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## Confirm Myra Selby for the Seventh Circuit

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# Confirm Myra Selby for the Seventh Circuit

CARL TOBIAS\*

## INTRODUCTION

President Barack Obama recently nominated Myra Selby for a vacancy on the U.S. Court of Appeals for the Seventh Circuit. The nominee is a highly accomplished lawyer who has compiled a distinguished record in both the public and private sectors. For example, Selby was the first African American to earn partnership in a substantial Indianapolis law firm, and both the first African American and the first female Justice to serve on the Indiana Supreme Court. Therefore, concerted White House attempts to confirm her were unsurprising. Nonetheless, with 2016 being a presidential election year, delays have inevitably infused appointments, which have only been exacerbated by the conundrum of replacing Justice Antonin Scalia. Because Myra Selby is an excellent consensus nominee and the Seventh Circuit must have its entire judicial complement to promptly, inexpensively, and equitably address a substantial and complex docket, her appointment process merits scrutiny—which this piece undertakes.

This Article canvasses Selby's dynamic professional record, the federal judicial selection process under President Obama, and the Seventh Circuit. It ascertains that Selby is an exceptionally competent, mainstream prospect and that the appellate court requires all of its members to deliver justice. However, Republican senators did not collaborate, particularly after they had captured a Senate majority—a circumstance that this presidential election year aggravates. The last section, therefore, proffers recommendations for Selby's prompt Senate consideration and confirmation.

## I. SELBY'S QUALIFICATIONS

The aspirant is well equipped to be a Seventh Circuit member. In 1988, the nominee earned partnership in the highly regarded Ice Miller law firm,<sup>1</sup> becoming the first African American partner of a major Indianapolis law firm.<sup>2</sup> Over 1993 and 1994, Selby was the Director of Health Care Policy for the state of Indiana under Governor Evan Bayh.<sup>3</sup> In 1995, Selby became the first African American and

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1. Press Release, White House, Office of the Press Sec'y, President Obama Nominates Two to Serve on the U.S. Court of Appeals (Jan. 12, 2016) [hereinafter Jan. 12 Obama Press Release].

2. Press Release, Senator Joe Donnelly, Donnelly Announces President's Nomination of Myra Selby to Fill Vacancy on U.S. Court of Appeals for Seventh Circuit (Jan. 12, 2016) [hereinafter Donnelly Press Release].

3. Jan. 12 Obama Press Release, *supra* note 1.

female member to serve on the Indiana Supreme Court.<sup>4</sup> Across Selby's tenure on the High Court, the jurist wrote greater than one hundred majority opinions, which encompassed landmark determinations that involved medical malpractice and tort law reform issues.<sup>5</sup> In 1999, the nominee retired from the Indiana Supreme Court and returned to the Ice Miller firm.<sup>6</sup>

That year, after Selby had completed her judicial service, the Indiana Supreme Court appointed her to become the Chair of its Commission on Race and Gender Fairness, a position in which she has served as a member ever since.<sup>7</sup> During her time on the commission, the candidate has spearheaded endeavors to increase the accessibility of the Indiana Supreme Court to the public by enlarging educational and outreach activities.<sup>8</sup> Upon rejoining Ice Miller, Selby has engaged in a broad-ranging practice that emphasizes corporate internal investigations, appellate court practice, complex litigation, compliance counseling, risk management, and strategic and additional legal advice predicated on appreciation of related business goals across diverse industry sectors.<sup>9</sup>

Indiana Democratic Senator Joe Donnelly powerfully endorsed Selby and reiterated her excellent qualifications on the same day that President Obama nominated her.<sup>10</sup> The lawmaker urged that the Senate Judiciary Committee accord Selby a hearing when he was introducing Winfield Ong, the excellent, mainstream Southern District of Indiana nominee, at Ong's May hearing.<sup>11</sup> Selby also earned a qualified rating from the American Bar Association's (ABA) evaluation committee.<sup>12</sup>

Therefore, Selby is a dynamic person who ought to be confirmed; she resembles Wisconsin attorney Donald Schott—the other Seventh Circuit aspirant whom President Obama nominated on the same day—and numerous talented, moderate, and diverse Obama appointees who supply copious benefits.<sup>13</sup> Appellate courts that have all their positions filled can more swiftly, economically, and fairly review

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4. *Id.*

5. *Id.*

6. *Id.*

7. *Myra C. Selby Overview*, ICE MILLER LLP, <http://www.icemiller.com/people/myra-c-selby/> [<https://perma.cc/GQ7D-Q2AQ>] (last visited Sept. 14, 2016).

8. *Id.*

9. *Id.*

10. Donnelly Press Release, *supra* note 2.

11. *Hearing on Nominations Before the S. Comm. on the Judiciary* (May 18, 2016), <http://www.judiciary.senate.gov/meetings/05/18/2016/nominations> [<https://perma.cc/7FJA-9RQ3>] [hereinafter *May 18 Hearing*] (statement of Senator Donnelly).

12. *Ratings of Article III and Article IV Judicial Nominees: 114th Congress*, A.B.A. STANDING COMM. ON FED. JUDICIARY, [https://www.americanbar.org/content/dam/aba/uncategorized/GAO/WebRatingChart114.aut\\_hcheckdam.pdf](https://www.americanbar.org/content/dam/aba/uncategorized/GAO/WebRatingChart114.aut_hcheckdam.pdf) [<https://perma.cc/WX2Q-4TZF>] (last updated Sept. 13, 2016).

13. Jan. 12 Obama Press Release, *supra* note 1. Schott received a May hearing and a June 13-7 committee vote with no discussion, but the nominee has awaited a floor vote since then. *Executive Business Meeting*, U.S. SENATE COMM. ON JUDICIARY (June 16, 2016), <http://www.judiciary.senate.gov/meetings/06/16/2016/executive-business-meeting-1> [<https://perma.cc/5LU2-74WT>]; *May 18 Hearing*, *supra* note 11.

substantial caseloads.<sup>14</sup> Increased diversity vis-à-vis ethnicity, gender, and sexual orientation improves comprehension and resolution of critical questions that tribunals decide.<sup>15</sup> Minority judges also reduce prejudices that undercut justice.<sup>16</sup> Nevertheless, given the lack of consideration that Republicans have generally accorded Obama nominees, Selby may encounter a number of difficulties realizing 2016 approval.

