5-2016

Filling Federal Court Vacancies in a Presidential Election Year

Carl W. Tobias

University of Richmond, ctobias@richmond.edu

Follow this and additional works at: http://scholarship.richmond.edu/law-faculty-publications

Part of the Judges Commons, and the Supreme Court of the United States Commons

Recommended Citation


This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.
FILLING FEDERAL COURT VACANCIES IN A PRESIDENTIAL ELECTION YEAR

Carl Tobias *

Scholars and politicians who closely track the federal judicial selection process appreciate that confirmations slow and ultimately halt over presidential election years, a phenomenon which has greater salience in a chief executive’s last administration. That policy comprises numerous strands. Important are the conventions—which have permitted the approval of many superb, uncontroversial district court nominees routinely through the fall of most presidential election years and in certain lame duck sessions—while allowing a number of capable, mainstream appellate nominees to manage consideration until the August Recess. The traditions derive from respect for voters’ preferences expressed in the elections, the incoming chief executive, who should have the opportunity to fill vacant judicial posts, and new senators, who must discharge their constitutional responsibility to provide advice and consent on selections.

Nevertheless, GOP members have not always followed these customs and other venerable conventions throughout President Barack Obama’s years. For instance, Republicans automatically hold over Judiciary Committee votes on able, moderate candidates for a week, and the GOP leadership denied talented, centrist appeals court nominees’ final ballots after mid-June 2012. Ever since winning the upper chamber in November 2014, Republicans have incessantly promised to duly effectuate “regular order” again.1 However, the Senate confirmed merely eleven jurists in 2015, which is the fewest since Dwight Eisenhower was Presi-

---

* Williams Chair in Law, University of Richmond School of Law. Thanks to Peggy Sanner and Katie Lehnen for fine ideas, Leslee Stone for excellent processing as well as Russell Williams and the Hunton Williams Summer Endowment Fund for generous, continuing support. The data in this piece were current when the piece went to print on April 25, 2016. Remaining errors are mine.

1. See infra Part I.B.
dent. Because the United States confronts seventy-four openings (thirty-two “judicial emergencies”), which plainly undermine the delivery of justice, and the GOP will keep stalling and ignoring customs applied over presidential election years, 2016 court appointments merit scrutiny.

The first section of this article canvasses selection in Obama’s tenure, ascertaining that Republicans cooperated little and contravened numerous traditions, especially after the party captured a majority. Thus, section two analyzes why the GOP did not collaborate and the consequences. Because that obstruction—which undercuts justice and regard for the coequal branches of government—will actually continue across 2016, the piece surveys devices, which could rectify or ameliorate those critical impacts this presidential election year.

I. JUDICIAL SELECTION IN THE OBAMA ADMINISTRATION

A. The First Six Years

Selection proceeded well Obama’s first term and a half when Democrats controlled the Senate, particularly in contrast to 2015. He aggressively consulted home state politicians, seeking their guidance and requesting proposals of fine, mainstream candidates, advice which Obama usually followed. These endeavors promote cooperation, as senators defer to colleagues in jurisdictions with vacancies because of mutual respect, and they can and do halt processing by not returning blue slips—a tradition which permits consideration to advance. Despite solicitous, persistent White House cultivation of all lawmakers, many failed to coordinate, slowly adopting processes or submitting prospects, while some have not even tendered picks.

2. Jennifer Bendery, Congratulations, GOP. You’re Confirming Judges at the Slowest Rate in 60 Years, HUFFINGTON POST (Sept. 17, 2015), http://www.huffingtonpost.com/entry/obama-judicial-nominations_55faced7e4b0820d9178a5c.


Republicans cooperated with the Democratic majority in swiftly arranging committee hearings at which five nominees testified every three weeks, carefully questioning them in the panel sessions and effectively posing later written queries when indicated. However, the GOP automatically held over discussions and committee votes one week for all choices recommended but fifteen of 350 excellent, moderate nominees.

Republicans slowly agreed to most possibilities’ chamber debates, if warranted, and yes or no ballots, requiring exceptional, consensus selections to languish across months until Democrats petitioned for cloture. Republicans also demanded roll call votes and numerous debate minutes yet used virtually none for superior, uncontroversial prospects, many of whom captured appointment without opposition, thereby needlessly consuming precious Senate floor time. Those procedures stalled confirmations and meant openings remained close to ninety for much of the half decade following August 2009, numbers that were unprecedented.

In the 2012 presidential election year, these strategies continued and increased. The GOP regularly held over committee discussions and ballots for one week, rejected prompt floor vote on confirmations, and mandated roll call ballots for accomplished, noncontroversial designees who easily secured confirmation, while final appellate votes ceased in mid-June. With Obama’s re-election, Republicans cooperated with the Democratic majority in swiftly arranging committee hearings at which five nominees testified every three weeks, carefully questioning them in the panel sessions and effectively posing later written queries when indicated. However, the GOP automatically held over discussions and committee votes one week for all choices recommended but fifteen of 350 excellent, moderate nominees.

Republicans slowly agreed to most possibilities’ chamber debates, if warranted, and yes or no ballots, requiring exceptional, consensus selections to languish across months until Democrats petitioned for cloture. Republicans also demanded roll call votes and numerous debate minutes yet used virtually none for superior, uncontroversial prospects, many of whom captured appointment without opposition, thereby needlessly consuming precious Senate floor time. Those procedures stalled confirmations and meant openings remained close to ninety for much of the half decade following August 2009, numbers that were unprecedented.

