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# Confirming Judges In The 2016 Senate Lame Duck Session

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## CONFIRMING JUDGES IN THE 2016 SENATE LAME DUCK SESSION

*Carl Tobias\**

*In this piece, Professor Carl Tobias descriptively scrutinizes the nomination and confirmation regimes throughout the administration of President Barack Obama. The article critically evaluates selection finding that persistent Republican Senate obstruction resulted in the greatest number of unoccupied posts for the longest duration, briefly moderated by the 2013 detonation of the “nuclear option,” which constricted filibusters. Nevertheless, the article contends when the Grand Old Party (GOP) attained a chamber majority, Republicans dramatically slowed the nomination and confirmation processes after January 2015. Therefore, openings surpassed ninety before Congress is scheduled to reassemble. Because this dilemma erodes rapid, inexpensive, and equitable disposition, the article suggests how the Senate should promptly reduce the multitude of unfilled judgeships once the lame duck session commences.*

Following the prolonged summer recess and Congress’ truncated appearance on Capitol Hill, the politicians departed Washington in September until November. The protracted absence of Senators permitted merely one judge’s confirmation after June, leaving the bench with ninety-four empty seats when members convene in November. Moreover, presidential and Senate election results will provoke numerous circuit and district judges to assume senior status or retire, which means that the courts will probably face 110 vacancies out of 842 lower court judgeships at the 2017 Inauguration Day. Regardless of who captured the presidency and the upper chamber, Democratic and Republican Senators need to cooperate and fill the positions over the lame duck session. Tribunals require their entire complement of judges for delivering justice, yet presently attempt to resolve massive caseloads with ninety-four vacancies. Appointments in the congressional session which begins after the elections merit consideration.

The piece descriptively scrutinizes the nomination and confirmation regimes throughout the administration of President Barack Obama. It critically evaluates selection and finds that persistent Republican Senate obstruction resulted in the greatest number of unoccupied posts for the longest time, which the 2013 detonation of the “nuclear option” that constricted fil-

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ibusters briefly moderated. Nevertheless, when the Grand Old Party (GOP) attained a chamber majority, Republicans dramatically slowed the nomination and confirmation processes after January 2015. Therefore, openings surpassed ninety before Congress is scheduled to reassemble. Because this dilemma erodes rapid, inexpensive, and equitable disposition, the paper suggests how the Senate should promptly reduce the multitude of unfilled judgeships once the lame duck session commences.

## I. OBAMA ADMINISTRATION JUDICIAL SELECTION

At President Obama's inauguration, the lower federal courts encountered fifty-four vacancies.<sup>1</sup> The administration swiftly ensured careful nomination for able, centrist, diverse prospects.<sup>2</sup> The White House consulted home state elected officers and aggressively pursued their recommendations of superb, consensus individuals, especially minority, female and lesbian, gay, bisexual and transgender (LGBT) picks.<sup>3</sup> Numerous lawmakers concomitantly adopted special initiatives which could detect, examine and propose talented, mainstream submissions, notably persons of color, women and LGBT selections.<sup>4</sup> The White House correspondingly assembled ideas from conventional outlets, particularly the American Bar Association (ABA), and less customary sources, encompassing minority, women's and LGBT bar groups and politicians familiar with strong candidates.<sup>5</sup> They helped aspirants navigate the pre-nomination system while tendering multiple fine possibilities. Officials then sent choices and Obama canvassed them, nominating many.

The Obama White House significantly improved the appointments procedures,<sup>6</sup> comprehensively seeking aid from both parties.<sup>7</sup> Obama engaged

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1 Russell Wheeler, *Judicial Nomination: Into the Home Stretch*, BROOKINGS INST. (2010), <https://www.brookings.edu/opinions/judicial-nomination-into-the-home-stretch/>; see VACANCIES IN THE FEDERAL JUDICIARY (2009).

2 Carl Tobias, *Judicial Selection in Congress' Lame Duck Session*, 90 IND. L.J. SUPP. 52, 53 (2015) citing Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2239-40 (2013); see also Sheldon Goldman et al., *Obama's Judiciary at Midterm*, 94 JUDICATURE 262 (2011) (explaining that Obama's nominees were among the most diverse in history).

3 Tobias, *supra* note 2, at 53, citing 160 CONG. REC. S5364 (daily ed. Sept. 8, 2014) (statement of Sen. Leahy); Sheldon Goldman et al., *Obama's First Term Judiciary*, 97 JUDICATURE 7, 18 (2013) (emphasizing Obama's excellent record of nominating "nontraditional" candidates, such as women and racial and ethnic minorities); Tobias, *supra* note 2, at 2239-40.