More specifically, on the exact day that the President nominated Myra Selby, Indiana Republican Senator Dan Coats issued a press release in which the politician “reiterated his call for the establishment of an Indiana Federal Nominating Commission to make recommendations on this and other judicial vacancies affecting the Hoosier state.”<sup>17</sup> The press release admonished that Senator Coats had originally urged the creation of a judicial merit selection commission in May 2015.<sup>18</sup> He argued that Indiana citizens would be served best with a “nomination process that is taken completely out of politics,”<sup>19</sup> asserting that there was ample time to create a fair process in the remainder of the 114th Congress and that the Selby nomination should be considered by the entity that he proposed.<sup>20</sup> Coats observed that these selection panels enjoy a lengthy history in the state, recounting the 1980 establishment by Indiana Grand Old Party (GOP) Senators Richard Lugar and Dan Quayle of the “Indiana Merit Commission on Federal Judicial

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14. See Andrew L. Alder, *Extended Vacancies, Crushing Caseloads, and Emergency Panels in the Federal Courts of Appeals*, 15 J. APP. PRAC. & PROCESS 163, 165-66 (2014); William M. Richman, *An Argument on the Record for More Federal Judgeships*, 1 J. APP. PRAC. & PROCESS 37, 38-39 (1999), for the idea that judicial vacancies undermine swift, economical, and fair resolution of cases.

15. See 160 CONG. REC. S5,349 (daily ed. Sept. 8, 2014) (statement of Sen. Leahy); Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2239-40, 2254 (2013). Diverse judges resolve controversial matters concerning issues, such as civil rights, employment discrimination and abortion. See SALLY J. KENNEY, *GENDER AND JUSTICE* (2013); FRANK WU, *YELLOW* (2002). *But see* Stephen J. Choi, Mitu Gulati, Mirya Holman & Eric A. Posner, *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504 (2011).

16. See FINAL REPORT, NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS & ETHNIC FAIRNESS (1997) (evaluating the nature and extent of issues that racial, religious and ethnic fairness present in the Ninth Circuit and proffering recommendations for addressing the problems detected); *Report of the First Circuit Gender, Race and Ethnic Bias Task Forces*, 9 B.U. PUB. INT. L. J. 173 (1999) (conducting a limited investigation to evaluate the nature and extent of issues of gender, race, and ethnic bias present in the First Circuit). Federal courts that mirror the nation improve public confidence in the judiciary. See Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L. J. 1423, 1442 (2008); Tobias, *supra* note 15, at 2249.

17. Press Release, Senator Dan Coats, Coats Responds to President’s Nominations for Indiana Judicial Vacancies (Jan. 12, 2016) [hereinafter Jan. 12. Coats Press Release]; see also Maureen Groppe, *Obama Nominates Indiana Lawyers to Federal Bench*, INDIANAPOLIS STAR (Jan. 12, 2016), <http://www.indystar.com/story/news/politics/2016/01/12/obama-nominates-indiana-lawyers-federal-bench/78710858/> [<https://perma.cc/6U4E-4LL6>].

18. Press Release, Senator Dan Coats, Coats Calls for Commission to Fill Indiana Judicial Vacancies (May 13, 2015).

19. *Id.*

20. Jan. 12. Coats Press Release, *supra* note 17.

Appointments.”<sup>21</sup> Coats stated that the group “recruited, interviewed, investigated and made final recommendations” on candidates for federal appointments over more than two decades.<sup>22</sup> Since Selby’s January 12 nomination, Coats has steadfastly maintained this position and refused to deliver his “blue slip” that the Judiciary Committee requires before the nominee’s panel hearing can proceed.<sup>23</sup>

## II. OBAMA ADMINISTRATION SELECTION

Selection functioned efficaciously during Obama’s initial term and a half when Democrats enjoyed a Senate majority. The White House assiduously consulted home state senators—particularly Republicans—seeking, and normally adopting, recommendations of highly competent, moderate, diverse nominees.<sup>24</sup> These efforts fostered cooperation, as politicians from jurisdictions that experience vacancies receive deference because they can end the process by refusing to deliver blue slips. Notwithstanding aggressive White House cultivation of the senators, a number of members have not coordinated—declining to recommend accomplished candidates.<sup>25</sup>

The GOP collaborated with Democrats in arranging and conducting regular committee hearings; however, the leadership “held over” discussions and committee ballots until the second executive business meeting for all except one in sixty-six excellent, consensus appellate choices.<sup>26</sup> Republicans slowly agreed to upper chamber debates for many nominees, when needed, and yes or no votes, making accomplished centrists languish for weeks until Democrats petitioned for cloture.<sup>27</sup> The GOP concomitantly demanded numerous roll call votes and considerable debate time for superb, moderate candidates; they easily won

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21. *Id.*

22. *Id.*

23. See Sheldon Goldman, Elliot Slotnick & Sara Schiavoni, *Obama’s First Term Judiciary: Picking Judges in the Minefield of Obstructionism*, 97 JUDICATURE 7, 17 (2013); Marilyn Odendahl, *Time Running Out to Get Indiana Judicial Nominees Confirmed*, IND. LAW. (July 14, 2016), <http://www.theindianalawyer.com/time-running-out-to-get-indiana-judicial-nominees-confirmed/PARAMS/article/40891> [<https://perma.cc/SR87-EBRG>]; see also Ryan Owens, Daniel E. Walters, Ryan C. Black & Anthony Madonna, *Ideology, Qualifications, and Covert Senate Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347, 347 (2014) (finding that “[s]enators use their blue slips to block ideologically distant nominees as well as unqualified nominees.”).