In the 2012 presidential election year, these strategies continued and increased. The GOP regularly held over committee discussions and ballots for one week, rejected prompt floor vote on confirmations, and mandated roll call ballots for accomplished, noncontroversial designees who easily secured confirmation, while final appellate votes ceased in mid-June. With Obama’s re-election,

5. Goldman et al., supra note 3, at 16–17; Tobias, Senate Gridlock, supra note 3, at 2242–43.
6. It found most fine. Tobias, Senate Gridlock, supra note 3, at 2242–43. Six of the fifteen were for the Arizona District that was an emergency. Carl Tobias, Filling the District of Arizona Vacancies, 56 ARIZ. L. REV. SYLLABUS 5, 5-6 (2014) [hereinafter Tobias, Arizona Vacancies].
10. Tobias, Senate Gridlock, supra note 3, at 2246; supra notes 6–8 and accompanying text; infra note 24 and accompanying text.
11. Tobias, Senate Gridlock, supra note 3, at 2252.
Democrats hoped that Republicans would actually enhance collaboration, but they did not, and this recalcitrance culminated in June 2013 when he proffered three well qualified, mainstream, diverse recommendations for the U.S. Court of Appeals for the District of Columbia Circuit, the nation’s second most important court. The GOP refused each a floor ballot, and frustration with incessant obstruction provoked Democrats to cautiously exercise the “nuclear option,” which limited filibusters. The measure’s November 2013 implementation, which Republicans asserted enabled the 113th Congress to approve 134 twenty-seven persons in the 2014 lame duck session. After that mechanism’s explosion, Republicans forced Democrats to invoke cloture on all nominees until 2015.

B. Selection in 2015

Once the GOP became the majority, this lack of cooperation persisted and eclipsed that when Republicans were the minority. The leadership has constantly said that it would dutifully restore the world’s greatest deliberative body to regular order. Members duly recited this litany to describe reinstitution of the normal processes which ostensibly governed the chamber before Democrats subverted them. Early in January 2015, Mitch McConnell (R-Ky.), the new Majority Leader, proclaimed: “We need to return to regular order, ... to a normal: the GOP has failed. ...”


1. The District Court

a. The Nominations


17. See, e.g., 160 CONG. REC. S4679, S4681 (daily ed. July 22, 2014) (statement of Sen. Hatch) (“It is past time to restore the Senate’s rightful place in our constitutional order.”).
to regular order,\textsuperscript{18} and he directly reiterated that phrase over subsequent months.\textsuperscript{19} Charles Grassley (R-Iowa), the Judiciary Committee Chair, propounded analogous views. Emblematic was his January 21 statement that the Committee would deploy regular order in assessing judicial nominees.\textsuperscript{20} Despite many pledges, the GOP has failed to expeditiously offer suggestions for presidential review, committee hearings and ballots or chamber floor debates, when required, and final votes.

1. The District Court Process

a. The Nomination Process

Obama has continued to assiduously consult, seeking proposals from home state officers about well qualified, consensus picks, which he normally used by selecting them, as moderation and competence are Obama district possibilities' hallmarks.\textsuperscript{21} Notwithstanding his insistent cultivation of all legislators, many Republicans have declined to coordinate, slowly establishing procedures or forwarding candidates, and a few have chosen none.\textsuperscript{22} In early January 2016, thirty-six in forty-three (eight of nine appeals courts) openings lacking nominees and eighteen in twenty-one vacancies without them—which the U.S. Courts Administrative Office ("AO") dutifully classifies emergencies—were in jurisdictions that at least one GOP senator represents.\textsuperscript{23}

\textsuperscript{19} Id. at S155 (daily ed. Jan. 12, 2015); id. at S2767 (daily ed. May 12, 2015). This approach has encountered some criticism from across the aisle. See, e.g., id. at S2949 (daily ed. May 18, 2015) (statement of Sen. Reid); id. at S3223 (statement of Sen. Leahy). Other commentators have noticed the decline in judicial confirmations as well. Jim Manley, Has the Senate Really Turned a Corner?, WALL ST. J., (June 24, 2015) http://blogs.wsj.com/washwire/2015/06/24/has-the-senate-really-turned-a-corner/.
\textsuperscript{21} Most Presidents tap able centrists. Goldman et al., supra note 3, at 15–17; Tobias, Senate Gridlock, supra note 3, at 2240.
\textsuperscript{22} Goldman et al., supra note 3, at 17; ALLIANCE FOR JUSTICE, supra note 4.
The clearest example is Texas, which has the most U.S. openings, notwithstanding approval of three excellent, uncontroversial jurists by May 2015. In early January, it faced two circuit and seven district court vacancies, all lacking nominees with eight comprising emergencies, and for many of which the recommendation process had yet to begin or had stalled.\textsuperscript{24} Texas is not alone. Most crucial were Pennsylvania’s two empty Third Circuit seats and Western District openings in three of ten positions without nominees for multiple years,\textsuperscript{25} while Georgia had two unfilled Eleventh Circuit slots and the Northern District had a third of posts vacant several years before politicians reached a “deal” with Obama to fill them.\textsuperscript{26}

b. The Confirmation Process

i. Judiciary Committee Hearings


Chair alleged the public should expect no “discernible difference” between how the panel operates with GOP rather than Democratic leadership, suggesting it would provide hearings every few weeks that Congress was in session, a policy ex-Chair Patrick Leahy (D-Vt.) ably instituted the last three Congresses and Grassley, the Ranking Member over the 112th and 113th, helped effectuate. Disparities rapidly materialized, however. For instance, the next hearing occurred seven weeks after the first and the third eight weeks later, while the fourth and fifth came in June and July with the latest on September 30, October 21, and December 9. The March hearing was conducted for a pair of nominees and the summer hearings for three each, in comparison with the five Leahy typically evaluated.

In the April 20 debate on a Texas re-nominee, Grassley proclaimed Republicans matched the Democratically led Senate over President George W. Bush’s seventh year, because at the identical juncture, the “committee had held three nominee hearings for a total of 10 judges,” while the panel “already held 4 nomination hearings” [on] 6 judges. Harry Reid (D-Nev.), the Minority Leader, countered that the 2015 panel was “not having any hearings to speak of;” by June 8, 2007, “Democrats confirmed 18 judges, including 3 circuit court judges.”

ii. Judiciary Committee Discussions and Votes

Despite Grassley’s pledges, which he repeated at the February 12 meeting, the Chair held over votes from that session until Feb-

