2016

Confirming Circuit Judges in a Presidential Election Year

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Confirming Circuit Judges in a Presidential Election Year

Carl Tobias*

ABSTRACT

Over 2016, President Barack Obama tapped accomplished, mainstream candidates for seven of twelve federal appeals court vacancies. Nevertheless, the Senate Judiciary Committee has furnished a public hearing and vote for merely three nominees and did not conduct a hearing for any other prospect this year. 2016 concomitantly is a presidential election year in which appointments can be delayed and stopped—a conundrum that Justice Antonin Scalia’s Supreme Court vacancy exacerbates. Because appellate courts comprise tribunals of last resort for practically all cases and critically need each of their members to deliver justice, the appointments process merits scrutiny.

The Essay first evaluates the records which nominees have previously assembled, President Obama’s judicial appointments process, and the appeals courts. It finds that the seven nominees are dynamic, consensus prospects. Republican senators have not collaborated with the Obama Administration, particularly since 2015 when they captured an upper chamber majority, a phenomenon that this presidential election year intensifies. The courts desperately need all of their jurists to rapidly, economically, and fairly treat growing dockets.

The last section, accordingly, surveys proposals for Senate review.

INTRODUCTION

Across 2016, President Barack Obama chose superb, mainstream prospects for seven of twelve empty federal appellate court posts. However, the Senate Judiciary Committee has granted a public hearing and report for merely three nominees and failed to promptly schedule a hearing for any remaining candidate this year.1 Moreover, 2016 is a presidential election year in which appointments can be delayed and halted—a complication that Justice Antonin Scalia’s Supreme Court vacancy worsens.2 Because

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1 See Hearings & Meetings, U.S. S. COMM. ON THE JUDICIARY, https://www.judiciary.senate.gov/hearings (last visited Oct. 4, 2016) (refine results by year 2016) (showing that the Senate has only held three nomination hearings and votes for Courts of Appeals nominees in 2016—the results include two additional nomination hearings, but those hearings were not for Courts of Appeals nominees).

appellate tribunals are courts of last resort for virtually every appeal and critically need all of their members to deliver justice,³ the confirmation procedures warrant scrutiny.

The Essay first addresses the records which the nominees have already compiled, President Obama’s judicial selection process, and the circuits. It ascertains that the seven nominees comprise dynamic, moderate picks. Republican senators have not collaborated with the Obama Administration, particularly since they captured an upper chamber majority,⁴ a phenomenon that this presidential election year intensifies.⁵ The tribunals desperately require each jurist to swiftly, inexpensively, and fairly treat growing cases.⁶ The last section, therefore, details proposals for Senate review.

I. NOMINEE QUALIFICATIONS

The nominees are highly qualified, consensus, diverse appellate court possibilities.⁷ For instance, Judge Abdul Kallon and Judge Lucy Haeran Koh have provided remarkable federal district court service over a half decade; Justice Lisabeth Tabor Hughes and Justice Myra Selby have concomitantly performed as exceptional jurists on the Kentucky Supreme Court and the


⁵ See Seung Min Kim & Burgess Everett, ANGRY GOP SENATE FREEZES OUT OBAMA NOMINEES, POLITICO (Oct. 14, 2015, 5:06 AM), http://www.politico.com/story/2015/10/gop-senate-barack-obama-cotton-214700 (explaining that Republicans’ desire to win the 2016 presidential election and appoint conservative judges is a reason that they have not confirmed more of President Obama’s judicial nominees).