24. Tobias, *supra* note 15, at 2239–40; see also Goldman, et al., *supra* note 23, at 7, 8–17.

25. Certain senators recommended few or none. See 161 CONG. REC. S6,151 (daily ed. July 30, 2015) (statement of Sen. Schumer); Goldman et al., *supra* note 23, at 16; John Cornyn and Ted Cruz’s Texas: *A State of Judicial Emergency*, ALLIANCE FOR JUSTICE, <http://www.afj.org/our-work/issues/judicial-selection/texas-epicenter-of-the-judicial-vacancy-crisis> [<https://perma.cc/NV97-HVQY>] (last updated Sept. 6, 2016).

26. See *Executive Business Meeting*, U.S. SENATE COMM. ON JUDICIARY (Mar. 22, 2013), [http://www.judiciary.senate.gov/meetings/rescheduled\\_-\\_executive-business-meeting-2013-03-22](http://www.judiciary.senate.gov/meetings/rescheduled_-_executive-business-meeting-2013-03-22) [<https://perma.cc/A2HP-5PBZ>] [hereinafter Mar. 22 *Executive Business Meeting*]; Tobias, *supra* note 15, at 2242–43.

27. See Goldman et al., *supra* note 23, at 26–29; Tobias, *supra* note 15, at 2243–46.

appointment, thereby devouring rare floor hours.<sup>28</sup> These practices eviscerated appointments, leaving twenty court of appeals vacancies over practically five years subsequent to October 2009.<sup>29</sup>

In the 2012 presidential election year, this Republican obstruction grew.<sup>30</sup> Delay persisted, while appellate court nominee floor ballots ceased in June. After President Obama captured reelection, Democrats had hoped for enhanced cooperation, which did not result, and the Republicans' obstinacy increased the following year when the President submitted three extraordinary, mainstream, diverse nominees for the U.S. Court of Appeals for the District of Columbia Circuit—America's second most important court.<sup>31</sup> The GOP failed to grant them affirmative or negative votes, while protracted resistance animated Democrats' resolution to unleash the "nuclear option" that confined filibusters.<sup>32</sup>

In 2015, after Republicans had captured a Senate majority,<sup>33</sup> already nominal collaboration additionally decreased. GOP leaders repeatedly pledged that they would return the chamber to "regular order," the approach which they contended had governed before Democrats purportedly undermined the normal conduct of Senate business. Early in January, Senator Mitch McConnell (R-KY), the new Majority Leader, proclaimed, "We need to return to regular order."<sup>34</sup> Senator Chuck Grassley (R-IA), the new Judiciary Committee Chair, promised that the panel would similarly assess candidates.<sup>35</sup> Despite many vows, Republicans have

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28. See Tobias, *supra* note 15, at 2244–46; Seung Min Kim, *McConnell's Historic Judge Blockade*, POLITICO (July 14, 2016), <http://www.politico.com/story/2016/07/mitch-mcconnell-judges-225455> [<https://perma.cc/UL3P-DFKU>].

29. See *Archive of Judicial Vacancy Lists of 2009–14*, U.S. COURTS (2009–14), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> [<https://perma.cc/RK2Z-SZMY>].

30. See Tobias, *supra* note 15, at 2246.

31. See Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L. J. 121 (2015); Jeffrey Toobin, *The Obama Brief*, NEW YORKER (Oct. 27, 2014), <http://www.newyorker.com/magazine/2014/10/27/obama-brief> [<https://perma.cc/C7KA-KJ3Y>].

32. The 113th Senate approved 116 judges. *Judicial Confirmations for December 2014*, U.S. COURTS (2014), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2014/12/confirmations/html> [<https://perma.cc/K7D3-GPG9>]. Republicans made Democrats file cloture on all pre-2015 nominees. See 161 CONG. REC. S3,223 (daily ed. May 21, 2015) [hereinafter Leahy statement] (statement of Sen. Leahy).

33. Jerry Markon, Robert Costa & David Nakamura, *Republicans Win Senate Control as Polls Show Dissatisfaction with Obama*, WASH. POST (Nov. 4, 2014), [https://www.washingtonpost.com/politics/senate-control-at-stake-in-todays-midterm-elections/2014/11/04/e882353e-642c-11e4-bb14-4cfea1e742d5\\_story.html](https://www.washingtonpost.com/politics/senate-control-at-stake-in-todays-midterm-elections/2014/11/04/e882353e-642c-11e4-bb14-4cfea1e742d5_story.html) [<https://perma.cc/5AB4-YSZY>]; Jonathan Weisman & Ashley Parker, *Democratic Seats Fall in Seven States—Repudiation of President Obama*, N.Y. TIMES, Nov. 5, 2014, at A1.

34. McConnell has reiterated the refrain ever since January 2015. See 161 CONG. REC. S28 (daily ed. Jan. 7, 2015) (statement of Sen. McConnell); see generally MITCH MCCONNELL, *THE LONG GAME* (2016) (recounting McConnell's ambition to become Majority Leader and restore regular order). But see 161 CONG. REC. S2,949 (daily ed. May 18, 2015) (statement of Sen. Reid); Leahy statement, *supra* note 32, at 3223.

35. *Hearing on Nominations Before the S. Comm. on the Judiciary* (Jan. 21, 2015), <http://www.judiciary.senate.gov/meetings/nominations-2015-01-21> [<https://perma.cc/2SX2->

slowly proffered selections for Obama's evaluation and provided Obama's nominees committee hearings, panel votes, Senate debates, when required, and confirmation ballots. At 2016's beginning, this meant that eight of nine circuit vacancies without nominees—which the Administrative Office of the U.S. Courts (AO) designated as emergencies—plagued states that GOP members represented.<sup>36</sup> One jurist received confirmation all last year.