4 Goldman et al., *supra* note 3, at 7, 18; Carl Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 777 (2010).

5 Tobias, *supra* note 2, at 53. I also rely in this and in the next two sentences on Goldman et al., *supra* note 3; sources *supra* note 2.

6 Jeffrey Toobin, *The Obama Brief*, NEW YORKER, Oct. 27, 2014, at 24; see sources *supra* note 2.

7 Tobias, *supra* note 2, at 2239 (finding that Obama improved the appointments process by assiduously consulting and by emphasizing competence, ethics and diversity, rather than ideology); Peter Baker & Adam Nagourney, *Tight Lid Defined Process in Selecting a New Justice: Using Past*

Senators Patrick Leahy (D-Vt.), the Judiciary Committee Chair, who speedily instituted nominee panel hearings and votes; Harry Reid (D-Nev.), the Majority Leader, who directly controlled the floor; and Chuck Grassley (Iowa) and Mitch McConnell (Ky.), their Republican analogues.<sup>8</sup> Despite concerted Democratic endeavors, the GOP failed to reciprocate.<sup>9</sup> After nominations, Leahy swiftly initiated hearings,<sup>10</sup> but the minority party held over ballots seven days without reasons for excellent prospects whom the committee unanimously approved the next week.<sup>11</sup> McConnell collaborated little to set final votes, and his colleagues duly placed anonymous holds, or those with no substantiation, on capable, moderate nominees; this frustrated appointments, mandating cloture.<sup>12</sup> Republicans assertively demanded plentiful, unwarranted roll call ballots and debate time and this wasted scarce floor hours.<sup>13</sup> Therefore, by fall 2009, circuits wrestled with twenty, and district courts seventy-five, open positions, which effectively remained constant over the succeeding half decade, comprising the highest rate for an unprecedented period.<sup>14</sup> This situation worsened in 2013 when Obama picked competent, mainstream, diverse aspirants for three D.C. Circuit vacancies.<sup>15</sup> After the GOP rejected yes or no votes for each, the machinations forced Democrats to cautiously invoke the nuclear option.<sup>16</sup>

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*Battles to Avert Pitfalls*, N.Y. TIMES, May 28, 2009, at A1 available at <http://www.nytimes.com/2009/05/28/us/politics/28select.html> (Obama sought both parties' assistance by consulting with every Judiciary Committee member from each party).

- <sup>8</sup> Senator Grassley replaced Senator Jeff Sessions (Ala.) as Judiciary Committee Ranking Member in 2011. Carl Tobias, *Judicial Selection in Congress' Lame Duck Session*, 90 IND. L.J. SUPP. 52, 53 (2015) citing Tobias, *supra* note 2, at 2242.
- <sup>9</sup> For instance, some politicians slowly tendered names or recommended none. Goldman et al., *supra* note 3, at 17; Sheldon Goldman et al., *Obama's First Term Judiciary*, 97 JUDICATURE 7, 17 (2013).
- <sup>10</sup> Tobias, *supra* note 2, at 53; Maureen Groppe, *No Sparks Fly at Hearing*, INDIANAPOLIS STAR, (Apr. 30, 2009), at 3A.
- <sup>11</sup> Sessions found that most candidates whom Obama tapped were "fine nominees." *Exec. Business Mtg., S. Judiciary Comm.*, 111th Cong. (Oct. 8, 2009); *Exec. Business Mtg., S. Judiciary Comm.*, 111th Cong. (Oct. 15, 2009).
- <sup>12</sup> 155 CONG. REC. S11, 421 (daily ed. Nov. 17, 2009); 156 CONG. REC. S820 (daily ed. Feb. 26, 2010); Tobias, *supra* note 2, at 2246 (providing several examples of how filibusters can devour scarce resources and prolong vacancies).
- <sup>13</sup> The GOP even sought sixty, and used five, minutes for strong choices like Judge Beverly Martin; she won approval 97-0. 156 CONG. REC. S13, S18 (daily ed. Jan. 20, 2010); Doug Kendall, *The Bench in Purgatory*, SLATE, Oct. 26, 2009, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/10/the\\_bench\\_in\\_purgatory.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/10/the_bench_in_purgatory.html).
- <sup>14</sup> *Archive of Judicial Vacancies* (2009-14), *supra* note 1.
- <sup>15</sup> Press Release, White House, Office of the Press Sec'y, Remarks by the President on Nominations to the D.C. Circuit (June 4, 2013); Michael Shear and Jeremy Peters, *Judicial Picks Set Stage for Senate Battle*, N.Y. TIMES, June 4, 2013, <http://www.nytimes.com/2013/06/05/us/politics/obamatopappealscourtinchallengepublicans.html>.
- <sup>16</sup> I rely substantially in this and the next sentence on 159 CONG. REC. S8, 418 (daily ed. Nov. 21, 2013); Toobin, *supra* note 6; Jeremy Peters, *Building a Legacy, Obama Reshapes Appellate Bench*, N.Y. TIMES Sept. 14, 2014,

