfunctional Process}, supra note 4, at 9 (citing Sheldon Goldman, Sara Schiavoni, and Elliot Slotnick, \textit{W. Bush’s Judicial Legacy: Mission Accomplished}, 91 JUDICATURE 258 (May 2009)).
\textsuperscript{19} Goldman, supra note 18, at 260.
\textsuperscript{21} Wheeler, \textit{Where Do Things Stand?}, supra note 7.
\textsuperscript{22} Carl Tobias, \textit{Postpartisan Federal Judicial Selection}, 51 B.C. L. REV. 769, 781-83 (May 2010) (noting that while President Clinton also faced an early Supreme Court confirmation, Justice Ginsburg’s appointment was less controversial and “demanded significantly less time.”).
\textsuperscript{23} See infra Section IV.c
\textsuperscript{24} Wheeler, \textit{Obama’s First Term}, supra note 16. The figures are much closer for circuit court nominees, as Obama’s nominees are processed considerably faster than Bush’s. See infra Section IV.c. As Section IV will further discuss, the President and Senate share responsibility for the pre-nomination delays.
\textsuperscript{25} See Section IV.c.
These vacancies, and the protracted delays in the nomination and confirmation processes to fill them, have led to an alarming number of judicial emergencies. A judicial emergency is

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27 Id.
declared in district courts in “any vacancy where weighted filings are in excess of 600 per judgeship; any vacancy in existence more than 18 months where weighted filings are between 430 to 600 per judgeship; or any court with more than one authorized judgeship and only one active judge.” It is declared in circuit courts in “any vacancy in a court of appeals where adjusted filings per panel are in excess of 700; or any vacancy in existence more than 18 months where adjusted filings are between 500 and 700 per panel.” As we will discuss in Section III, judges in districts where judicial emergencies exist face rising caseloads and backlogs of cases. Moreover, parties face delays in proceedings. While judicial emergencies have decreased in number since their recent high in 2011, they remain higher today than at any time in the previous decade.


30 Archive of Judicial Vacancies, ADMIN. OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx (last visited May 5, 2013). This historical information is not available in the judicial emergencies page. Rather, the judicial emergency data for each month must be found on that month’s judicial vacancy page.
III. The Impact of Judicial Vacancies and Judicial Emergencies

This section will look at how vacancies affect federal judges, litigants, and the judiciary as an institution. It will address the impact of rising caseloads on judges, including senior judges, and will discuss how subsequent delays in adjudication impact individual parties and corporate litigants. Ultimately, it will demonstrate that vacancies have a significant impact on the career experience and court conditions for judges and litigants, respectively.

a. Impact on Judges and Litigants

As vacancies have risen across the judiciary over the last number of years, judges have faced a steep increase in caseloads and a significant backlog of cases.\(^{31}\) This has taken a particularly harmful toll on civil cases. Because the Speedy Trial Act requires courts to consider criminal cases ahead of civil ones, the civil bar has borne most of the hardship.\(^{32}\) As vacancies mount and as each remaining judge takes on an increasing number of their district’s cases, “a number of districts are left to address enormous civil backlogs.”\(^{33}\)

In many districts, vacancies exacerbate a pre-existing trend toward increased caseloads per judge.\(^{34}\) In Arizona, for instance, criminal prosecutions rose 70% in just over two years.* In 2011, vacancies left “the remaining three Tucson-based judges handling more than 1,200 criminal cases each” in addition to their civil caseloads.\(^{36}\) In the Western District of Texas, which

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\(^{32}\) Speedy Trial Act, 18 U.S.C. §3161(a) (2006) (“In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.”).

\(^{33}\) Tobias, supra note 22, at 775.

\(^{34}\) Id.; Mears, supra note 6.

\(^{35}\) Mears, supra note 6.

\(^{36}\) Id. Shortly before he was killed in the assassination attempt on Congresswoman Gabrielle Giffords, Chief Judge John Roll initiated a request for a judicial emergency and sought to extend the Speedy Trial Act requirement of 70
“includes 800 miles of U.S.-Mexico border,”37 “a federal trial judge’s criminal caseload can be six times the normal caseload.”38 In that district, Judge Royal Furgeson assumed senior status in 2008 and has yet to be replaced.39 Furgeson refers to the courts in border states as “absolutely crowded” and hails judges “handling eight times the number of criminal cases than are normally registered in other courts across the nation.”40 Chief Judge Fred Biery compared judging in that district to “pedaling as fast as we can on an increasingly rickety bicycle.”41

While criminal cases have increased dramatically in just a few short years in the border states, rising prosecutions compound the vacancy problem across many judicial districts.42 Between 2002 and 2012, the number of criminal cases filed in federal courts rose 51% on a national level.43 In courts with broader jurisdictions like the U.S. District Court for the District of Columbia, additional cases like Guantanamo appeals delay civil and some criminal cases even further. In 2011, Chief Judge Royce Lamberth called the situation “as bad as I’ve seen it.”44 “Our court is swamped,” Lamberth said. “The result is we expect to try very few civil cases this spring or summer and only criminal cases where the Speedy Trial Act dictates trial now. We need new
days to 180 days. He had gone to speak to Congresswoman Giffords that day about the judicial vacancy crisis. A judicial emergency was enacted after his death.
38 Center for American Progress, supra note 31.
40 Mears, supra note 6.
41 Martin supra note 37.
42 Tobias, supra note 22, at 775.
44 Mears, supra note 6.
judges just as many other courts do. In Lamberth’s court and others, parties are left to compete for “scarce judicial resources.”