In November 2014, President Obama tapped Kara Farnandez Stoll, an experienced, moderate practitioner, and District Judge Luis Felipe Restrepo, a dynamic, centrist jurist, as nominees to the Federal and Third Circuits.<sup>37</sup> Stoll's March 2015 hearing progressed well;<sup>38</sup> Stoll earned a late April committee ballot.<sup>39</sup> In June, McConnell intimated that appellate court nominees' approvals could stop.<sup>40</sup> Harry Reid (D-NV), the Minority Leader, vociferously criticized the

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KAPD] [hereinafter Jan. 21 *Hearing*]; David Catanese, *Chuck Grassley's Gavel Year*, U.S. NEWS & WORLD REP. (Jan. 28, 2015), <http://www.usnews.com/news/articles/2015/01/28/chuck-grassleys-gavel-year> [https://perma.cc/8CU5-KFC7].

36. Republicans cooperated little, so Obama decided to suggest no 2015 nominee. However, the President did propose seven candidates during 2016, four of whom lack hearings because home state senators have not returned blue slips for Third Circuit nominee Rebecca Ross Haywood, Sixth Circuit nominee Lisabeth Tabor Hughes, Eleventh Circuit nominee Abdul Kallon, or Seventh Circuit nominee Myra Selby. *See* Jan. 12. Coats Press Release, *supra* note 17; Press Release, Senator Patrick Toomey's Statement on the Nomination of Rebecca Haywood to the Third Circuit (Mar. 16, 2016); Joseph Gerth, *McConnell Rejects Obama Choice of KY Judge*, COURIER-JOURNAL (Mar. 18, 2016), <http://www.courier-journal.com/story/news/politics/2016/03/18/mcconnell-says-he-kill-6th-circuit-nomination/81971446/> [https://perma.cc/Q8D6-CEAU]; Jonathan Tamari & Jeremy Roebuck, *Obama's Pick For Judgeship Here Draws Toomey's Ire*, PHILLY.COM (Mar. 17, 2016), [http://articles.philly.com/2016-03-17/news/71576667\\_1\\_pat-toomey-obama-supreme-court-president-obama](http://articles.philly.com/2016-03-17/news/71576667_1_pat-toomey-obama-supreme-court-president-obama) [https://perma.cc/57UT-AKQG]; Mary Troyan, *Obama Appoints Judge Abdul Kallon to 11th Circuit*, MONTGOMERY ADVERTISER (Feb. 12, 2016), <http://www.montgomeryadvertiser.com/story/news/2016/02/11/obama-appoints-judge-abdul-kallon-11th-circuit/80253358/> [https://perma.cc/WG4C-36VS]; *see also infra* notes 74–75 and accompanying text. Emergencies reflect docket size and vacancy length. *Archive of Judicial Vacancies Emergencies for 2015–16*, U.S. COURTS (2015–16). The AO is the federal courts' administrative arm.

37. Press Release, White House, Office of the Press Sec'y, President Obama Nominates Two for U.S. Courts of Appeals (Nov. 12, 2014).

38. *See Hearing on Nominations Before the S. Comm. on the Judiciary* (Mar. 11, 2015), <http://www.judiciary.senate.gov/meetings/nominations> [https://perma.cc/4HLU-JV3L].

39. *Executive Business Meeting*, U.S. SENATE COMM. ON JUDICIARY (Apr. 23, 2015), <http://www.judiciary.senate.gov/meetings/executive-business-meeting-2015-04-23> [https://perma.cc/88RG-LFVE].

40. McConnell has yet to clarify this suggestion. Burgess Everett & Nick Gass, *McConnell Vows to Slow Judicial Nominees*, POLITICO (June 5, 2015), <http://www.politico.com/story/2015/06/mitch-mcconnell-judicial-nominations-118674> [https://perma.cc/4M37-U83U]. *But see* Alexander Bolton, *McConnell Backs Away from Judicial Shutdown Talk*, THE HILL (June 6, 2015), <http://thehill.com/homenews/senate/244196-mcconnell-backs-away-from-judicial-shutdown-talk> [https://perma.cc/2UEZ-SVZL].

Majority Leader for abandoning his constitutional duty by setting no final vote.<sup>41</sup> Concomitantly, Patrick Leahy (D-VT), the Ranking Member, decried the Senate's inability to appoint a nominee, focusing on Stoll, prompting her speedy July confirmation with a 95-0 vote.<sup>42</sup>

Restrepo's consideration was extremely slow. The accomplished, consensus nominee waited seven months for a committee hearing because Patrick Toomey (R-PA) did not return the blue slip until May 2015, as contrasted with Robert Casey (D-PA), who submitted his in November 2014.<sup>43</sup> A June hearing proceeded smoothly; Toomey offered powerful support and Restrepo expertly answered all of the questions posed.<sup>44</sup> The candidate was not appointed until this January.<sup>45</sup> Should only a pair of appellate nominees have confirmation, that record would be virtually unprecedented. In 2007–08, the Democratic majority helped appoint ten of President George W. Bush's circuit nominees, while in 1988, it promoted the appointment of six prospects designated by President Ronald Reagan and Supreme Court Justice Anthony Kennedy.<sup>46</sup>

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41. Reid contended that McConnell would “not even [approve] a consensus nominee [like] Kara Stoll,” recounting the Majority Leader's Senate floor pleading for rapid confirmation of Bush 2008 nominees. 161 CONG. REC. S3,850 (daily ed. June 8, 2015).

42. 161 CONG. REC. S4,591 (daily ed. June 24, 2015); 161 CONG. REC. S4,678 (daily ed. July 7, 2015).

43. Kim, *supra* note 28; Jonathan Tamari, *A Judicial Nominee Waits; Toomey Gets Blamed*, PHILLY.COM (May 9, 2015), [http://articles.philly.com/2015-05-09/news/61952388\\_1\\_toomey-luis-felipe-restrepo-president-obama](http://articles.philly.com/2015-05-09/news/61952388_1_toomey-luis-felipe-restrepo-president-obama) [<https://perma.cc/Q8P8-DFA7>]. *But see* Sen. Pat Toomey, *I Am Not Delaying Judge L. Felipe Restrepo's 3rd Circuit Nomination*, PITTSBURGH POST-GAZETTE (May 13, 2015), <http://www.post-gazette.com/opinion/letters/2015/05/13/I-am-not-delaying-Judge-L-Felipe-Restrepo-s-3rd-Circuit-nomination/stories/201505130068> [<https://perma.cc/89F2-KCWB>].