Indiana Supreme Court. 8 Rebecca Ross Haywood and Jennifer Klemetsrud Puhl have also supplied upper echelon federal prosecutorial leadership. 9 Donald Schott has correspondingly been a very fine partner over years with Quarles & Brady, a well-regarded law firm. 10 Judge Koh is the first Northern District of California Asian-American jurist; 11 Haywood, Judge Kallon, and Justice Selby constitute excellent African-American candidates. 12

Thus, all of the prospects merit chamber analysis and resemble


numerous strong, mainstream, diverse Obama nominees whose confirmations yield manifold advantages. Circuits that have all of their judges can more promptly, economically, and fairly review substantial numbers of cases. Increased ethnic, gender, and sexual orientation diversity improves comprehension and resolution of core questions which tribunals face, and minority jurists decrease biases that undermine justice. Federal courts that mirror the American populace concomitantly help to enhance public confidence in the judiciary. The Grand Old Party’s (“GOP”) treatment of President Obama’s nominees reveals that the seven will confront difficulties realizing approval over the 2016 presidential election year.

II. JUDICIAL SELECTION IN THE OBAMA ADMINISTRATION

The selection procedures operated rather efficaciously throughout President Obama’s initial six years when Democrats possessed a chamber majority. The President assertively consulted home state elected officials—notably Republicans—pursuing able, moderate, diverse candidates, and he normally adhered to these officials’ guidance. Those initiatives fostered cooperation, as members from jurisdictions with vacancies receive deference because they can stop processing through “blue

13 See Tobias, Senate Gridlock, supra note 6, at 2253.
15 Tobias, Senate Gridlock, supra note 6, at 2249.
18 Tobias, Presidential Election Year, supra note 4, at 36.
19 See Sheldon Goldman et al., Obama’s First Term Judiciary, 97 JUDICATURE 7, 8–17 (2013); Tobias, Senate Gridlock, supra note 6, at 2241 (observing that in the past, President Obama has displayed considerable deference to home state politicians on judicial appointments).
slip” retention. Notwithstanding persistent solicitous Administration cultivation of numerous lawmakers, many legislators only nominally coordinated by delaying adoption of procedures or forwarding individuals.

Republicans collaborated to schedule panel hearings, but they “held over” discussions and votes a week for all except one of sixty-one competent, mainstream appellate picks. The GOP slowly concurred on these recommendations’ floor debates, when necessary, and final ballots, requiring talented, centrist aspirants to languish weeks until Democrats petitioned for cloture. Republicans also demanded roll call votes and debate time on fine, moderate choices, numbers of whom easily secured appointment, thereby wasting rare floor hours. Those practices stalled confirmations and left between twelve and twenty-one circuit openings unfilled for over four-plus years after September 2009.

In the 2012 presidential election year, these stratagems grew. The GOP continued this dilatory behavior, halting final appellate ballots in
June. With President Obama’s reelection, Democrats hoped that Republicans would cooperate more, yet they did not. Recalcitrance peaked over 2013 when the White House suggested three excellent, mainstream, diverse possibilities for the U.S. Court of Appeals for the District of Columbia Circuit, the nation’s second most important tribunal. Republicans denied the nominees floor votes, and lengthy obstruction provoked the Democratic majority to cautiously unleash the “nuclear option” that restricted filibusters while allowing chamber ballots on the three and myriad other lower court submissions. Across 2014, Democrats concentrated on appellate nominees, promptly scheduling cloture and final votes practically each week that Congress was in session.

During 2015, after the GOP captured a majority, already negligible coordination plummeted even further. The leadership incessantly exclaimed that it would again bring to the chamber regular order, the system which pertained before Democrats ostensibly eroded the scheme. In early January, Senator Mitch McConnell (R-Ky.), the new Majority Leader, proclaimed: “We need to return to regular order.” Moreover, Senator

27 See id.
29 See Tobias, Federal Appellate Court Vacancies, supra note 6, at 2–3.
30 See id.
36 Id. Senator McConnell has incessantly repeated the mantra ever since. See, e.g., 161
Chuck Grassley (R-Iowa), the new Judiciary Chair, enunciated similar ideas. Despite a multitude of analogous pledges, Republicans have slowly provided choices for President Obama’s assessment, committee nominee hearings with ballots, and chamber debates and votes. In late 2015, these complications meant eight in nine appellate vacancies—which the U.S. Courts designated emergencies—lacked nominees, and these vacancies plagued jurisdictions that GOP members represented. The Senate approved one circuit jurist last year.