29. Hearing on Judicial Nominees Before the S. Comm. on the Judiciary, 114th Cong. (Mar. 11, 2015); id. (May 6, 2015); id. (June 10, 2015); id. (July 22, 2015); id. (Sept. 30, 2015); id. (Oct. 21, 2015); id. (Dec. 9, 2015).
30. Compare Hearings on Judicial Nominees Before the S. Comm. on the Judiciary, 114th Cong. (Mar. 11, June 10, July 22, 2015), with Hearings on Judicial Nominees Before the S. Comm. on the Judiciary, 113th Cong. (Jan. 28, Sept. 9, 2014); see supra text accompanying note 24 (noting many senators’ failure to tender picks for judicial nomination).
32. Id. He said four executive nominees, including for Attorney General, testified and that Obama’s nominees had been treated “extremely fairly,” as he named 309 judges versus 273 for Bush. Id. But see supra note 29, infra notes 33, 42, 44, 52.
ruary 26, retaining a practice the GOP used during Obama’s first term and a half. Those delayed were five superb, moderate U.S. Court of Federal Claims re-nominees whom the panel duly reported last year on unopposed voice votes and four superior, consensus district re-nominees, two for emergencies, with powerful support of the Republican party home state panel members: John Cornyn, Ted Cruz, Orrin Hatch, and Mike Lee.

iii. Floor Debates and Votes

McConnell concurred on few quick nominee debates and votes when he was the Minority Leader Obama’s initial six years, thus requiring Democrats to pursue cloture on numerous selections and eventually change filibusters. However, McConnell pledged additional cooperation in his new role as Majority Leader, while scheduling nominee floor debates and chamber ballots afforded a constructive opportunity for respecting this promise.

34. Executive Business Meeting Before the S. Comm. on the Judiciary, 114th Cong. (Feb. 26, 2015) [hereinafter Feb. 26 Executive Business Meeting]; see also Executive Business Meeting Before the S. Comm. on the Judiciary, 114th Cong. (Feb. 12, 2015); Josh Voorhees, Procedural Purgatory, SLATE (Mar. 29, 2015), http://www.slate.com/articles/news_and_politics/politics/2015/03/loretta_lynch_confirmation_mitch_mcconnell_and_the_gop_have_delayed_it_but.html; supra text accompanying note 20.

35. See, e.g., Executive Business Meeting Before the S. Comm. on the Judiciary, 113th Cong. (Sept. 11, 2014); Executive Business Meeting Before the S. Comm. on the Judiciary, 114th Cong. (Nov. 19, 2014); see also supra note 6.

36. Executive Business Meeting Before the S. Comm. on the Judiciary, 113th Cong. (Feb. 26, 2014); see also supra note 24.

37. Jan. 21, 2015 Hearing, supra note 20 (showing four District Judge nominees on the agenda); Feb. 26 Executive Business Meeting, supra note 34 (voting on judicial nominees); Grassley eschewed weekly meetings, unlike Leahy. See, e.g., Executive Business Meeting Before the S. Comm. on the Judiciary, 113th Cong. (June 12, 19, 26, 2014) (providing statements from Leahy during weekly meetings).


41. The delay troubles the four districts.


Nevertheless, McConnell actually set no fast pace. During Obama's first six years, the Senate confirmed only five nominees to the Court, re-nominees and otherwise, with powerfully superb, moderate, and four superior, nominees, with powerful power clusters of panel members: Lee.  

McConnell pledged to give “advice and consent” does not end with a presidency's final two years and carefully urged swift authorization of the Judicial Conference proposal for seventy-three nominations to provide the bench resources for delivering justice.  

McConnell failed to publicly say when the other three or five Court of Federal Claims aspirants would have votes. Nonetheless, he confirmed one trial level re-nominee on April 20, prompting Leahy's contention this was only the second appointment, which clearly proved that GOP “delay and obstruction” revealed the earlier Obama years was continuing, and his denunciation of the “slow trickle,” which harms courts and the public.  

When the Senate Republican leader denied rapid ballots for the

---

42. 161 CONG. REC. S2029–30 (daily ed. Mar. 26, 2015). They approved sixty-eight jurists during Bush's last two years and fifteen by the end of March 2007, in contrast to none in 2015. Id.  
last two district re-nominees, Reid compared the pair of jurists the GOP approved the entire year with sixteen over 2007, while he mentioned twenty nominees were pending in committee, emergencies doubled this year, and Republicans’ disregard of their constitutional responsibility was an “injustice to the American people.” These efforts seemingly provoked McConnell to schedule floor consideration near the Memorial Day Recess for the district re-nominees. In their debates, Leahy charged that persons enjoyed September nominations and January hearings, yet had languished for almost three months, contending José Olvera one of six district emergencies in Texas. He alleged Republicans persistently tendered excuses for nominee obstruction and criticized their “delay for delay’s sake” which miss[es] the bigger picture of the responsibility to fill openings. When the Senate approved a lone nominee in July, Democrats pursued unanimous consent requests on votes that were denied. For example, Charles Schumer (D-N.Y.) aptly contrasted the 2008 appointments results with this year, pleading for three designees’ consideration, but Grassley reiterated his notions about the 2014 duck session confirmations, which violated regular order, and how this year was like 2007, urging his colleague to “put that in your pipe and smoke it.”

c. Summary

Despite repeated protests from prominent GOP leaders, January until April 2016, with only four nominees granted merely the panel correspondence, Claims re-nominees were again stalled in 2015. This desultory pace in Obama’s first six years, for instance, the strong opposition to controversial re-nomination in 2007, and the GOP’s failure to confirm jurists before lengthening vacancies.

2. The Appellate Court

Both parties examined the selections are considered a political policy, which often取决于 Obama mustered majorities in the Court of Appeals for the First Circuit; Felipe Restrepo to the First Circuit. He marshaled partisan reasons, because GOP senators wanted circuit vacancies.
Despite repeated declarations of the regular order mantra by prominent GOP leaders since winning the chamber, from early January until April 12, 2015, they confirmed no district judges, with only four ahead of July.53 Before June, the committee also granted merely three hearings and one included two nominees; the panel correspondingly allowed four district and five Court of Claims re-nominees’ ballots on February 26 and two more April 23.54 This desultory record contrasts with Democratic endeavors in Obama’s first six years and even over Bush’s presidency; for instance, the strongest precedents were thirty-four of his fine, uncontroversial recommendations for districts, who realized confirmation in 2007, and Democrats’ systematic consideration of trial jurists before lengthy recesses.55

2. The Appellate Court Process

Both parties examine appellate nominees very closely because the selections are comparatively fewer, while they articulate more policy, which often has ideological effects. In November 2014, Obama mustered nomination of Kara Farnandez Stoll to the U.S. Court of Appeals for the Federal Circuit and District Judge Felipe Restrepo to the U.S. Court of Appeals for the Third Circuit.56 He marshaled no other appellate designees, primarily because GOP senators represent most jurisdictions without nominees, and they have
coordinated little. Stoll was an experienced, mainstream Federal Circuit practitioner, and Restrepo is a stellar, centrist jurist, and each is Latina/o. Neither received Committee hearings in 2014, as Obama proffered both following the 2014 elections.