44. *See Hearing on Judicial Nominations Before the S. Comm. on the Judiciary* (June 10, 2015), <http://www.judiciary.senate.gov/meetings/nominations-06-10-15> [<https://perma.cc/D8KM-VJY7>] [hereinafter June 10 *Hearing*]. The GOP held over Restrepo until the next meeting, as the party has virtually all Obama nominees. *See* Mar. 22 *Executive Business Meeting*, *supra* note 26 and accompanying text. Nevertheless, the panel unanimously voice voted on him at the subsequent meeting. *Executive Business Meeting*, U.S. SENATE COMM. ON JUDICIARY (June 25, 2015), <http://www.judiciary.senate.gov/meetings/executive-business-meeting-06-25-15> [<https://perma.cc/NYC9-CKZ4>]; *Executive Business Meeting*, U.S. SENATE COMM. ON JUDICIARY (July 9, 2015), <http://www.judiciary.senate.gov/meetings/executive-business-meeting-07-09-15> [<https://perma.cc/9ATV-X4X2>].

45. No reason supported Restrepo's prolonged appointments process for an emergency vacancy. 162 CONG. REC. S17–21 (daily ed. Jan. 11, 2016); *see also supra* text accompanying notes 38–39, 42 (contrasting Stoll's expeditious confirmation).

46. *Archive of Judicial Vacancies*, U.S. COURTS (1988, 2007–08), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> [<https://perma.cc/4WW4-NJKK>]; Christopher Kang, *Republican Obstruction of Courts Could Be the Worst Record Since the 1800s*, HUFFINGTON POST (Apr. 20, 2016), [http://www.huffingtonpost.com/christopher-kang/republican-obstruction-of\\_b\\_9741446.html](http://www.huffingtonpost.com/christopher-kang/republican-obstruction-of_b_9741446.html) [<https://perma.cc/B5GG-E2QJ>] (explaining that the GOP may provide the fewest circuit appointments since 1897–98, when the federal courts comprised only 25 circuit judgeships); Kim, *supra* note 28.



Confirmations traditionally slow and halt during presidential election years, such as 2016, phenomena exacerbated by GOP refusal to consider U.S. Court of Appeals for the D.C. Circuit Chief Judge Merrick Garland, President Obama's Supreme Court nominee.<sup>47</sup> Nonetheless, customs do permit able, mainstream circuit nominees to receive up or down votes following May.<sup>48</sup> The Senate promoted appointment of eleven President George H. W. Bush 1992 candidates (six after June); two nominees President Bill Clinton mustered in January 1996 with eight for 2000 (one post-June); and five Bush nominated over 2004 with four more coming in 2008 (none subsequent to June either year).<sup>49</sup> All but the last were the precedents that McConnell and Arlen Specter (D-PA) summoned when forcefully urging expeditious floor votes on Bush's 2008 nominees.<sup>50</sup> Over Bush's final year (a presidential election year), the Democratic majority confirmed four nominees.<sup>51</sup> Indeed, U.S. Court of Appeals for the Fourth Circuit Judge Steven Agee's March candidacy and confirmation nine weeks later were especially pertinent.<sup>52</sup> Five Obama 2012 candidates earned approval before June 13.<sup>53</sup>

In short, confirming one appellate court judge last year and a second on January 11 powerfully contrasts with Democrats' appointing ten in the comparable period of Bush's tenure. The few approvals portend unfavorably for circuit appointments this year, while Republicans must significantly accelerate the pace by confirming accomplished, consensus nominees, like Selby, if the GOP hopes to equal confirmations during Bush's final two years.

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47. Michael D. Shear, Julie Hirschfeld Davis & Gardiner Harris, *Obama Pick Engages Supreme Court Battle*, N.Y. TIMES, Mar. 17, 2016, at A1; Russell Wheeler, *The "Thurmond Rule" and Other Advice and Consent Myths*, BROOKINGS INST. (May 25, 2016), <https://www.brookings.edu/blog/fixgov/2016/05/25/the-thurmond-rule-and-other-advice-and-consent-myths/> [<https://perma.cc/ZZ4R-MPDP>].

48. See Shear et al., *supra* note 47; Wheeler, *supra* note 47. Republican delay of Judge Garland has been slowing circuit nominees, including Selby. See *Executive Business Meeting*, U.S. SENATE COMM. ON JUDICIARY (Mar. 17, 2016), <http://www.judiciary.senate.gov/meetings/executive-business-meeting-03-17-16> [<https://perma.cc/H4TJ-ZKM7>] (statements of Sens. Leahy & Grassley); *Executive Business Meeting*, U.S. SENATE COMM. ON JUDICIARY (May 19, 2016), <http://www.judiciary.senate.gov/meetings/05/19/2016/executive-business-meeting> [<https://perma.cc/C9CY-CGKG>] (statements of Sens. Leahy & Grassley); 162 CONG. REC. S1,523 (daily ed. Mar. 16, 2016).

49. *Archive of Judicial Vacancies*, U.S. COURTS (1992, 1996, 2000, 2004, 2008), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> [<https://perma.cc/4WW4-NJKK>].

50. 154 CONG. REC. 15,424 (July 17, 2008) (statement of Sen. McConnell); see also 161 CONG. REC. S3,850 (statement of Sen. Reid), *supra* note 41.

51. Six more won 2007 approval. See *supra* note 46 and accompanying text.

52. 154 CONG. REC. 13,588 (June 24, 2008) (confirming Judge Helene White in 9 weeks); 154 CONG. REC. 9,714 (May 20, 2008); Press Release, White House, Office of the Press Sec'y, Presidential Nominations Sent to the Senate (Mar. 13, 2008).