In November 2014, President Obama attempted to place Kara Farnandez Stoll, an experienced, consensus attorney, on the Federal Circuit, and District Judge Luis Felipe Restrepo, a talented, moderate jurist, on the Third Circuit. He proposed no additional candidate over 2015, mainly because Republicans hailed from all but one state (California) with appellate openings that lacked nominees, while GOP senators collaborated little with the

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President. However, President Obama did choose seven prospects this year.

Judge Stoll’s March 2015 hearing proceeded smoothly, yet there was not a committee ballot until late April. On June 4, Senator McConnell intimated that the GOP would stop confirming President Obama’s circuit picks, a suggestion which he apparently has not elucidated. Senator Harry Reid (D-Nev.), the Minority Leader, next assailed the Majority Leader’s violation of his constitutional duty in approving no one. Senator Patrick Leahy (D-Vt.), the Judiciary Committee Ranking Member, also criticized the denial of any floor vote for weeks, namely Judge Stoll’s, which may have promoted her 95–0 July ballot. Judge Restrepo’s canvass trenchantly

41 See Tobias, Presidential Election Year, supra note 4, at 45; Nominations & Appointments, THE WHITE HOUSE, https://www.whitehouse.gov/briefing-room/nominations-and-appointments (last visited Oct. 4, 2016) (filter results by Agency Name, selecting “Federal Judiciary”) (showing that President Obama nominated no appellate candidates in 2015 after he renominated Judge Stoll and Judge Restrepo); see supra note 38 and accompanying text.

42 See supra notes 8–12 and accompanying text; see also Lydia Wheeler, Inside Merrick Garland’s Judicial Record, THE HILL (Mar. 19, 2016, 10:09 AM), http://thehill.com/regulation/court-battles/273621-inside-merrick-garlands-judicial-record. Some nominees lacked home state senator support, without which President Obama largely refused to nominate throughout the first seven years. However, his decision to nominate without that support was justified after so many years of assiduous consultation. See supra notes 19–21 and accompanying text; infra notes 87–88 and accompanying text; see also Tobias, Filling Federal Appellate Vacancies, supra note 14, at 864 (observing that the application of more confrontational methods to judicial selection can be justified after cooperative methods prove to be ineffective).


46 161 CONG. REC. S3,850 (daily ed. June 8, 2015) (statement of Sen. Reid). Senator Reid contended that Senator McConnell would “not even [approve] a consensus nominee such as Kara Stoll,” and pointed out that Senator McConnell had paled on the Senate floor in the past for swift confirmation of Republican circuit nominees, especially during the Bush Administration. Id. at S3,849–50 (statement of Sen. Reid).

A June hearing went smoothly; Senator Toomey proffered support with Judge Restrepo deftly answering panel queries. He only earned confirmation this January. Should merely two nominees receive approval, that would be unprecedented. Indeed, the Democratic majority helped confirm ten of President George W. Bush’s appellate submissions his final two years.

2016 is a presidential election year when appointments conventionally slow and ultimately halt, a concern which GOP refusal to process U.S. Court of Appeals for the District of Columbia Circuit Chief Merrick Garland,
President Obama’s Supreme Court nominee aggravates, so those attributes could frustrate approval. However, customs permit impressive, mainstream nominees to have votes after the Memorial Day recess. The Senate confirmed eleven Bush père 1992 aspirants (six following June); two of President Bill Clinton’s in January 1996; eight in 2000 (one after June); five whom President Bush mustered during 2004; and four over 2008 (none post-June either year). All, save the Bush nominees, were the very precedents to which Senator McConnell and Senator Arlen Specter resorted when championing swift appointment of Bush 2008 circuit nominees. In President Bush’s final year, a presidential election year, the Democratic majority helped confirm four nominees (none past June). Judge Steven Agee’s March choice, with approval nine and one-half weeks later, was most compelling because of how quickly the Senate approved him. Five Obama nominees won confirmation prior to June 13, 2012.