Vacancies’ toll on the civil bar is especially pronounced. As the backlog of civil cases increases, “justice [is] delayed in cases involving protections of individual rights, advancement of business interests, compensation for injured victims, and enforcement of federal laws.” Observers fear that civil litigation may “become[] a waiting game” where the winner is often the party who “has the most money to afford waiting the longest.” Many litigants, in fact, choose not to wait at all. According to Ian Millhister of the Center for American Progress, “Instead of waiting, many civil litigants are settling their disputes. That can be appropriate in many cases, but there is ‘no shortage of plaintiffs who wind up taking inadequate settlements’ or businesses that make unnecessary payments to end the expense and uncertainty of litigation.”

Addressing this concern last year, Chief Judge J. Curtis Joyner of the Eastern District of Pennsylvania repeated the old maxim, “justice delayed is justice denied.”

A 2008 case is illustrative. That year, Elizabeth and Nicholas Powers jointly sued their employer, the University of Illinois, for sex discrimination. In 2011, as the parties awaited jury selection, Chief Judge Michael McCuskey was forced to halt the trial to preside over the

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increasing number of criminal cases brought before him.\(^{52}\) Rather than wait for trial, the parties entered into a settlement.\(^{53}\) In an interview following the postponement, Chief Judge McCuskey explained that he had no choice but to delay the civil case, explaining, “you've got a right to sue but you do not get a right to a speedy jury trial.”\(^{54}\) In 2010, Judge McCuskey’s district had 1,200 civil cases that were pending for more than three years, compared to only 55 in 1997.\(^{55}\) Nationwide, in 2006, only 6.6% of all civil cases remained on the docket for more than three years.\(^{56}\) In 2010, the percentage more than doubled to 15.9%, leaving over 45,000 cases in limbo.\(^{57}\)

Judicial vacancies have also imposed increased costs on litigants. In 2011, Chief Judge Mary Lisi of Rhode Island reassigned 27 cases to New Hampshire and Massachusetts.\(^{58}\) These case transfers raised expenses for the parties themselves and required additional attorneys’ fees to cover their lawyers’ travel.\(^{59}\) Chief Judge Lisi explained that the decision to reassign the cases was unique in recent history, but necessary given the court’s four-year vacancy and rising caseload.\(^{60}\) She stated, “[the court’s] job is to resolve cases and to do so in as timely and efficient manner as we can” and lamented that such delays hindered that process.\(^{61}\) Her decision to transfer the 27 cases followed President Obama’s second failed nomination to the court’s vacant seat.\(^{62}\)

\(^{52}\) Id.
\(^{53}\) Id.
\(^{54}\) Id.
\(^{55}\) Fields and Emshwiller, supra note 49.
\(^{57}\) Id.
\(^{59}\) Id. (discussing how “the move is upsetting and personally expensive” to litigants and inconvenient for attorneys).
\(^{60}\) Id.
\(^{61}\) Id.
\(^{62}\) Id.
These delays also have a significant impact on businesses, and in turn, on the economy. Corporations and small businesses rely on the courts to enforce contracts, to resolve disputes, and to determine liability. If these decisions “can’t be reached through quick and prompt justice,” Judge Furgeson said, “things unravel for business.” The impact could be wide reaching.

Extending the duration of corporate litigation can negatively impact the economy. The “financial uncertainty” of pending litigation inhibits the advancement of business interests and may prevent businesses from investing in infrastructure, employment, or research and development until after litigation is resolved. According to Andrew Cohen of the Atlantic, federal judges are “job creators.” “The court system provides the oil that helps run the machinery of commerce.” Last year, then-ABA President Bill Robinson echoed those sentiments, bluntly stating, “Businesses face uncertainty and costly holdups, preventing them from investing and creating jobs. In sum, judicial vacancies kill jobs.”

While vacancies and increasing caseloads are burdensome for sitting judges, the strain may be even harder on judges who have already assumed senior status or who are eligible to assume senior status but decline to do so for fear of adding to the vacancy problem. These senior judges play a crucial role in maintaining the level of productivity in federal courts, as they may continue to work in their own districts or travel to other districts to alleviate the burden of vacancies.

Judge David Alan Ezra, a senior judge from Hawaii, recently moved to San Antonio to fill in for

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63 Fields and Emshwiller, supra note 49; Cohen, supra note 5.
64 Cohen, supra note 5.
65 Fields and Emshwiller, supra note 49.
66 Cohen, supra note 5.
67 Id.
68 Id.
69 Robinson, supra note 47.
Judge Furgeson, and will quadruple his current caseload. “This is corollary to having a big wild fire in the Southwest Border states,” Ezra said, “and fire fighters coming from Hawaii going there to help put out the fire.”