53. The Senate conducted no additional votes in 2012, so Republicans required that five accomplished centrists wait for appointment until 2013. *Archive of Judicial Vacancies*, U.S. COURTS (2012–13), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> [<https://perma.cc/4WW4-NJKK>].

### III. EXPLANATIONS FOR AND CONSEQUENCES OF PROBLEMATIC SELECTION

The explanations for the problematic state of appointments are complicated,<sup>54</sup> yet observers ascribe the “confirmation wars” to Judge Robert Bork’s 1987 failed Supreme Court appointment.<sup>55</sup> Evaluators discern that the system has cratered, as manifested by corrosive partisanship, striking paybacks, and strident division in which both parties ratchet down the regime—phenomena clearly demonstrated by the GOP’s recalcitrant refusal to analyze Judge Garland.<sup>56</sup>

The implications of selection’s troubled condition are unpromising. The severely restricted confirmation action since 2015 means that the federal bench encounters twelve circuit and thirty-five emergency vacancies.<sup>57</sup> The judiciary could only have the relatively “few” openings *after* Democrats marshaled the nuclear option that constricted filibusters.<sup>58</sup> However, recent inactivity will drastically enlarge vacancies and emergencies next year, perhaps leaving the Seventh Circuit with more than the present two openings.<sup>59</sup>

Stalled judicial appointments have numerous crucial adverse impacts.<sup>60</sup> They force a multitude of nominees to leave careers on hold and stop many excellent prospects from contemplating the bench.<sup>61</sup> Protracted analyses of selections deprive

54. Scholars and politicians vigorously debate whether appointments have always been complicated. *See generally* Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice: Federal Judicial Selection, 1789–1861*, 100 IOWA L. REV. 551 (2015); Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL’Y 1035 (2009).

55. *See generally* ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989); MARK GITENSTEIN, *MATTERS OF PRINCIPLE: AN INSIDER’S ACCOUNT OF AMERICA’S REJECTION OF ROBERT BORK’S NOMINATION TO THE SUPREME COURT* (1992).

56. The most recent altercation began with contentions that Democrats stalled Bush’s concluding two years and the GOP retaliated with unprecedented delay in Obama’s tenure. Democrats then exploded the nuclear option to promptly confirm many judges in 2014’s lame duck session. Republicans next drastically slowed all nominees. *See* Kim, *supra* note 28; *supra* Part II.

57. The latter rose from eleven to as many as the current thirty-five. *See Archive of Judicial Vacancies Emergencies for 20016*, U.S. COURTS (2016); Joe Palazzolo, *Obama’s Successor Will Likely Fill Dozens of Judicial Vacancies*, WALL STREET J., (Mar. 18, 2016), <http://www.wsj.com/articles/obamas-successor-will-likely-fill-dozens-of-judicial-vacancies-1458340351> [<https://perma.cc/9AL8-YANP>]; *see* Wheeler, *supra* note 47.

58. *See supra* note 32 and accompanying text. Chief Judge Diane Wood, of the U.S. Court of Appeals for the Seventh Circuit, recently stated that additional vacancies would create a problem in managing the circuit caseload. *See* Patricia Manson, *Vacancies on Bench Cause Concern*, CHI. DAILY L. BULL. (May 3, 2016), <http://www.chicagolawbulletin.com/Archives/2016/05/03/Supreme-Court-vacancies-5-3-16.aspx> [<https://perma.cc/F5GC-4259>].

59. *Archive of Judicial Vacancies*, U.S. COURTS (2016), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> [<https://perma.cc/4WW4-NJKK>] (predicting that the 9th Circuit could have four vacancies in late 2016).

60. *See* 160 CONG. REC. S5,349, *supra* note 15; Tobias, *supra* note 15, at 2252–53.

61. *See* Andrew Cohen, *In Pennsylvania, the Human Costs of Judicial Confirmation Delays*, ATLANTIC (Sept. 9, 2012), <http://www.theatlantic.com/politics/archive/2012/09/in->

courts of necessary judicial resources and myriad litigants of criminal and civil justice.<sup>62</sup> These deleterious effects also undercut citizen regard for selection procedures and the coordinate branches of government.<sup>63</sup> Few appellate courts experience problems so daunting as the Seventh Circuit, which faces a substantial docket that consumes much time.<sup>64</sup>

In sum, this assessment clearly demonstrates the need for prompt Senate action. First, the chamber has a constitutional duty. Much relevant precedent, notably respecting Bush's 2007–08 appointments, correspondingly applies.<sup>65</sup> Specific earlier precedent is even more compelling.<sup>66</sup> Justice Scalia's vacancy should not actually play much of a role in delaying Selby. If the GOP declines to move Obama's Supreme Court nominee, there would be plentiful time for scrutinizing her, and even if the party relents on Judge Garland, the chamber could easily approve Selby this year, as it did Justice Kennedy and six 1988 court of appeals picks.<sup>67</sup> She concomitantly affords multiple contributions and resembles state Supreme Court justices who smoothly won confirmation in previous years.<sup>68</sup> Finally, the Seventh Circuit desperately requires all of its judges to promptly, inexpensively, and fairly decide cases.<sup>69</sup>

#### IV. SUGGESTIONS FOR THE CONFIRMATION PROCESS

During an election year, politics must not undercut Selby's consideration, as feuding over Justice Scalia's vacancy cogently attests. The nominee did serve commendably on the Indiana Supreme Court, which facilitates appointment,

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pennsylvania-the-human-costs-of-judicial-confirmation-delays/261862/  
[https://perma.cc/74GW-YPQ8]; Palazzolo, *supra* note 57.

62. See CHIEF JUSTICE JOHN ROBERTS, 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2010); Tobias, *supra* note 15, at 2252–53; Jennifer Bendery, *Federal Judges Are Burned Out, Overworked and Wondering Where Congress Is*, HUFFINGTON POST (Sept. 30, 2015), [http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies\\_us\\_55d77721e4b0a40aa3aaf14b](http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_us_55d77721e4b0a40aa3aaf14b) [https://perma.cc/LH9K-PX9V].