53 See Judd Legum, What Republicans Said About Supreme Court Nominations During George W. Bush’s Last Year, THINKPROGRESS (Feb. 16, 2016, 9:30 AM), http://thinkprogress.org/justice/2016/02/16/3749754/what-republicans-said-about-supreme-court-nominations-during-george-w-bushs-last-year/ (arguing that Republicans wanted to apply the Thurmond Rule during almost the entire last year of President Obama’s presidency in sharp contrast to Bush’s last year).

54 Tobias, Presidential Election Year, supra note 4, at 53. Republican refusal to grant Judge Merrick Garland, the Supreme Court nominee, a hearing may be delaying the seven 2016 appellate nominees.


59 See id. Helene White was confirmed almost as quickly, in merely ten weeks. See id.

In short, appointing one circuit prospect last year and a second this January markedly contrasts with Democrats’ approving ten over the comparable 2007–2008 period. The statistics portend ominously for the remainder of this year, while the GOP needs to significantly escalate the pace, should the party hope to surpass Democratic achievements over President Bush’s final pair of years.

III. EXPLANATIONS FOR AND CONSEQUENCES OF PROBLEMATIC SELECTION

The reasons for the selection procedures’ troubled condition are complex, yet observers directly ascribe the modern “confirmation wars” to Circuit Judge Robert Bork’s 1987 attempted Supreme Court approval. They find the scheme has collapsed, as witnessed by corrosive partisanship, systematic paybacks, and striking divisiveness in which each party ratchets down the regime, seen with the denial to Judge Garland, President Obama’s Supreme Court nominee, of any process.

The implications currently are grave. The severely limited 2015 activity means that the bench has twelve circuit vacancies and thirty-two emergency vacancies, a crucial parameter which the GOP allowed to rise substantially.
The judiciary only has the relatively “meager” ten after Democrats marshaled the nuclear option that confined filibusters. Slow approvals have clear adverse impacts. They force nominees to place careers and lives on hold and may stop many highly respected aspirants from even contemplating the bench. The protracted Senate confirmation process deprives tribunals of critical judicial resources and numerous litigants of speedy justice. These effects diminish citizen regard for the process and the government branches.

65 See supra notes 32–33 and accompanying text.
68 BARRY J. MCMILLION, CONG. RESEARCH SERV., R42732, LENGTH OF TIME FROM NOMINATION TO CONFIRMATION FOR “UNCONTROVERSIAL” U.S. CIRCUIT AND DISTRICT COURT NOMINEES: DETAILED ANALYSIS 16 (2012); Tobias, Senate Gridlock, supra note 6, at 2253;
70 Tobias, Presidential Election Year, supra note 4, at 51; Tobias, Senate Gridlock, supra note 6, at 2253.
In sum, this examination indicates that the appointments procedures deserve enhancement, and the Senate must promptly review the seven nominees. First, it has a constitutional duty to evaluate the nominees.71 Second, multiple precedents are relevant. For instance, the chamber approved four Bush 2008 circuit designees; two submitted after February captured appointment nine weeks later.72 Earlier precedent is more compelling, and extensive conventions favor assessing the seven possibilities.73 Justice Scalia’s vacancy ought to not postpone consideration; so long as the GOP refuses to move President Obama’s Supreme Court nominee, it will have plentiful time for canvassing the circuit nominees.74 Even if the party does relent on Judge Garland, legislators might felicitously analyze the seven appellate nominees over 2016. Third, everyone is highly capable and will afford the valuable contributions—such as ethnic, gender, and experiential diversity, increased judicial resources, decreased biases that undermine justice, and improved public confidence in the judiciary—documented above,75 and each nominee embodies the type of person who can secure appointment in a presidential election year.76 Finally, the circuits need all of their jurists.77

IV. SUGGESTIONS FOR THE CONFIRMATION PROCESS

The fight which implicates Justice Scalia’s vacancy demonstrates that neither the politics of judicial selection nor the politics of a presidential election year should drive lower federal court assessment. Judge Kallon and Judge Koh are sitting federal judges, which can facilitate the confirmation process because FBI background checks and American Bar Association (“ABA”) evaluations and ratings only need updating; the jurists were already confirmed and they have compiled lengthy, accessible records.78 Moreover,