Senior judges have helped keep courts productive, but their efforts and travels should not be seen as a permanent solution. First, visiting judges may not bring to a district the same familiarity with circuit case law and district customs as that district’s judges. Connecticut Senator Richard Blumenthal explains, “There is a reason that district court judges are appointed from the ranks of residents. They are familiar with local customs and character and culture.” Relying on judges from other districts might undermine that purpose. Additionally, such reliance may not be fair to senior judges or to judges who are considering retirement but who stay on because they know their departure will lead to greater a strain on the court system. Chief Judge McCuskey, for instance, commutes 90 miles between two Illinois courts and relies on two “81-year-old senior judges to fill the gap.” “I had a heart attack six years ago, and my cardiologist told me recently, ‘You need to reduce your stress,’” Chief Judge McCuskey said in 2011. “I told him only the U.S. Senate can reduce my stress.” If a significant number of the senior judges assisting today fully retire or reduce their caseloads, the extent of the judicial vacancy crisis fully would be revealed.

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72 People for the American Way, supra note 4.
73 Id.
74 Martin, supra note 37.
75 Id. (stating judges from Montana, Ohio, Kentucky, and South Dakota traveled to Connecticut to help relieve the burden posed by vacancies).
77 Id.
78 Id.
b. Impact on the Judiciary

In addition to the impact on judges and litigants, it is worth considering vacancies’ impact on the federal judiciary as an institution. This section will consider vacancies’ effect on judges’ methods of adjudication, on the judiciary’s credibility, and on lawyers’ interest in being nominated as judges.

i. Method of Adjudication

In 2012, Jake D. Pugh considered whether increases in vacancies affected judges’ methods of adjudication.\(^79\) He examined whether it led to a shift from a trial model of judging to an administrative model of judging, and did not find such an effect.\(^80\) He also noted that while changes in court staffing did not have a predictable impact on the number of criminal or civil trials completed in that district, they did have some impact on the number of trials per judge, particularly in criminal cases.\(^81\) While Pugh also indicated that vacancies did not necessarily affect the time from filing to disposition in civil trials or in all civil cases, he noted, “[t]he effects of high vacancies might materialize as a growing backlog of filings rather than as a change in productivity as measured in output.”\(^82\) His study, he wrote, “would not necessarily capture this backlog effect.”\(^83\) Additionally, further study would be necessary to indicate “whether courts were already operating at capacity when vacancies arose . . . an increase in caseload resulting from vacancies would likely not affect the adjudicative approach of a judge who is already completely overloaded.”\(^84\)

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\(^79\) Pugh, supra note 70.
\(^80\) Id.
\(^81\) Id.
\(^82\) Id. at 25.
\(^83\) Id.
\(^84\) Id.
ii. Credibility of the Judiciary

Vacancies imperil not only the court’s effectiveness, but also its credibility. As caseloads rise and fewer judges are available to hear them, Americans wait longer for judicial action and may question the judicial process. “Ultimately, I think people will lose faith in the rule of law,” Judge Alex Kozinski, Chief Judge of the U.S. Court of Appeals for the Ninth Circuit, recently said.  

“We as a nation believe that if you have a dispute, you go to court and within a reasonable period of time, you get a decision.” Vacancies and delays “erode confidence in the courts’ ability to uphold constitutional rights and render fair and timely decisions.”

Attorney General Holder has warned that courts are becoming “stressed to the breaking point.” That stress might soon increase. “Because of projected retirements and demographics changes,” Holder continued, “the number of annual new vacancies in the next decade will be 33 percent greater than in the past three decades.” If the pace of judicial confirmations continued at its 2009-2010 rate, between a third and half of the federal judiciary “would be vacant by 2020.”

Moreover, political battles over judicial confirmations may undermine the courts’ role as an impartial arbiter. Because much of the courts’ business takes place out of the spotlight, many Americans’ sole impression of the judiciary comes from the partisan rhetoric over confirmations portrayed in the news. Justice Kennedy addressed this concern in his opening remarks to the

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85 Markon and Murray, *supra* note 76.
86 *Id.*
87 Robinson, *supra* note 47.
89 *Id.*
90 *Id.*
Ninth Circuit Judicial Conference last year. Partisanship in the confirmation process “makes the judiciary look politicized when it is not,” he told the audience, “and it has to stop.”

iii. Will lawyers be dissuaded from joining the judiciary?

In addition to its impact on the judiciary’s credibility, judges and scholars wonder if the vacancy crisis might dissuade lawyers from serving as judges. Russell Wheeler, a fellow at the Brookings Institute who writes extensively on judicial nominations, notes that the work life of a federal district judge has changed considerably over the last two decades. Filings per judge have increased significantly across the judiciary, with vacancies driving judges’ caseloads even higher. Trials per judge have declined “from 31 in 1991 to 21 last year.” Moreover, “the proportion of drug and immigration criminal cases in the district courts has doubled . . . and is much higher in some districts.” Wheeler speculates that these factors, combined with salaries lower than those of private practice, might discourage potential judges from serving.