63. Tobias, *supra* note 15, at 2252–53.

64. U.S. COURTS, U.S. COURTS OF APPEALS—MEDIAN TIME INTERVALS IN MONTHS FOR CASES TERMINATED ON THE MERITS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPT. 30, 2015, Table B-4 (2016). Senior judges can help very much, but they are not a substitute for active judges.

65. See *supra* notes 46, 49–52 and accompanying texts.

66. Senators approved more judges and confirmed the jurists later in time. See *supra* text accompanying notes 48–49.

67. See Joan Biskupic, *How Mitch McConnell Won the SCOTUS Fight (for Now)*, CNN.COM (Sept. 29, 2016), <http://www.cnn.com/2016/09/29/politics/mitch-mcconnell-merrick-garland-scotus/>; Mike DeBonis, *A Hundred Days Later, White House Isn't Giving up on Replacing Antonin Scalia*, WASH. POST (May 25, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/05/25/a-hundred-days-later-white-house-isnt-giving-up-on-replacing-antonin-scalia/> [https://perma.cc/7JU2-ANQ7]; see *supra* text accompanying notes 46–49.

68. See *infra* note 80 and accompanying text (listing state Supreme Court nominees); see also *supra* Part I. (describing Selby's contributions).

69. See *supra* notes 59, 64 and accompanying text.

because she has compiled a lengthy, accessible record.<sup>70</sup> However, Selby will need a Federal Bureau of Investigation background check, so the committee ought to actively cooperate with that entity and the Justice Department when thoroughly investigating the nominee.<sup>71</sup>

The Chair in turn should efficiently schedule a hearing, because Selby is very astute, the Seventh Circuit must have every judicial position filled, and Grassley needs to reciprocate for Democrats' collegial approval of many jurists throughout 2007–08.<sup>72</sup> If Grassley resists a nominee hearing, Senator Donnelly might institute another effort to prevail on the Chair—as he did at the May hearing for nominee Winfield Ong.<sup>73</sup> Donnelly might also consider attempting to persuade his senior Indiana colleague, Senator Coats, to reexamine possible delivery of the blue slip by suggesting that Coats review the actions of several GOP home state politicians who have returned blue slips for Obama circuit nominees. For example, Senator John Hoeven (R-ND) met with Jennifer Klemetsrud Puhl, Obama's U.S. Court of Appeals for the Eighth Circuit nominee, and deemed satisfactory her answers to many questions, while he expressed support when introducing Puhl at her June hearing and when the committee recently approved her.<sup>74</sup> Senator Ron Johnson

70. See Tobias, *supra* note 15, at 2258; see also *supra* Part I.

71. Selby has compiled a long, accessible record, so her vetting can be rather brief. See *supra* Part I.

72. Obama proposed five circuit nominees after Schott and Selby. See *Judicial Vacancy List for September 2016*, U.S. COURTS (2016), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2016/09/vacancies> [https://perma.cc/LJA8-8MYR]. Schott and Ninth Circuit nominee Judge Lucy Haeran Koh would fill emergencies, while she had a July hearing and September panel approval. *Hearing on Nominations Before S. Comm. on the Judiciary* (July 13, 2016), <http://www.judiciary.senate.gov/meetings/07/13/2016/nominations> [https://perma.cc/NX4Q-2N6D] [hereinafter *July 13 Hearing*]; *Executive Business Meeting*, U.S. SENATE COMM. ON JUDICIARY (Sept. 15, 2016), <http://www.judiciary.senate.gov/meetings/09/15/2016/nominations> Eighth Circuit nominee Jennifer Klemetsrud Puhl had a summer hearing and vote. *Hearing on Nominations Before the S. Comm. on the Judiciary* (June 21, 2016), <http://www.judiciary.senate.gov/meetings/06/21/2016/nominations> [https://perma.cc/D7QK-K6ZX]; *Executive Business Meeting*, U.S. SENATE COMM. ON JUDICIARY (July 14, 2016), <http://www.judiciary.senate.gov/meetings/07/04/2016/executive-business-meeting> [https://perma.cc/F6YH-LUYS].

73. See *May 18 Hearing*, *supra* note 11. Senator Dianne Feinstein might have instituted another effort to prevail on the Chair with Judge Koh because the senator had supported controversial Bush nominees. See Sheryl Gay Stolberg, *Avoiding Clash, Senate Sends Judicial Nomination to Floor*, N.Y. TIMES, May 26, 2006; Bob Egelko, *Feinstein Draws Fire over Vote for Judge*, SF CHRON. (Aug. 4, 2007), <http://www.sfgate.com/politics/article/Feinstein-draws-fire-over-vote-for-judge-2549435.php> [https://perma.cc/3BG9-P8YR].

74. See *July 13 Hearing*, *supra* note 72; Press Release, Sen. John Hoeven, Judiciary Committee Recommends Jennifer Puhl for Seat on 8th U.S. Circuit Court of Appeals (July 14, 2016); Patrick Springer, *Puhl, Federal Appeals Court Nominee from ND, Slated for Senate Hearing*, INFORUM (June 17, 2016), <http://www.inforum.com/news/4057075-puhl-federal-appeals-court-nominee-nd-slanted-senate-hearing> [https://perma.cc/7HU9-ABXK]; Patrick Springer, *Senate Hearing Friendly for Appointment to Replace Fargo-Based Appeals*

(R-WI) concomitantly appeared to rely partly on a merit selection commission's recommendation of Donald Schott, the President's other Seventh Circuit nominee, in returning his blue slip.<sup>75</sup>

Coats may also wish to consult additional relevant precedent, which demonstrates that very few other GOP senators have insisted on employing merit selection commissions at the circuit level, even in Obama's tenure when Republicans opposed many of his nominees, apparently in part because the commissions consume substantial time and energy to establish and operate.<sup>76</sup> If Coats does not relent and deliver his blue slip, Donnelly might wish to consider establishing a panel similar to the commission that Coats has proposed, but that action would significantly delay Selby's chamber review.<sup>77</sup>