72 See supra notes 55, 58–59 and accompanying text.
73 See supra notes 52–55, 58 and accompanying text.
74 See supra note 54; see generally Legum, supra note 53 (discussing the Garland nomination and delay).
75 See supra notes 7–12 and accompanying text.
76 See Geoffrey R. Stone, The Supreme Court Vacancy and the Constitutional Responsibilities of the Senate, HUFFINGTON POST (Feb. 24, 2016, 4:43 PM), http://www.huffingtonpost.com/geoffrey-r-stone/the-supreme-court-vacancy_b_9310498.html (explaining that the Senate typically confirms qualified, mainstream nominees, even in election years); supra notes 7–12 and accompanying text (describing the nominees’ qualifications); infra text accompanying note 98.
77 See supra notes 67–70 and accompanying text.
78 Cf. Carl Tobias, Filling the Judicial Vacancies in a Presidential Election Year, 46 U. RICH. L. REV. 985, 992 (2012) (explaining that nominating presently-sitting judges has been a successful nomination strategy because the judges’ records have already been examined by
President Obama should continue assiduous cultivation of both parties’ senators, notably the leadership and individual panel members.\(^79\)

The committee has rather expeditiously analyzed Judges Koh, Puhl, and Schott, prospects with filed blue slips,\(^80\) through pervasive coordination with the FBI, the ABA, and the Justice Department.\(^81\) However, the panel only recently granted the three nominees hearings and panel votes.\(^82\) Home state senators have not returned blue slips provided for Haywood, Justice Hughes, Judge Kallon, and Justice Selby.\(^83\) These legislators ought to consult the efforts of Senator John Hoeven (R-N.D.), who supported Judge Puhl’s nomination and lauded her at her hearing;\(^84\) and Senator Ron Johnson (R-Wis.), who partly depended on a merit selection commission’s proposal of Schott.\(^85\) Senator Toomey at least conversed with Haywood before issuing a press release that expressed dissatisfaction about some of her answers.\(^86\)
but he needs to reexamine this decision. Senator McConnell curtly rejected Justice Hughes’s nomination the day on which President Obama made it, asserting that the chief executive failed to notify him. 87 This seemed implausible, as multiple Kentucky outlets had earlier reported her possible nomination. 88 Senator McConnell should now interview Justice Hughes or perhaps suggest a pick whom he considers more desirable. 89

Once blue slips arrive, the Chair ought to promptly schedule hearings, as the tribunals which the choices would join require that each post be filled, and he should dutifully reciprocate for Democrats’ processing of 2007–2008 candidates. 90 If Senator Grassley rejects, or slowly arranges, hearings, lawmakers must prevail upon him. For example, Senator Dianne Feinstein

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89 He may prefer District Judge Amul Thapar. See Gerth, supra note 87; see also Megan Carpentier, Trump’s Supreme Court Picks: From Tea Party Senator to Anti-Abortion Crusader, THE GUARDIAN (Sept. 24, 2016, 12:00 PM), https://www.theguardian.com/law/2016/sep/24/donald-trump-supreme-court-nominations-names (describing Thapar’s qualifications and Republican presidential nominee Donald Trump’s inclusion of Thapar on list of potential Supreme Court nominees in his administration).

90 See Press Release, Senator Dan Coats, Coats, Donnelly Express Support for U.S. District Court Nominee Winfield Ong During Senate Judiciary Committee Hearing (May 18, 2016), https://www.coats.senate.gov/newsroom/press/release/coats-donnelly-express-support-for-us-district-court-nominee-winfield-ong-during-senate-judiciary-committee-hearing (Senator Joe Donnelly (D-Ind.) urging the Senate Judiciary Committee to expeditiously conduct a hearing, even though Senator Coats had failed to return his blue slip for Justice Selby); supra notes 55, 58, 72 and accompanying text.