There is also a concern that delays in the nomination process can discourage lawyers in private practice from submitting their names as potential judges. While the wait to be confirmed might be “tolerable” for state and magistrate judges, professors, and public interest lawyers, private lawyers’ “practice is likely to suffer in an extended limbo as clients resist signing on with lawyers whose nominations are on the record and who may not be there for the duration of the case. Moreover, while lawyers might accept, albeit reluctantly, having their practice in an eight month or longer hiatus if confirmation seems assured, they might well be less likely to do so if

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92 Id.
93 Wheeler, Dysfunctional Process, supra note 4, at 6.
94 Id.
95 Id.
96 Id.
97 Id.
the chances are only four in five.\textsuperscript{98} Because confirmation rates have fallen over the last several decades and because no lawyer can be assured of confirmation in the current climate, private practice attorneys may hesitate before accepting a nomination.\textsuperscript{99}

Chief Justice Roberts, and Chief Justice Rehnquist before him, worried about the decreasing number of federal judges who were appointed from the private bar.\textsuperscript{100} While 67\% of Eisenhower’s nominees came from private practice,\textsuperscript{101} only 36\% of the district court judges and 13\% of circuit court judges confirmed during Obama’s presidency were nominated from private practice.\textsuperscript{102} Chief Justice Roberts has expressed his displeasure regarding the decrease in private practice attorneys as opposed to public sector lawyers and state and magistrate judges. “It changes the nature of the federal judiciary,” he said, “when judges are no longer drawn primarily from among the best lawyers in the practicing bar.”\textsuperscript{103}

IV. Advice and Consent: The Causes of the Judicial Vacancy Crisis

This section will address the question of why this crisis arose. In short, vacancies have risen because the President did not emphasize judicial nominations early in his presidency and because conflicts with the Senate cause delays at both the pre-nomination and the post-nomination stages of the confirmation process.

To understand why the vacancy crisis has transpired, it is necessary to examine the judicial nomination and confirmation processes. This section will first set the stage by explaining the lower court nomination conflict from the 2005 nuclear option battle to the present day vacancy crisis. While many of the most intense and most public conflicts involve circuit court nominees,

\textsuperscript{98} Wheeler, \textit{supra} 4, at 16.
\textsuperscript{99} Id.
\textsuperscript{101} Id. at 141.
\textsuperscript{102} Wheeler, \textit{Obama’s First Term, supra} note 16, at 13. The extent to which vacancies had any impact on this trend is unclear.
\textsuperscript{103} Wheeler, \textit{Changing Backgrounds, supra} note 100, at 143.
delays and Senate opposition impact district court nominees as well. It will then evaluate three stages of the confirmation process at which nominations are delayed. First, it will expand on the discussion from Section II regarding the Obama Administration’s slow start and modest approach to judicial nominations. This section will compare the Obama and Bush Administrations, shed light on why judicial nominees were not a major priority in the President’s first year in office, and demonstrate why this slow start might hamper his ability to overcome the vacancy crisis. Next, it will examine the delays in the initial nomination process. While it is often argued that the President simply takes too long to settle on nominees, this section will demonstrate that Senate procedures are at least partially responsible for pre-nomination delays. Finally, it will discuss the long delays between nomination and Senate floor vote. Unlike the others, this section most closely mirrors the popular narrative of partisanship impacting judicial confirmations.

a. The Nuclear Option and the Senate Confirmation Conflict

Today’s intense confirmation standoff and the volatile environment in which lower court nominees are considered can be traced back to 2005. That spring, Democrats filibustered ten court of appeals nominees they claimed were out of the ideological mainstream.104 While Republicans claimed such filibusters were unprecedented and demanded the Democrats allow floor votes, Democrats accused Republicans of having done the same thing to President Clinton.105 Tensions boiled over in May of that year when Republicans unveiled the nuclear option: they threatened to change the rules of the Senate to eliminate the filibuster.106

106 Id.
The Senate was originally created to be a body of compromise, the saucer in which the legislative tea cools.\textsuperscript{107} To that end, any senator is allowed to filibuster a Senate action to prevent a motion from moving forward and to compel further debate on the subject. In 1917, the Senate instituted a cloture system to limit the use of filibusters.\textsuperscript{108} Before a floor vote can be held today, sixty senators must agree to end debate. Judicial confirmations thus often turn on whether the opposition in the Senate will allow a floor vote on a particular nominee. If the opposition party has at least 41 members, it can prevent the Senate from ending debate and deny a nominee a floor vote, even if a majority of senators support that nominee’s confirmation.

The majority party in the Senate, however, is free to change the Senate’s rules. If the majority changes the 60-vote cloture requirement to a 50-vote requirement, the majority would always be able to end debate and cloture would become irrelevant. This maneuver is known as the nuclear option because its enactment would have “blow[n] up the Senate.”\textsuperscript{109} If Republicans used the nuclear option, Democrats warned in 2005, “they would have ground the Senate to a halt.”\textsuperscript{110} They threatened to retaliate by using every available procedural device to derail President Bush’s agenda.\textsuperscript{111}

Minority party senators oppose the nuclear option for two main reasons. First, and most obviously, it would dramatically limit the senators’ power by eliminating the minority’s leverage. Second, it would change the nature of the Senate. While those in favor of changing the

\textsuperscript{108} Grieve, \textit{supra} note 105. While the 1917 rule required a two-thirds majority to end debate, a 1975 rule changed it to the current three-fifths requirement.
\textsuperscript{109} Toobin, \textit{supra} note 104.
\textsuperscript{110} Jed Shugerman, \textit{Revisiting the Senate’s Nuclear Option}, BOSTON GLOBE, Sept. 12, 2005, http://www.boston.com/news/globe/editorial_opinion/oped/articles/2005/09/12/revisiting_the_senates_nuclear_option/. This phrase was used almost universally at the time.
\textsuperscript{111} Toobin, \textit{supra} note 104 (quoting former Senator Tom Daschle: “It takes unanimous consent to stop the reading of bills, the reading of every amendment. On any given day, there are fifteen or twenty nominations and a half-dozen bills that have been signed off for unanimous consent. The vast work of the Senate is done that way. But any individual senator can insist that every bill be read, every vote be taken, and bring the whole place to a stop.”).
rules would argue it prevents partisan obstruction, many senators argue that removing the protection of filibusters give the minority would “undercut[] our fundamental system of checks and balances” and “promote one-party rule.”112 The Senate, they argue, would cease to be a body of compromise.