They marshaled fifty-one, not sixty-seven, ballots when amending the filibuster rule to require a majority vote for cloture. Detonating the nuclear option essentially allowed Senate majorities to confirm all three D.C. Circuit possibilities and many other circuit and district court nominees.<sup>17</sup> In 2014, Reid emphasized appellate court candidates, arranging cloture and Senate votes most weeks that the chamber operated.<sup>18</sup> Those actions, especially the nuclear mechanism's release, permitted the courts of appeals to confront seven openings, although the districts had thirty-two, when Congress adjourned near 2014's close.<sup>19</sup>

Over 2015, after Republicans had captured a Senate majority,<sup>20</sup> already negligible coordination further diminished. GOP leaders incessantly pledged they would again bring to the chamber "regular order," a phrase employed to describe the approach which Republicans claimed governed before Democrats ostensibly eroded it. Early in January, McConnell, the new Majority Leader, urged: "We need to return to regular order."<sup>21</sup> Grassley, the new Judiciary Chair, vowed he would treat nominations analogously.<sup>22</sup> Despite many promises, Republicans slowly designated choices for Obama to review, planned nominee hearings and committee ballots, and scheduled chamber debates and votes. This meant that, by 2015's conclu-

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[http://www.nytimes.com/2014/09/14/us/politics/building%ADlegacy%ADobama%ADreshapes%ADappellate%ADbench.html?\\_r=1](http://www.nytimes.com/2014/09/14/us/politics/building%ADlegacy%ADobama%ADreshapes%ADappellate%ADbench.html?_r=1).

17 159 CONG. REC. S8584 (daily ed. Dec. 10, 2013); *id.* at S8667 (daily ed. Dec. 11, 2013); 160 CONG. REC. S283 (daily ed. Jan. 13, 2014); Todd Ruger, *Court Seats Filling Up: Democrats Push Votes Ahead of Elections*, NAT'L L. J., Aug. 11, 2014.

18 Leahy statement, *supra* note 3; Burgess Everett, *How the Senate reshaped the courts*, POLITICO (Aug. 22, 2014), <http://www.politico.com/story/2014/08/how-going-nuclear-unclogged-the-senate-110238>.

19 Jeffrey Toobin, *Bench Press*, NEW YORKER, Sept. 21, 2009, at 42. Appellate court openings were at their lowest point since 1990. This is particularly striking, because 1990 judgeships legislation approved 11 new judgeships, bringing the total to 179. Pub. L. No. 101-650, Tit. II, § 206, 104 Stat. 5098 (1990). Partisanship that was formerly confined to Justices has now infected all levels of the federal judiciary. Goldman et al., *supra* note 3, at 12-14; Tobias, *supra* note 2, at 2234-38.

20 Jerry Markon et al., *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); Jonathan Weisman & Ashley Parker, *G.O.P. Takes Senate*, N.Y. TIMES, Nov. 5, 2014, at A1.

21 He repeated the mantra throughout last year and all of 2016. 161 CONG. REC. S27-28 (daily ed. Jan. 7, 2015); *id.* at S2767 (daily ed. May 12, 2015); see Sarah Binder, *Can Mitch McConnell Repair the Senate?*, WASH. POST, Nov. 12, 2014, <https://www.washingtonpost.com/news/monkey-cage/wp/2014/11/12/can-mitch-mcconnell-repair-the-senate/> (explaining the regular order concept). *But see* 161 CONG. REC. S2949 (daily ed. May 18, 2015) (statement of Sen. Reid) (criticizing the twenty nominations pending in the Judiciary Committee, and twenty-five judicial emergencies); 162 CONG. REC. S5433 (daily ed. Sept. 8, 2016) (statement of Sen. Leahy) (arguing that Republicans refusal to process Garland demonstrates the failure to return to regular order).