Once the blue slip arrives and Grassley sets a hearing, the panel must promptly conduct a session that allows legislators to robustly query Selby, who then provides comprehensive, direct answers.<sup>78</sup> Because she is an exceptional consensus nominee who decided few controversial issues when serving as an Indiana Supreme Court Justice but has resolved diverse, pressing matters with nuanced solutions, the hearing will resemble the dynamic for Judge Restrepo: few GOP senators attended, posing somewhat pedestrian questions that the jurist capably addressed.<sup>79</sup> Panel members would then posit written queries to which Selby responds in a careful, timely manner.<sup>80</sup>

The Chair will next arrange a committee debate and vote several weeks later. Most of President Obama's nominees who were state High Court Justices—personified by Ninth Circuit Judges Morgan Christen and Andrew Hurwitz—

*Judge*, BISMARCK TRIB. (June 21, 2016), [http://bismarcktribune.com/news/state-and-regional/senate-hearing-friendly-for-appointment-to-replace-fargo-based-appeals/article\\_5155ec6c-fe6e-5445-910a-6816105c8f51.html](http://bismarcktribune.com/news/state-and-regional/senate-hearing-friendly-for-appointment-to-replace-fargo-based-appeals/article_5155ec6c-fe6e-5445-910a-6816105c8f51.html) [https://perma.cc/Z8TN-5P38].

75. Ron Johnson, Opinion, *Cooperation Only Goes So Far with Sen. Tammy Baldwin*, MILWAUKEE J. SENTINEL (Mar. 11, 2016), <http://archive.jsonline.com/news/opinion/cooperation-only-goes-so-far-with-sen-tammy-baldwin-b99685832z1-371825211.html> [https://perma.cc/3NL6-AXWB]; see also Letter from Univ. of Wis. Law School Professors on the Donald Schott Nomination, to Sen. Ron Johnson (Feb. 23, 2016), <http://www.afj.org/wp-content/uploads/2016/02/Law-Prof-Ltr-Schott.pdf> [https://perma.cc/W32L-9NUU].

76. For example, the Texas senators deploy a Federal Judicial Evaluation Commission which assesses circuit and district court vacancies, but the two Texas Fifth Circuit vacancies have lacked nominees for nearly four and two-and-a-half years. See *Archive of Judicial Vacancies*, U.S. COURTS (2016), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> [https://perma.cc/4WW4-NJJK]; ALLIANCE FOR JUSTICE, *supra* note 25.

77. See Jan. 12. Coats Press Release, *supra* note 17. The time required to assemble the selection panel and for it to solicit applications and vet candidates could effectively delay Senate review until the lame duck session. This should be a last resort, because a panel is unnecessary and would impose substantial delay.

78. June 10 *Hearing*, *supra* note 44.

79. Senator David Perdue (R-GA) chaired, asking most of the questions. *Id.*; see *supra* Part I (illustrating Selby's deft resolution of disputes).

80. June 10 *Hearing*, *supra* note 44 (including Perdue's announcement that the record would remain open a week for written questions).

feliculously secured committee ballots because the individuals had compiled long, accessible records as talented, consensus jurists.<sup>81</sup> After members briefly discuss the nominee, the senators vote.

Many reasons demonstrate why Selby ought to have a prompt floor debate and ballot. The Majority Leader should implement the regular order that he constantly praises and honor distinctly relevant 2008 precedent.<sup>82</sup> If McConnell, nonetheless, refuses to arrange Selby's debate and vote, the nominee's proponents must aggressively pursue cloture.<sup>83</sup> Talented moderates conventionally attain positive or negative ballots, so lawmakers who favor custom should agree to cloture.<sup>84</sup> After Selby reaches the floor, the leader necessarily must organize dignified and respectful debate, which rigorously evaluates numerous pertinent questions, and the Senate must quickly vote.

Unfortunately, in September, the chamber recessed to campaign without considering the nomination of Myra Selby mainly because Senator Coats has not relented by delivering his blue slip. However, the Senate intends to return after the November elections for a lame duck session in which the chamber must seriously consider reviewing Selby. Senator Donnelly should attempt to persuade Coats to relent and, if he does not, perhaps cooperate with the senator to assemble a commission.

#### CONCLUSION

In January, President Obama nominated Myra Selby for the Seventh Circuit. Because she is an experienced, mainstream candidate and the court needs all of its jurists, the chamber must not allow the presidential election year or GOP recalcitrance to frustrate her confirmation.

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81. Press Release, White House, Office of the Press Sec'y, President Obama Nominates Justice Morgan Christen for the U.S. Court of Appeals (May 18, 2011); Press Release, White House, Office of the Press Sec'y, President Obama Nominates Justice Andrew David Hurwitz to Serve on the U.S. Court of Appeals (Nov. 2, 2011); 157 CONG. REC. S8,625 (daily ed. Dec. 15, 2011) (including Christen's confirmation); 158 CONG. REC. S4,108 (daily ed. June 12, 2012) (including Hurwitz's confirmation).

82. See *supra* text accompanying notes 34, 49–52 (urging that the Senate follow regular order and that it confirm Bush nominees, four of whom the Democratic majority helped approve).

83. See *supra* note 32 and accompanying text. For recent Republican denials of Democrats' unanimous consent requests, see 162 CONG. REC. S2,654 (daily ed. May 10, 2016); 162 CONG. REC. S4,870 (daily ed. July 7, 2016); 162 CONG. REC. S5,045 (daily ed. July 13, 2016); 162 CONG. REC. S5,900 (daily ed. Sept. 20, 2016). Most GOP senators oppose any 2016 Supreme Court pick; few oppose Selby. See Ted Cruz, Opinion, *The Scalia Seat: Let the People Speak*, WALL STREET J., (Mar. 6, 2016), <http://www.wsj.com/articles/the-scalia-seat-let-the-people-speak-1457307358> [<https://perma.cc/R55W-285Q>].

84. See *supra* text accompanying notes 48–53.