In 2005, however, a last-minute détente was reached.113 A group of fourteen senators, the aptly named Gang of Fourteen, agreed to allow votes on some nominees and to allow Democrats to filibuster two.114 The senators agreed to reserve the filibuster of judicial nominees only for “extraordinary circumstances,” a term left undefined.115

By 2009, however, the parties’ roles were reversed. In March of that year, Senate Republicans sent President Obama a letter explaining, “if we are not consulted on, and approve of, a nominee from our states, the Republican Conference will be unable to support moving forward on that nominee.”116 In essence, they threatened to filibuster. Tensions have been high since. In April of this year, Senate Majority Leader Harry Reid threatened the nuclear option.117

The current battle over judicial confirmations must be understood in light of the nuclear option. All Senate discussions of judicial nominees carry undertones of threats and gamesmanship.118 This environment bears on the topics discussed in the next three subsections. First, the President was hesitant to nominate judges in his first year for fear the conflict would

112 Statement of Senator Patrick Leahy on the Nuclear Option (May 23, 2005), http://votesmart.org/public-statement/98639/statement-of-senator-patrick-leahy-on-the-nuclear-option#.UYh9kyt4ZMN. See also Toobin, supra note 104 (quoting Senator Charles Schumer: “[T]he nuclear option dramatically changes this place. “It makes the Senate into the House of Representatives. We are no longer the cooling saucer. The whole idea of the Senate is you need a greater degree of bipartisanship, comity, than in the House.”).


114 Id.

115 Id.


118 Toobin, supra note 113.
derail his agenda. Next, judicial nominees are often delayed at the pre-nomination stage because the President must work with home-state senators or risk opposition after nomination, as promised in the 2009 letter. Finally, the post-nomination phase has been ripe with conflict over some of the President’s younger and more controversial nominees. The spring of 2013 has seen tensions rise and the possibility of the nuclear option is once again on the table.

b. A Matter of Priority: President Obama’s Slow Start to Judicial Nominations

As conservatives might proudly declare and liberals might begrudgingly admit, the Bush Administration’s internal nomination process was the gold standard for circuit and district court nominations. President Bush’s “well-oiled judicial nominating machinery” included two offices, the Department of Justice’s Office of Legal Policy and the White House Counsel’s office, that worked together to select nominees. This “Judicial Selection Committee” operated during the Reagan years and was reinstated when the younger Bush became President. Conservative academics and former officials were also a “guiding force for the judicial selection processes in the W. Bush White House.” This structure was “put in place at the outset” of the Bush Administration “to achieve a lasting legacy on the federal bench.”

In addition to this behind-the-scenes selection process, Bush made a political issue of his commitment to conservative jurists. He announced his first slate of eleven circuit court nominees, “including several outspoken conservatives,” in a public ceremony soon after he took

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119 See infra Section IV.b.
120 See Letter from Republican Conference, supra note 116; see infra section IV.c.
121 See infra Section IV.c.
123 Goldman, supra note 18, at 260-61.
124 Id.
125 Id. at 260 (citing the influence of Jay Sekulow, Leonard Leo, C. Boyden Gray, and Edwin Meese, III).
126 Id.
Ultimately, President Bush’s focused strategy was successful. In addition to confirming Chief Justice Roberts and Justice Alito to the Supreme Court, “a veritable all-star team of conservative judges with strong appeal to the Republican base had been seated on the appellate bench during the first six years of the W. Bush presidency.”

President Obama made “judicial nominations a lower political priority.” Despite a higher number of judicial retirements than Clinton or Bush faced, Obama nominated fewer nominees during his first term than either of his two immediate predecessors. “The White House in that first year did not want to nominate candidates who would generate rancorous disputes over social issues that would further polarize the Senate,” former White House counsel Gregory Craig explained. It focused instead on its legislative agenda. Then, the two Supreme Court vacancies “prompted aides to set aside most work on lower judgeships” and “personnel upheavals” plagued the offices charged with evaluating prospective nominees. Before long, vacancies and emergencies had risen to alarming levels.

Only after the Affordable Care Act debate wound down did the Administration focus on nominations. Obama nominated a young, liberal law professor, Goodwin Liu, to the United States Court of Appeals for the Ninth Circuit and reached out to notable liberal scholars to gauge their interest in the judiciary. He nominated 99 district court judges in the 112th Congress, as

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128 Goldman, supra note 18, at 260.
129 Savage, supra note 20.
130 Wheeler, Dysfunctional Process, supra note 4, at 3.
131 Savage, supra note 20.
132 Id.
133 Id.
134 Id. (stating Liu “was arguably the first Obama nominee who was the ideological equivalent of some of the most controversial Bush nominees.”).
opposed to only 44 during the 111th Congress.\textsuperscript{135} He also nominated an unprecedented number of women and racial and sexual minorities to the federal bench, and put six left-leaning judges on the United States Court of Appeals for the Fourth Circuit.\textsuperscript{136} Still, because of his slow start and the delays we will outline in the next two sections, he will likely play catch-up with vacancies for the remainder of his Presidency.

c. Delays in the Judicial Nomination Process

While the previous section discussed the internal problems in the Obama Administration that led to its poor start on nominations, this section takes a closer look at two distinct phases of the confirmation process itself: the pre-nomination phase and the post-nomination phase. The following charts are illustrative:

\begin{figure}
\centering
\includegraphics[width=\textwidth]{United_States_District_Court_Nominees_Stages_of_Delay.png}
\caption{United States District Court Nominees: Stages of Delay\textsuperscript{137}}
\end{figure}


\textsuperscript{136} Savage, supra note 20; Rucker, supra note 3.