After Senator Grassley schedules hearings, the panel should conduct brief sessions which would permit members to rigorously question aspirants who carefully answer.\footnote{Nominees provide five-minute opening statements, and members employ five-minute rounds for questioning. Hearing on Nominations Before the S. Comm. on the Judiciary, 114th Cong. (June 10, 2015), http://www.judiciary.senate.gov/meetings/nominations-06-10-15 (the video on this page provides an example of such a hearing).} Because numerous President Obama choices are competent moderates who have decided, or assumed positions on, relatively few controversial issues,\footnote{See, e.g., Tom Goldstein, An Assessment of Judge Sri Srinivasan’s Rulings (or, “I Read All These FERC Cases so You Don’t Have To”), SCOTUSBLOG (Mar. 14, 2016, 9:58 AM), http://www.scotusblog.com/2016/03/an-assessment-of-judge-sri-srinivasans-rulings-or-i-read-all-these-ferc-cases-so-you-dont-have-to/ (explaining that the opinions of Judge Sri Srinivasan, an Obama pick for the D.C. Circuit, did not demonstrate a strong ideological bent); Wheeler, supra note 42 (explaining that Judge Garland’s record on controversial issues was limited and did not hint at his positions on such issues).} the hearings would essentially resemble the dynamic of Judge Restrepo’s session: several senators posed general queries to which the judge diligently and candidly responded.\footnote{Hearing on Nominations Before the S. Comm. on the Judiciary, supra note 92 (during this hearing, Senator Perdue announced the possibility that senators might submit written questions within the next week).} If any of the seven choices appears controversial, the preferable treatment would be asking probing questions during hearings.\footnote{Public hearings are preferable to premising the retention of blue slips and effectively one-senator vetoes on nominees’ answers to senators’ queries in private interviews. See supra note 86.} Following the sessions, politicians would have one week to craft written queries, which designees frequently answer rapidly.\footnote{See Hearing on Nominations Before the S. Comm. on the Judiciary, supra note 92 (during this hearing, Senator Perdue announced the possibility that senators might submit written questions within the next week).}

The Chair would next schedule debates and ballots a few weeks later. Committee members participate in the discussions, which, for nominees like the seven possibilities, are cursory,\footnote{See, e.g., Executive Business Meeting of the S. Comm. on the Judiciary, 114th Cong. (July 14, 2016), http://www.judiciary.senate.gov/meetings/07/04/2016/executive-business-meeting (video demonstrating that the discussion preceding the panel vote on Puhl was cursory); Executive Business Meeting of the S. Comm. on the Judiciary, 114th Cong. (June 16, 2016), http://www.judiciary.senate.gov/meetings/06/16/2016/executive-business-} and then vote. Many nominees whom
President Obama has proffered have easily received committee approval because they were very qualified, uncontroversial submissions.98

The Majority Leader ought to provide a floor debate and a chamber ballot shortly after the panel reports every nominee. This would dutifully implement the regular order that he dramatically trumpets and would respect the customs seen during recent presidential election years, such as the 2008 precedents.99 If Senator McConnell eschews chamber debates and votes on the seven nominees, their proponents should pursue unanimous consent100 and, if that is rejected, seek cloture. Accomplished, mainstream nominees have conventionally merited yes or no ballots.101 Accordingly, politicians who honor tradition must favor cloture.102

Once nominees arrive on the floor, the Majority Leader should promptly orchestrate debate that carefully scrutinizes numerous relevant questions while being dignified and respectful of the candidates and contrary ideas. After exacting ventilation of pertinent issues, the Senate must expeditiously vote.103