Stoll’s March hearing proceeded smoothly, yet the panel only voted her to the floor on April 23 where she languished for a number of weeks. McConnell neglected to publicly declare when the superior prospect would be considered, but on June 4, he suggested that the GOP would halt final ballots on more Obama appeals court nominees. After press outlets reported this idea, a McConnell staffer proclaimed: “We’re going to continue to do judges. [There’s] not a shutdown. We probably will have a circuit court nominee.”

On June 8, Reid accused the Majority Leader with drastic obstruction—namely rejecting chamber ballots for appellate picks, which contravened his duty—by invoking McConnell’s floor speeches that pled for quick votes on all Bush 2008 circuit selections, while Reid alleged the GOP had yet to confirm one appellate possibility—“not even a consensus nominee such as Kara Stoll,” and urged her prompt consideration. As the Senate departed on the July 4 Recess without considering any person since late May, Leahy protested the inactivity, canvassed the dismal 2015 results and demanded expeditious votes for those on the floor, notably Stoll, which might have provoked her 95-0 July 7 ballot. If few circuit aspirants win confirmation, this would flatly sanction the GOP duty.

58. See sources cited supra note 56.
60. Executive Business Meeting Before the S. Comm. on the Judiciary, 114th Cong. (Apr. 23, 2015).
64. 161 CONG. REC. S4591 (daily ed. June 24, 2015). Leahy reiterated much data and

...
Mainstream Federal noncontroversial jurist, and hearings in 2014, hearings.

yet the panel only panel, and hearings when on June 4, he suggested more Obama appointed this idea, a to continue to do will have a circuit

er with drastic ob- her appellate picks, McConnell's floor 2008 circuit selection for one appellate pick such as Kara As the Senate delegating any person since passed the dismal for those on the and her 95-0 July 7 confirmation, this would fla-

the GOP duty. Id.; see supra notes 42-44, 60 and accompanying text; see also id. at S4678 (daily ed. July 7, 2015) (Stoll vote).

See supra notes 42, 46, 63-64 and accompanying text.


159 CONG. REC. S4516 (daily ed. June 17, 2013); Spencer, supra note 68. He was then a magistrate judge of this district. All modern Presidents elevate judges from lower courts. Tobias, Senate Gridlock, supra note 3, at 2258.


No nominee was picked before him. Hearings on Judicial Nominees Before the S. Comm. on the Judiciary, 114th Cong. (May 6, 2015).

pledged he would set a hearing once Toomey provided the blue slip. 73 A panel aide said it was evaluating the nominee’s background under “regular order.” 74 On the chamber floor the day the May hearing occurred, Reid deftly repeated Toomey’s laudatory descriptions of Restrepo while asking if Pennsylvanians wonder why the lawmaker failed to explain the talented nominee’s sliding “by his own party.” 75

Toomey later denied he was stalling Restrepo, and declared the committee was analyzing him but would only conduct a hearing after that concluded and promised to return the blue slip then, unless pertinent concerns surfaced. 76 On May 14, Toomey yielded, producing his blue slip, ostensibly due to the inquiry’s end. 77 The June 10 panel hearing was seamless, as Toomey voiced powerful support and Restrepo clearly answered questions. 78 The candidate was held over yet won approval on a July 9 unopposed voice vote. 79 Given how Grassley’s July 16, 2015, hearing occurred, Reid deftly repeated Toomey’s final ball No defensible cause Obama for emergency openi the same day, w port. 80 Observes plained slow proc

3. Summary of D

Reid and L Grassley’s claims ma when, for instance respe they can cept. 81 Essential to express advice pirsants in many


76. Put Toomey, I Am Not Delaying Judge L. Felipe Restrepo, PITI (May 15, 2015), http://www.post-gazette.com/opinions/letters/2015/05/15/I-am-not-delaying-Judge-L-Felipe-Restrepo-3rd-Circuit-nomination/stories/20150515068; see Tamari, supra note 68; see also supra notes 72–74 and accompanying text (discussing Toomey’s claims that he remained supportive of Restrepo, despite his failure to return the blue slip).


vote.79 Given how long most 2015 nominees waited coupled with Grassley’s July tirade and McConnell’s cryptic discussion of his June 4 allusion to circuit votes, it is not surprising that Restrepo’s final ballot was not conducted until January 11, 2016.80

No defensible idea supports Restrepo’s protracted delay, because Obama first made the jurist’s nomination in 2014 for an emergency opening. His lengthy wait contrasts to Stoll, proposed the same day, who had a March hearing and April Committee report.81 Observers also insistently contended partisanship explained slow processing.82

3. Summary of District and Appellate Processes

Reid and Leahy continuously and convincingly addressed Grassley’s claims with applicable data on confirmations and hearings.83 The Chair’s figures were rather persuasive, especially when, for instance, he employed analogous metrics, but in some respects they can lack pertinence, as data support numerous concepts.84 Essential is assiduously fulfilling the constitutional duty to express advice and consent and place talented, consensus aspirants in many vacancies, specifically emergencies.85 The most