\textsuperscript{137} Wheeler, Obama’s First Term, supra note 16.
Although district and appellate nominees are delayed at all stages of the process, these figures demonstrate that pre-nomination delays have a significantly larger impact on district court vacancies, while post-nomination delays are more common to circuit court nominees.

Subsection i will examine the causes of pre-nomination delays, while subsection ii will discuss post-nomination delays and the potential for the resurfacing of the nuclear option.

i. Pre-Nomination Delays: Shared Responsibility and Senatorial Courtesy

Obama’s nominees have received hearings more quickly than Bush’s nominees, but have faced longer delays in being nominated in the first place. The vacancy-to-nomination stage of the Obama judicial appointment process is over 120 days longer than during Bush’s presidency and just over a month longer than during the Clinton Administration.\(^{139}\) Some degree of delay is undoubtedly due to Obama’s “slow start” in submitting nominations.\(^{140}\) His focus on legislative

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\(^{138}\) Id.

\(^{139}\) Id.

matters over nominations and the staff turnover on his judicial selection team led to few and slow nominations in his first year. However, two additional factors outside of Obama’s control, senatorial courtesy and the ABA ratings process, largely have contributed to these delays.

A. Senatorial Courtesy and Blue Slips

The practice of allowing home-state senators to select or approve judicial nominees has led to substantial delays. Traditionally, “Senators of the President’s party . . . have played the primary role in selecting candidates for the President to nominate to federal district court judgeships in their states” and an “influential, if not primary role” in recommending circuit court nominees. Members of the opposing party play a “consultative” role in the process. This practice of “senatorial courtesy,” which “dat[es] back to 1789,” historically meant that the Senate would not confirm judicial nominees if the home state senators did not support them. Since 1917, the Chair of the Senate Judiciary Committee sends a blue form, called a “blue slip,” to senators of the nominee’s party requesting their feedback on the nominee. If a senator does not object to the nominee, he or she simply returns the slip to the Chair. If the senator does object or has reservations, he or she can withhold the slip. Some Judiciary Committee chairs, including Senator Leahy, choose not to consider nominations until both senators return their slips. This allows senators of both parties to wield a significant level of influence over nominations and leads to perhaps the greatest delays in the confirmation process.

141 See Section IV.b.
143 Id.
144 Id. at 5.
145 Id. at 10.
146 Id.
147 Id. at 10.
Blue slip delays take two forms. In the first, a senator can simply withhold the blue slip of any nominee they oppose. Senators of both parties have withheld blue slips during Obama’s presidency. Senator Bob Menendez, a Democrat from New Jersey, withheld his blue slip for Third Circuit nominee Patty Shwartz for over a year before relenting,\textsuperscript{149} while the Republican senators from Arizona have successfully blocked district court nominee Rosemary Marquez since 2011.\textsuperscript{150} More commonly, however, blue slips result in pre-nomination delays. “[T]he President has been reluctant to make a nomination without feeling confident that both home-state Senators will return their blue slips on that nominee.”\textsuperscript{151}

While Bush’s White House took the lead in consultations with home-state senators,\textsuperscript{152} Obama has not had that luxury. Because the March 2009 Republican Conference letter made it clear senators would oppose nominees if they were not first consulted, the Administration has worked closely with senators to jointly select nominees.\textsuperscript{153}

It is too conclusive, however, to blame these delays on partisanship. Although states with two Republican senators have longer vacancy-to-nomination delays than states with mixed delegations or states with two Democratic senators, Russell Wheeler of the Brookings Institute cautions that such figures are unhelpful.\textsuperscript{154} Long-pending nominations in one state or another can significantly affect the statistics, and the studies do not account for whether the White House

\textsuperscript{151} Alliance for Justice, State of the Judiciary, supra note 148, at 10.
\textsuperscript{152} Goldman, supra note 18, at 260.
\textsuperscript{153} Wheeler, Dysfunctional Process, supra note 4, at 9; See Section IV.a.; Letter from Senate Republican Conference, supra note 116.
“has been slower to suggest potential nominees in states with Republican senators, or to react more slowly to suggestions.”\(^{155}\) Perhaps the most significant result of Wheeler’s research in this area is that states with two senators of Obama’s own party have longer vacancy-to-nomination delays than all of Bush’s district court nominees combined.\(^{156}\) In essence, regardless of political party, the entire process has slowed.