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98 See, e.g., supra note 97 (showing that Puhl and Schott easily received committee votes). This was especially true for judges whom President Obama elevated, such as Judge Costa and Judge Nguyen, who easily won approval, as they had already captured panel and final votes in their district court confirmations. See Executive Business Meeting of the S. Comm. on the Judiciary, 112th Cong. (Dec. 1, 2011), http://www.judiciary.senate.gov/meetings/executive-business-meeting-2011-12-01 (showing easy committee approval for Judge Nguyen); Ben Kamisar, Texas Judge Costa Moves to Full Senate Vote, DALL. MORNING NEWS: TRAIL BLAZERS BLOG (Mar. 27, 2014, 11:58 AM), http://trailblazersblog.dallasnews.com/2014/03/texas-judge-costa-moves-to-full-senate-vote.html/ (showing easy committee approval for Judge Costa);

99 See supra notes 55, 57–59, 72 and accompanying text (discussing the 2008 precedent when the Democratic Senate majority helped confirm four of President Bush’s circuit nominees, with Senator McConnell strenuously urging approval of those nominees and many others in floor speeches).

100 E.g., 162 CONG. REC. S1,368 (daily ed. Mar. 9, 2016) (statement of Sen. Mikulski); 162 CONG. REC. S2,655 (daily ed. May 10, 2016) (statements of Sens. Casey, Cardin, and Coons); 162 CONG. REC. S5,045 (daily ed. July 13, 2016) (statements of Sens. Schumer, Warren, and Hirono). Senator Ted Cruz (R-Tex.) has promised that he will filibuster any 2016 Supreme Court nominee, but it remains unclear whether Senator Cruz or other senators will block any of the seven appellate nominees once the committee votes them to the floor. See Ted Cruz, The Scalia Seat: Let the People Speak, WALL ST. J. (Mar. 6, 2016, 6:35 PM), http://www.wsj.com/articles/the-scalia-seat-let-the-people-speak-1457307358.


102 See supra text accompanying notes 54–60.

103 Even if the responsibilities to proffer advise and consent on the President’s nominees and provide a coequal branch adequate resources to discharge its constitutional responsibilities do not foster greater GOP cooperation, self-interest, practicality, and political
If the endeavors cataloged are not productive, Democrats may seriously contemplate, and perhaps rely on, less customary approaches. For instance, the President can engage in “trades”—a notion that President Obama and Georgia legislators seemed to employ. Democrats and Republicans might concomitantly adopt a bipartisan judiciary in which the party not in control of the White House suggests a percentage of nominees. More dramatic could be recess appointments; however, several complex legal, practical, and political complications accompany that solution, which probably should be reserved for grave emergencies.

CONCLUSION

Early in 2016, President Obama tapped seven excellent, consensus, diverse appellate nominees. Because the individuals constitute remarkable, moderate prospects and the courts need all of their members to deliver justice, the chamber should not allow this presidential election year or GOP resistance to impede the choices’ swift review.

realities may. For example, the Republican presidential nominee might not win, and Republicans will have to defend twice as many chamber seats as Democrats. Therefore, Republicans may favor accomplished, consensus Obama nominees, like the seven tapped this year, over jurists whom Hillary Clinton would appoint, especially if the GOP loses the chamber. Kristina Peterson, GOP Senate Plots Its Path on Merrick Garland Supreme Court Nomination, WALL ST. J. (Mar. 17, 2016, 4:35 PM), http://www.wsj.com/articles/gop-plots-its-path-on-merrick-garland-supreme-court-nomination-1458169679.


105 Cf. Michael J. Gerhardt, Judicial Selection as War, 36 U.C. DAVIS L. REV. 667, 688 (2003) (suggesting that both parties could “alternat[e] in making recommendations to the President”); Carl W. Tobias, Postpartisan Federal Judicial Selection, 51 B.C. L. REV. 769, 790 (2010) (proposing that the party that controls the presidency could trade a judgeships law for the opposing party’s suggestion of nominees). This would become effective in 2017, so neither party can game the system. The aforementioned practices can leverage the selection process by publicizing and dramatizing how the confirmation wars undercut justice. For numerous other suggestions, see Michael L. Shenkman, Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track, 65 ARK. L. REV. 217, 298–311 (2012); Tobias, Senate Gridlock, supra note 6, at 2255–65.