---

79. Executive Business Meeting Before the S. Comm. on the Judiciary, 114th Cong. (June 25, July 9, 2015); see Executive Business Meeting Before the S. Comm. on the Judiciary, 114th Cong. (Apr. 23, 2015); Executive Business Meeting Before the S. Comm. on the Judiciary, 114th Cong. (Mar. 11, 2015).
80. 161 CONG. REC. S8443 (daily ed. Dec. 7, 2015) (confirmation vote, but not Restrepo’s); see John Tamari, Senate Schedules Vote on Long-Delayed Pa. Nominee Restrepo, PHILA. INQUIRER (Dec. 9, 2015, 9:22 PM), http://www.philly.com/philly/blogs/capitolinq/Senate-schedules-vote-on-long-delayed-PA-nominee-Restrepo.html (confirming the agreement on scheduling the January 11 vote); supra notes 59–64 (Stoll’s wait); supra notes 44–50 (re-nominees with much GOP support took ninety days from panel to final votes).
81. See supra text accompanying notes 44–45. She lacked his prior full inquiry, leaving unclear why he took six months, especially with his full 2013 canvass and later district court service. The Senate finally confirmed Restrepo 82/6 on January 11. 162 CONG. REC. S21 (daily ed. Jan. 11, 2015).
83. See supra notes 33, 42–50 and accompanying text.
84. See Russell Wheeler, Confirming Federal Judges During the Final Two Years of the Obama Administration: Vacancies up, Nominees down, BROOKINGS: FIXGOV BLOG (Aug. 18, 2015, 8:00 AM), http://www.brookings.edu/blogs/fixgov/posts/2015/08/18-obama-federal-judges-confirmation-wheeler.
relevant precedent is Democrats’ 2007–08 effort, which confirmed almost seventy Bush court picks. In sum, the 2015 processing record—approving one circuit and ten trial jurists—sharply contrasts to Democrats’ work at a comparable juncture.

II. THE REASONS FOR AND IMPLICATIONS OF THE PROBLEMATIC SELECTION PROCESS

A. Reasons

The explanations for appointments’ problematic condition are complex. Scholars and politicians robustly debate whether selection has always been troubled, but a number trace the modern “confirmation wars” to the pitched fight about Judge Robert Bork’s Supreme Court nomination three decades ago. Writers contend the process is effectively on a downward trajectory summarized by partisanship and serial obstruction in which the parties ratchet down the regime, while both consider any concession unilateral disarmament. For example, the most recent iteration derives from Republican accusations that Democrats stymied confirmations during the ending pair of Bush years and retaliated for that with unprecedented stalling in Obama’s tenure. Democratic frustration eventually provoked the nuclear option’s invocation that spurred Republicans to contend Democrats had abrogated the rules. Mandating cloture on all prospects concomitantly fueled Democrats’ endeavors that rapidly approved numerous ju-

86. Ten were circuit picks. See supra text accompanying note 42.


88. See generally ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989) (explaining that Robert Bork’s nominations was contentious); MARK OTTENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER’S ACCOUNT OF AMERICA’S REJECTION OF ROBERT BORK’S NomINATION TO THE SUPREME COURT (1992) (discussing the epic struggle that took place between senators, the press, staff, and civil liberty organizations over Robert Bork’s nomination).


90. See supra notes 6–10 and accompanying text.

91. See supra notes 12–14 and accompanying text.
rists over 2014’s lame duck session to which the GOP responded by profoundly delaying 2015 choices. In short, rampant partisanship and many severe paybacks seem to epitomize the process.

B. Implications

2015 inaction leaves the courts with seventy-four Article III judgeships empty, while the AO identifies emergencies for twenty-eight circuit and district court positions, a statistic which Republicans permitted to double since January of last year. Open posts were essentially at ninety for much of the five years which commenced in August 2009; the courts were only able to experience the comparatively low figure of seventy-four vacancies after Democrats had unleashed the nuclear option which prevented Republicans from mounting successful filibusters. However, 2015 inactivity can yield one hundred openings and perhaps fifty emergencies next year.

Slow confirmations have many deleterious impacts. They require fine, uncontroversial nominees to place lives and careers on hold dissuade myriad remarkable candidates from entertaining bench service. Protracted Senate assessment deprives tribunals of judicial resources which they critically need, impedes prompt, economical and fair case disposition, imposes substantially greater pressure on already overburdened jurists and compels litigants to wait years on resolution. These detrimental ef-

---

92. See supra notes 14–83 and accompanying text.
94. See sources cited supra notes 12-14, 39, 44.
ffects have also undermined citizen regard for selection and the government's coordinate branches. The above propositions suggest that proposals for improving confirmations warrant scrutiny.

III. SUGGESTIONS FOR THE FUTURE

The appointment of merely eleven court nominees in 2015 and other problematic phenomena show that the process will face serious complications over the 2016 presidential election year. Most important, approvals can gradually slow and come to a halt, and the judiciary could have nearly one hundred unfilled positions, almost half emergencies, were 2015 inaction to continue. Accordingly, Obama, the chamber, and members should now pledge to fulfill the shared constitutional duty for appointments, thus providing the bench sufficient resources to deliver justice, with meaningful cooperation throughout the nomination and confirmation procedures. GOP senators and party leaders ought to effectuate the regular order construct again by carefully deploying multiple ideas at the close of Bush's Administration, reinstituting strategies that expedite consideration and formulating new promising concepts, which directly fill the ample vacancies with highly qualified centrist.

All selection participants must canvass and implement numerous ways of ending or tempering the "confirmation wars." Integral will be stopping or ameliorating the vicious cycle of paybacks and strident, counterproductive partisanship which the majority's rhetoric and corresponding delay exemplify, namely the June suggestion by McConnell that few appellate nominees would receive confirmation and Grassley's petulant July denial of chamber votes until fall. Strikingly ironic about 2015 GOP conduct was the failure to even match approvals in numbers recent presidential election years.

98. See Cohen, supra note 96 (explaining the "real-life consequences of delay" due to "justice delayed syndrome"); Palazzolo, supra note 93 (noting citizens' discontent with civil cases piling up due to slow judicial appointment process); Ruger, supra note 96 (describing judicial appointment delay as having large impact on public).

99. For many specific ideas, see Shenkman, supra note 44, at 298–311; Tobias, Senate Gridlock, supra note 3, at 2255–65.

A. Selection in Modern Presidential Election Years

Because 2016 is one such year, for which peculiar conventions have developed, relatively diverse approaches could enjoy success. A major tradition has been that the nomination and confirmation processes slow, particularly at second terms' conclusion, and ultimately grind to a halt. This custom is mainly based on respect for voter preferences expressed in the November elections and for incoming chief executives and senators, who deserve the opportunity to proffer candidates and contribute advice and consent.

The tradition has allowed consideration of many accomplished, consensus trial level nominees into most autumns but rarely through lame duck sessions. For example, the chamber approved twenty-two Bush père choices in 1992 after June; seventeen of President Bill Clinton's over 1996 following June with eight after June 2000; a pair of Bush submissions later than June in 2004 combined with eight recommendations after this month over 2008; and fourteen Obama candidates across 2012. Those data could reveal Democratic Presidents' nominees fared better, yet many variables such as nomination timing, which party held a majority and the review's narrow scope, complicate analysis.