Several senators have tried to speed up this process by instituting judicial selection committees in their states. In Colorado, Senators Mark Udall and Michael Bennet established a bipartisan committee that “advertised the vacancy, took applications, conducted interviews and background checks, and then made recommendations to the senators.”\(^{157}\) Last month, Texas Senators John Cornyn and Ted Cruz announced a similar, bipartisan committee “composed of leading Texas attorneys who will screen and recommend to the Senators nominees for vacancies on the federal bench.”\(^{158}\)

However, while these committees may promote “bipartisanship” and “transparency,” they might actually contribute to delays.\(^{159}\) According to Wheeler, in Obama’s first term, “the non-committee states produced proportionately more nominees (as a proportion of vacancies) and produced them faster.”\(^{160}\) Committee state nominees also took longer to be confirmed once nominated than nominees from non-committee states.\(^{161}\) Additionally, while the confirmation rates were similar for committee state nominees and non-committee state nominees, committee

\(^{155}\) Id. at 7.
\(^{156}\) Id.
\(^{159}\) Wheeler, Dysfunctional Process, supra note 4, at 13
\(^{160}\) Id.
\(^{161}\) Id.
state nominees received more negative votes than non-committee state nominees.\textsuperscript{162} Although these committees may eventually become productive, they currently do not lead to faster confirmations.\textsuperscript{163}

\textbf{B. ABA Ratings}

The ABA ratings process has also delayed nominations. When Obama took office, he reinstated the practice of submitting potential nominees’ names to the American Bar Association for qualification ratings.\textsuperscript{164} The ABA investigates nominees’ qualifications and rates them as “well qualified,” “qualified,” or “not qualified.”\textsuperscript{165} While Bush abolished this practice at the outset of his administration, allowing the ABA to rate prospective judges only after he had nominated them, Obama insists that the ABA rate potential judges prior to nomination.\textsuperscript{166} This introduces an inherent delay that Bush’s nominees did not face.\textsuperscript{167}

Further compounding this delay, the ABA assigned low ratings to fourteen of Obama’s potential nominees.\textsuperscript{168} Such opposition is unprecedented. “The number of Obama prospects deemed ‘not qualified’ already exceeds the total number opposed by the group during the eight-year administrations of Presidents Bill Clinton and George W. Bush.”\textsuperscript{169} Because the President has yet to formally nominate a judge that the ABA rated “unqualified,” these fourteen vacancies remained empty while the Administration worked with home-state senators to find replacement nominees.\textsuperscript{170}

\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Tobias, supra note 22, at 776.
\textsuperscript{166} Tobias, supra note 22, at 776.
\textsuperscript{167} Tobias, supra note 22, at 774.
\textsuperscript{168} Savage, supra note 165.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
While the reasoning for this higher-than-usual rejection rate is unclear, some “question whether the panelists – many of whom are litigators – place too much value on courtroom experience at the expense of lawyers who pursued career paths less likely to involve trials, like government lawyers and law professors.” This logic would actually comport with current trends in nominations, as such lawyers comprise an increasing portion of Obama’s nominees. Whatever the reasoning for these low grades, however, the ABA’s ratings do not always correlate with the Senate’s ultimate vote on a nominee. For example, in 2010, the ABA rated nominee Gloria Navarro of Nevada as Qualified/Not Qualified. She received unanimous support in the Senate, however, and was confirmed 98-0.

**ii. Post-Nominations Delays and the Return of the Nuclear Option**

While a number of Obama’s district court nominees waited significant amounts of time for floor votes, it is more common for circuit court nominees to be delayed at this stage of the proceedings. Although pre-nomination delays have a greater impact on vacancies, particularly in the district courts, post-nomination delays are more public, more combative, and fuel much of the narrative about ideological nominees and obstructionist senators. These battles also poison the political environment in which all nominees are considered, rendering controversial even those nominees who are otherwise universally supported.

Once nominated, Obama’s circuit court nominees receive hearings much faster than Bush’s nominees (220 days to 63 days), but wait significantly longer for the minority to allow confirmation votes after those hearings take place (177 to 63 days). One natural observation is that Democrats during Bush’s presidency might have done their due diligence prior to the

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171 *Id.*
172 See Section III.b.
174 Wheeler, *Obama’s First Term*, *supra* note 16.
hearing stage, while Republicans during Obama’s presidency might do their due diligence after the hearings. Democrats argue, however, that Republicans are stalling.

Democrats commonly claim that even their uncontroversial nominees are delayed. They point to the nominations of William Kayatta to the First Circuit and Robert Bacharach to the Tenth Circuit, who “were confirmed 387 and 399 days, respectively, after their initial nominations.”\textsuperscript{175} Despite long post-nomination wait times, Judges Kayatta and Bacharach were both confirmed overwhelmingly after the President’s second inauguration. “Even when we have a nominee for a circuit court that came from a Republican senator that was reported unanimously, it has taken almost a year to get that person confirmed,” White House Counsel Kathryn Ruemmler said.\textsuperscript{176}

It is possible, however, that these delays had less to do with opposition to the nominees and more to do with the timing of their nominations. The unwritten Thurmond Rule provides that the opposition party will not consider a president’s judicial nominees close to a presidential election.\textsuperscript{177} The minority hopes to wait until a president of their party is elected.