The tradition concomitantly permits strong, moderate appellate nominees to garner votes past the Memorial Day Recess, but occasionally later. A dramatic illustration was Stephen Breyer whose First Circuit Ted Kennedy (D-Mass.) persuaded after Ronald Reagan's 1980 defeat of President Jimmy Carter. More recently, the Sen-
ate approved eleven Bush père circuit aspirants during 1992 (six following June); two of Clinton’s in January 1996 with eight across 2000 (one later than June); while five Bush choices won approval over 2004 and four were confirmed in 2008 (none after that month either year). Five Obama 2012 jurists were appointed, but no candidate after mid-June. These figures show that both parties’ nominees met similar resistance, yet the GOP needs to greatly enhance the pace should it hope to equal the late Bush years’ performance.

In short, much consensus attends the conventions that nomination and confirmation processes slow and eventually halt in presidential election years, while circuit appointments conclude sooner, involving fewer approvals. However, considerable disagreement remains about the traditions’ exact contours, including when appointments could taper off and stop, while McConnell recently conceded that “there isn’t any particular official or unofficial cutoff date.” Those phenomena explain why the customs apparently have been different over time, honored in the breach and employed to capture partisan advantage.

B. Traditional Selection Measures

In this milieu, numerous tools can apply with more or less success. Politicians ought to seriously consider reinstituting a number of traditional measures, which proved efficacious during the last two Bush years, but that achieved checkered 2015 results witnessed by GOP inactivity. General examples abound. The President should continue assiduously consulting and quickly nominating prominent, mainstream candidates whom numerous home state officers respect the conventions and Obama or their preferences are considered or whom they wish to keep moving close and voting on these conventions so as to gain experience in Confirm.

Many specific notions even more insistently open posts surface that must supplement or stress numerous accomplishments panels, which applicants for vacant states have provided, to whom they advise closely scrutinize and Florida and Wisconsin promising judicial aspirants over tuning initiatives.

Senators also could signal notice of intent to compa future empty communing with just
home state officers diligently propose. Lawmakers must again respect the convention of abundantly deferring to home state colleagues and Obama, who has cultivated the legislators, heeded their preferences and sent a number of people Republicans tendered or whom they favored. Other general customs are the duties to keep moving able, consensus suggestions at a presidency's close and voting on cohorts of the aspirants near recesses, yet these conventions seem to be honored in the breach, and the 2015 experience in Committee, but particularly on the floor, was unpromising.

Many specific notions also could apply. The President should even more insistently consult senators from jurisdictions where open posts surface to accelerate nominations' pace. Those officials must supplement cooperation by especially promptly submitting numerous accomplished, unconstitutional prospects. Merit selection panels, which canvass, interview and effectively choose applicants for vacant court seats in Pennsylvania, Texas, and other states have provided help, but the commissions and lawmakers whom they advise can act slowly. Thus, politicians need to closely scrutinize diverse, promising models, such as the California and Wisconsin panels that efficiently yielded numerous capable aspirants over Bush's tenure, while concomitantly fine-tuning initiatives.

Senators also could move very expeditiously when judges proffer notice of intent to assume senior status and cautiously anticipate future empty positions by, for instance, respectfully communicating with jurists once they become eligible. Another...
concept is a mechanism enlisted in states that possess split delegations, notably Pennsylvania, which enables the senator from that party lacking the White House to submit able candidates. Other profitable solutions include presenting Obama multiple submissions and clearly ranking preferences, which enlarge his flexibility and cabin the necessity to start anew when Obama differs on the lone pick sent, a luxury the United States cannot afford in presidential election years.

If GOP lawmakers remain unreceptive to White House cultivation by acting slowly or forwarding minuscule possibilities, Obama could designate with no Republican delegation support; however, this proves unproductive. The Administration can also strike compromises about the kind of accomplished, moderate nominees whom Obama prefers. For example, he could rely more upon diversity vis-à-vis (1) age by championing older selections, as with Circuit Judge Andrew Hurwitz, the last 2012 nominee; (2) ideology or party affiliation, especially Republicans or Independents, namely a few Toomey candidates; (3) experience, such as prosecutors or civil defense lawyers; and (4) confirming administration, specifically Bush, with Circuit Judge Henry Floyd's elevation. All modern Presidents capitalize on the last tradition.

115. Toomey picks one in four whom Casey and he suggest. PENNSYLVANIANS FOR MODERN COURTS, Western District May Be Filled in 2015 (Mar. 2015); see supra note 69; sources cited infra note 142.
117. See supra notes 4, 22–26 and accompanying text.
118. He rarely uses it, as home state GOP members can retain blue slips and end processing. Goldman et al., supra note 3, at 16–18; Tobias, Senate Gridlock, supra note 3, at 2261; see supra notes 65, 71–72, 75–76.
119. 158 CONG. REC. S4108 (daily ed. June 12, 2012) (Hurwitz was sixty-six); 149 CONG. REC. S12,127 (daily ed. Sept. 29, 2003) (Carlos Bea was sixty-eight when Bush tapped him).
121. For appointee experiential data, see ALLIANCE FOR JUSTICE, BROADENING THE BENCH (2015).

123. Tobias, Senate Gridlock, supra note 3, at 2251 (nominating from the chief executive's party). For instance, President Obama appointed Solicitor General Elena Kagan to the Supreme Court. See supra note 124.
124. 160 CONG. REC. May 20, 2014 (Costa).
125. For example, Bush père elevated Justice Anthony Kennedy, See supra note 123.
126. That was contrary to the Bush administration's usual practice of naming for the Supreme Court from the S.D.N.Y. See supra note 123.
127. Shenkman, supra note 125; supra note 118.
128. Goldman et al., supra note 118, at 2250–51.
129. A study found that appointee experiential data are self-serving. See supra note 125.
130. Tobias, Filling the Supreme Court Vacancies: An Examination of Selections for the Supreme Court (1994).
it possess split dele-


cates. 115 Obama multiple


table candidates. 115

ig Obama multiple

which enlarge his


when Obama dif-


ced States cannot af-


White House cultiv-

ucle possibilities, 117
deligation support;

inistration can also

plished, moderate

, he could rely more

ng older selections,

st 2012 confirmee; 119
epublicans or Inde-

(3) experience, such

(4) confirming ad-

udge Henry Floyd’s

on the last tradi-


123. Tobias, Senate Gridlock, supra note 3, at 2255; see supra notes 68-69, 122 and ac-

companying text.


May 20, 2014) (Costa).

125. For example, Bush appointed Floyd, and Bush père and Clinton named So-

tomayor. See supra note 122.

126. That was controversial. See supra note 26; Tobias, Senate Gridlock, supra note 3, at

2251 (nominating from state in a circuit other than one where a vacancy occurs, as this

is a custom, not a rule). But see 28 U.S.C.A. § 44(c) (Supp. 2014).

127. Shenkman, supra note 44, at 299–300; Tobias, Senate Gridlock, supra note 3, at

2261; supra note 118.

128. Goldman et al., supra note 3, at 11–13; see Tobias, Senate Gridlock, supra note 3, at

2250–51.

129. A study found the many steps take time. See Gordon Bernant et al., Judicial Va-

cancies: An Examination of the Problem and Possible Solutions, 14 Miss. C. L. REV. 319,

332-333 (1994); Tobias, Senate Gridlock, supra note 3, at 2235.

130. Tobias, Filling Judicial Vacancies in a Presidential Election Year, supra note 100,

at 995.
Presidents' eighth year, a system which the Bush initiative epitomizes.\textsuperscript{131}

For its part, the Committee should provide greater numbers of hearings with more nominees while offering faster discussions and ballots.\textsuperscript{132} The Committee ought to survey additional productive notions that foster comparatively efficient review. A helpful approach, which Orrin Hatch (R-Utah) practiced when Judiciary Chair during the Bush years, was mounting abbreviated hearings for talented, centrist nominees.\textsuperscript{133} One illustration of this measure was the June 10 session for Restrepo and two district nominees, which entailed less than one hour with probing queries and frank, complete responses.\textsuperscript{134} Another solution that merits careful investigation would be holding discussions and votes the first time the panel considers nominees, specifically for emergencies, rather than delaying them a week, as happened with more than 350 Obama candidates, in particular Restrepo.\textsuperscript{135}

The Majority Leader needs to substantially expand floor debates and ballots. For instance, he could reestablish a valuable procedure which Democrats applied over Bush’s concluding years: having final votes regarding every strong, moderate district nominee on the floor before prolonged recesses, as Leahy cogently urged, and maybe clear them near the 2016 Memorial Day, July 4, or August Recesses.\textsuperscript{136} McConnell concomitantly ought to illuminate his June discussion of appellate candidates, because appointing very small numbers over a President’s last years would be unprecedented.\textsuperscript{137} Should he remain unresponsive, Democrats can attempt protesting with unanimous consent requests to hold expeditious final votes, which succinctly publicize and dramatize obstruction’s harmful impacts, yet Republicans flatly denied two

\textsuperscript{131} See supra notes 9, 44; see also supra text accompanying notes 102, 105.

\textsuperscript{132} See supra notes 27–37 and accompanying text.


\textsuperscript{134} Hearings on Judicial Nominees Before the S. Comm. on the Judiciary, 114th Cong. (June 10, 2015); supra text accompanying note 28; Shenkman, supra note 44, at 305–05 (urging abolishing hearings that add little substance and changing questionnaires to omit “completeness traps”).

\textsuperscript{135} See supra notes 6, 34–37, 80 and accompanying text.

\textsuperscript{136} See supra notes 44, 46–47.

\textsuperscript{137} He did allow Stoll’s July 7 final vote. See supra notes 61–64 and accompanying text.

\textsuperscript{138} See supra note 54; rather dramatic, confront accountable. Senators might infra note 145 and accompanying.


\textsuperscript{140} Even if Republican 3–83 and accompanying text.
reasonable July 2015 Democratic petitions urging floor ballots on recommendations.\textsuperscript{138}

C. Pragmatic Politics

Even if the constitutional duty of furnishing advice and consent and the responsibility to a coordinate branch for delivering adequate judicial resources do not persuade the GOP to collaborate more, some pragmatism, self-interest and political realities should dictate compliance with numerous traditional, modest approaches. For example, the party's sizeable presidential field inspires little confidence that anyone from this group will become the next chief executive, while over 2016 Republicans will defend twice as many chamber seats as the opposition.\textsuperscript{139} These prognostications, for instance, that Republicans could prefer a number of the fine, mainstream nominees Obama will marshal at his tenure's conclusion to submissions whom a new Democratic President might appoint, especially should Republicans not maintain the chamber. If the GOP wins the presidency, the figures above show Democrats will probably capture the Senate, which means the less the Republican party cooperates now the more likely that action will spark Democratic conduct as problematic or worse once 2017 begins.\textsuperscript{140}

\textsuperscript{138} See supra note 52 and accompanying text. If delay persists, Democrats can apply rather dramatic, confrontational notions. Obama may use the bully pulpit to hold the GOP accountable. Senators might protest with panel session boycotts. See supra notes 105, 109; infra note 146 and accompanying text.


\textsuperscript{140} Even if Republicans win the presidency and chamber, Democrats may adopt payback strategies akin to concepts the GOP used in Obama's first six years. See supra notes 3-83 and accompanying text.
D. More Dramatic, Controversial Approaches

Nevertheless, were GOP senators to resist Democrats' overtures or reject collaboration, Obama may actually consider additional dramatic, controversial alternatives. He can rely on the bully pulpit to hold GOP legislators accountable for slowly choosing picks, tendering few aspirants or delaying the confirmation regime following nomination or make openings an election issue. The chief executive and lawmakers can agree to drastically revamp the system through inauguration of a bipartisan judiciary whereby the party lacking executive control might designate specific percentages of nominees, a technique several legislators have adopted. Congress may package this idea with bills authorizing seventy-three judgeships, which could take effect over 2017, thus advantaging neither party.

If the situation becomes egregious, comparatively radical devices might be indicated. For example, Obama always can recess appoint designees, yet he wisely refrained from capitalizing on that notion because thorny legal and political concerns trouble the solution’s application. Democratic members could also boycott committee nomination hearings and meetings, while the caucus may analogously treat chamber floor activity, thereby confounding attempts to conduct panel and Senate business.