In June of last year, Senator McConnell announced that no further circuit court nominations would be considered until after the November election.\textsuperscript{178} District court nominees, however, were confirmed until September.\textsuperscript{179} Regardless of whether or not this is a good policy, it is a foreseeable, political reality. The blame, it seems, should be shared. Because the President did not turn a serious eye to nominations until after his first year in office, he only had a window of two years before the informal Thurmond Rule applied. In the cases of nominees like Kayatta and

\textsuperscript{175} Wheeler, \textit{Wait to Confirm Judges}, supra note 5.
\textsuperscript{176} Viser, supra note 10.
\textsuperscript{178} Id.
Bacharach, this likely extended their nominations – and their judgeships’ vacancies – by several hundred days.

Then there are the more controversial nominees. The most contentious nominations during Obama’s presidency have been young jurists seen as potential future Supreme Court nominees. While many Obama nominees have faced significant delays, only two have been successfully filibustered. Liu, then touted as a potential Supreme Court nominee, was defeated in 2011 in the “first major appeals-court nomination fight of the Obama presidency.” Liu’s liberal scholarship and criticism of Justices Roberts and Alito were likely to blame for his defeat. Despite winning support from a majority of senators, he was defeated on a cloture motion and Obama withdrew his nomination.

In March of this year, Republicans successfully filibustered their second Obama nominee, Caitlin Halligan, the general counsel for the Manhattan District Attorney’s office, who had been nominated to the DC Circuit, often seen as a stepping-stone to the Supreme Court. Republicans targeted Halligan for a brief she wrote advocating liability for gun manufacturers, and successfully filibustered her nomination in March. The President then withdrew her nomination.

This summer, the Senate will consider the nomination of Sri Srinivasan, principle deputy solicitor general, to the DC Circuit. Srinivasan is a former clerk to Justice O’Connor, has served in both the Obama and Bush administrations, and has argued 20 cases before the Supreme

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180 See infra Sections IV.e.
183 Toobin, supra note 113.
184 Id.
185 Id.
Court. Jeffrey Toobin has gone so far as to call Srinivasan a “Supreme Court nominee-in-waiting,” stating that if he is confirmed to the DC Circuit, “he’ll be on the Supreme Court before President Obama’s term ends.” While such claims are certainly speculative, the stakes are high for both parties, and both parties seem ready for a fight.

In advance of Srinivasan’s confirmation hearing, the tension over judicial nominees is rising to levels unseen since 2005. However, while Republican Senator Chuck Grassley and Democratic Senator Patrick Leahy have recently traded accusations about the process, both Senators frame the issues misleadingly. Grassley compares the fourteen nominees confirmed already this year to the one nominee confirmed at this time in Bush’s fifth year, but neglects the fact that most of those nominees are individuals like Kayatta and Bacharach whose nominations were not considered last year. He also blames the White House for the vacancy crisis by referring to the vacancies with no nominee, but does not mention senatorial courtesy or the impediments to speedy nominations. Leahy similarly points to the significant increase in time from hearing to floor vote between the Bush and Obama administrations, but neglects to mention that Bush nominees waited far longer to get hearings.

In April, Senator Grassley introduced the Court Efficiency Act. This law would add a seat to the 2nd and 11th Circuits, while reducing the number of seats on the DC Circuit from 11 to

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190 Bendery, *supra* note 188.
191 Grassley, *supra* note 189.
Grassley believes this will redistribute judgeships to circuits where the help is more needed, while more skeptical commentators draw comparisons with Roosevelt’s court packing plan. Regardless, the posturing by both sides does little to address the vacancy crisis. This plan would only add two seats to extra courts, while the current political battle prevents a larger number of nominees from being considered.

The nuclear option, similarly, would only aggravate the vacancy crisis. After the Halligan filibuster in March, Democrats threatened its use. “[W]e as a body have the power on any given day to change the rules with a simply majority,” Senator Reid said in April. “If the Republicans in the Senate don’t start approving some judges . . . we’re going to have to take more action.” His threats likely refer specifically to Srinivasan.

If Reid follows through on his threat and changes the Senate rules, Republicans would use other maneuvers to block legislation or even nominees, as Democrats would have eight years ago. The Senate, and the government, could come to a standstill. Even if it were successful in shepherding through current nominees, however, the costs would be too high, as it could harm the court’s credibility further by seating judges confirmed by a less-intensive Senate evaluation. While the nuclear option’s impact would have been significant in 2005, it would be catastrophic today. With vacancies high and caseloads climbing, the judiciary cannot afford for the Senate to be “ground to a halt.” It needs a body of compromise.

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8. This would not affect Srinivasan’s nomination, as he would be the 8th judge on that court if confirmed.
9. Id.; Alex Seitz-Wald, GOP Plots to Rig the Court, SALON (Apr. 11, 2013), http://www.salon.com/2013/04/11/the_gop_plot_to_rig_the_court/.
11. Id.
12. Id.; See Toobin, supra note 187; Toobin, supra note 113.
13. See Shugerman, supra note 110.
V. Conclusion

The rise in vacancies over the last four years has produced profound effects across the federal judiciary. The confluence of the vacancy crisis with the trend of rising caseloads has led to an understaffed and overworked federal bench and to significant delays in civil cases. The effect on judges and potential litigants is severe. The effect on the economy may be dire. The effect on the federal judiciary, however, is in the President’s and Senate’s hands.

Ultimately, the President and Senate must work together and work faster to address the vacancy crisis; there must be increased communication and compromise at both stages of the confirmation process. With tensions rising in the Senate, however, and the nuclear option looming, a continued fight over specific judges may lead to a bench with fewer and fewer.