E. The Judiciary

Finally, the Constitution assigns the political branches greater responsibility for selection than the courts, but they might apply numerous mechanisms. For instance, Chief Justices William Rehnquist and John Roberts deployed Year-End Reports to explain how opening judgeships while remaining without confirmations. Individuals, notably the chief justices, can dramatically regroup and, for example, particular judges may continue emphasizing they impose and even bully legislators on matters of judicial independence for the judicial independent across 2007–08.

If minuscule 2016 judgments seen during the majority’s definite aspirations de minimis, it is especially ironic how much GOP discord can determine this order without honoring the charte...
plain how openings directly undercut the courts and harm litigants while reprimanding both parties for stalling confirmations.\textsuperscript{146} Individual jurists or the bench as a whole, through entities, notably the Judicial Conference, may publicly and dramatically register opposition to delay in selection. For example, particular jurists or institutions have criticized, and should continue emphasizing, the pressures which numbers of vacancies impose and even testify before Congress or lobby it and each legislator on matters like increased judgeships.\textsuperscript{147} Nonetheless, certain actions might elicit concerns about separation of powers or judicial independence, specifically over the presidential election year.\textsuperscript{148}

CONCLUSION

If minuscule 2015 confirmations—resembling the few approvals seen during presidential election years—represent the new majority’s definition of regular order, this nascent leadership inspires de minimis confidence about 2016 court appointments. Especially ironic has been that the regular order trope suffuses much GOP discourse, even while the party has continued to undermine this order in the approval system. Recalcitrance and not honoring the chamber’s duty have acutely undercut the coordinate judiciary’s attempts to fulfill essential constitutional responsibilities. Thus, during 2016, Obama and senators must again implement regular order derived traditions used over recent presidential election years, namely district confirmations across 2007–08. Only then may the courts better deliver justice.

\textsuperscript{146} YEAR-END REPORTS, supra note 97.
\textsuperscript{147} See supra notes 44, 97, 143 and accompanying text. Some judges enjoy cordial relations with senators and urge them to fill vacancies. Tobias, Filling Judicial Vacancies in a Presidential Election Year, supra note 100, at 1003.
\textsuperscript{148} Stephen B. Burbank, The Architecture of Judicial Independence, 72 S. CAL. L. REV. 315, 316–17 (1999); see Tobias, Filling the Judicial Vacancies in a Presidential Election Year, supra note 100, at 1002. Unorthodox ideas, such as changing life tenure or electing judges, can apply but need legislation or constitutional amendment and, thus, are not feasible for 2016. Carl Tobias, Dear President Bush: Leaving a Legacy on the Federal Bench, 42 U. RICH. L. REV. 1041, 1054 (2008).
EPILOGUE

Unfortunately, the Senate, especially the Republican majority, has managed to ignore my cogent suggestions for filling the many vacancies in the 2016 presidential election year. The process began slowly in 2016, a circumstance exacerbated by Justice Antonin Scalia’s vacancy which arose in mid-February and the concomitant GOP refusal to consider U.S. Circuit Judge Merrick Garland, whom President Obama nominated on March 16. This year, the Judiciary Committee accorded one district court nominee a hearing before April 20 and has held over two district nominees for months without reasons. Five nominees won confirmation before President’s Day, although under regular order, they deserved 2015 votes. It remains unclear how long the GOP will use failure to consider Judge Garland as one critical excuse for also declining scrutiny of the fifty lower court nominees.

Obama promptly nominated a stellar pick for the Supreme Court, and the Constitution’s phrasing, policy, practical and political considerations, history, and custom show that the Senate should expeditiously and carefully review the nominee. On March 16, Obama nominated Garland, who has been a D.C. Circuit member for nineteen years and its Chief Judge since 2013. However, quickly after Justice Scalia’s death was reported, Senator McConnell announced that the chamber would not consider any Court nominee until after the November elections, a position that the Majority Leader, Senator Grassley, was unwilling to change for Garland, would make a fitting justice. A few GOP senators, especially the Republican majority have declined scrutiny of the other nominees. Thus, a history of a hearing, much ado about nothing.

Should Republican senators, the minority, not persuade Republicans, this man and his party, to recess appoint Judge Garland and hold a hearing, the bully pulpit might serve to advance Garland’s name to the floor and detainment on Republican’s initiative.

152. Hearing on Judicial Nominees Before the S. Judiciary Comm. (Dec. 9, 2015). Robert Colville and John Younge had their Senators’ support at a 2015 hearing. Id.
154. U.S. CONST., art. II, § 2; Tobias, Senate Gridlock, supra note 3, at 2236.
155. See sources cited supra note 150.
that the Majority Leader has steadfastly defended ever since.\textsuperscript{156} Senator Grassley has concomitantly refused to schedule any hearing for Garland,\textsuperscript{157} although the Chair had initially stated that he would make a final decision after learning the nominee’s identity.\textsuperscript{158} A few GOP Senators have interviewed Garland, but the vast majority have declined White House invitations to meet with the jurist.\textsuperscript{159} Thus, a standoff currently appears to govern the prospect of a hearing, much less any final consideration.

Should Republicans persist in refusing to consider the President’s nominee, Obama could institute several actions. If he cannot persuade Republicans to change their minds, Obama might recess appoint Judge Garland, but that concept is fraught with legal, practical, and political difficulties.\textsuperscript{160} Obama could also use the bully pulpit to cajole the GOP by, for example, withdrawing Garland’s name and tapping other nominees to focus public attention on Republican obstruction.


So long as the GOP continues to refuse any Supreme Court nominee processing, Republicans should process the fifty lower court nominees. Even if they relent on Garland, plentiful time remains to consider him and numerous lower court nominees. Grassley might promptly set panel hearings and votes for all well qualified consensus nominees every few weeks for the session’s remainder. McConnell should concomitantly schedule robust floor debate, if needed, and final ballots for all nominees expeditiously after the panel reports them. The GOP should follow its vaunted regular order, but Republicans might also want to prioritize by, for instance, considering nominees for emergency vacancies first.

President Obama has discharged his constitutional responsibility for nominating excellent, mainstream prospects for the Supreme Court, the appeals courts and the district courts. The Senate majority now must fulfill its constitutional duty to provide advice and consent on those nominees.