22 S. Judiciary Comm., *Hearing on Nominees* (Jan. 21, 2015); David Catanese, *Grassley's Gavel Year*, U.S. NEWS & WORLD REP., Jan. 28, 2015; Carl Tobias, *The Republican Senate leader and regular order*, THE HILL, July 14, 2016, <http://thehill.com/blogs/congress-blog/judicial/287713-the-republican-senate-leader-and-regular-order>.

sion, eight of nine appellate vacancies lacking nominees - which the Administrative Office of the U.S. Courts identified as emergencies - plagued states that GOP members represented.<sup>23</sup> One circuit and ten district jurists won confirmation last year.

2016 is a presidential election year when judicial appointments conventionally stall and ultimately halt, complications intensified by GOP refusal to process U.S. Court of Appeals for the District of Columbia Circuit Chief Judge Merrick Garland, Obama's accomplished, mainstream High Court nominee.<sup>24</sup> The Senate approved one circuit and eight trial court jurists before departing to campaign in late September, yet Republicans averaged only a lone confirmation per month since January 2015 and there could be 110 empty posts on the next Inauguration Day.<sup>25</sup>

## II. CRITICAL ANALYSIS

### A. Difficulties

Striking obstruction and rampant partisanship impose harmful effects. Making superb, moderate nominees wait prolonged times leaves robust careers on hold and dissuades many stellar prospects from contemplating the

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<sup>23</sup> For the eight of nine vacancies, see *Judicial Vacancies*, *supra* note 1 (2016), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2016/01/vacancies>. Republican Senators cooperated minimally, which prompted Obama to nominate no candidates across 2015. However, Obama did tap seven nominees in 2016. JUDICIAL VACANCIES, *supra*. Some prospects lack hearings, because home state Senators retain "blue slips." *E.g.*, Jonathan Tamari and Jeremy Roebuck, *Obama's Pick for Judgeship Her Draws Toomey's Ire*, PHILA. INQUIRER, Mar. 15, 2016; see Ryan Owens et al., *Ideology, Qualification, and Covert Senate Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347 (analyzing blue slips). Emergencies reflect substantial docket size and protracted vacancy length. Toobin, *supra* note 19.

<sup>24</sup> 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/theturmondruleandotheradviceandconsentmyths/>; Press Release, The White House, Remarks by the President Announcing Judge Merrick Garland as his Nominee to the Supreme Court (Mar. 16, 2016), <https://www.whitehouse.gov/the-press-office/2016/03/16/remarks-president-announcing-judge-merrick-garland-his-nominee-supreme>; Michael Shear et al., *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES, Mar. 16, 2016, at A1. McConnell has continuously vowed that the next President will fill this vacancy. Ariane de Vogue, *How McConnell Won, and Obama Lost, the Merrick Garland Fight*, CNN.COM (Nov. 9, 2016), <http://www.cnn.com/2016/11/09/politics/merrick-garland-supreme-court/>; Manu Raju, *No Confirmation for Garland in Lame Duck Session*, CNN.COM (Sept. 13, 2016), <http://www.cnn.com/2016/11/09/politics/merrick-garland-supreme-court/index.html>.

<sup>25</sup> JUDICIAL VACANCIES (2015-16), *supra* note 1; Russell Wheeler, *Recess is Over: Time To Confirm Judges*, BROOKINGS INST. (Sept. 6, 2016), <https://www.brookings.edu/blog/fixgov/2016/09/06/recess-is-over-time-to-confirm-judges/>.

bench.<sup>26</sup> This resistance deprives tribunals of necessary judicial resources and myriad litigants of civil and criminal justice, while it undermines swift, economical and fair case disposition,<sup>27</sup> and public regard for the confirmation system and the coequal branches.<sup>28</sup>

### B. Benefits

Notwithstanding these problems, Obama's impressive work and diligent efforts by lawmakers who cooperated with the White House realized considerable success when they approved numbers of very qualified, moderate, diverse candidates at 2014's close. For instance, Obama tripled the Asian American circuit jurists,<sup>29</sup> named the first gay appellate judge,<sup>30</sup> expanded the number of female choices' represented to more than 40 percent and increased experiential diversity.<sup>31</sup> This White House reduced openings to thirty-nine by the end of 2014; however, in November, the bench will have thirteen circuit, and eighty-one district, vacancies when Congress reconvenes for the lame duck session.<sup>32</sup>

Assiduous efforts by President Obama and Senators who helped confirm a plethora of talented, diverse nominees, yield advantages. Many circuit and district courts with fewer openings comparatively quickly, inexpensively and equitably resolve immense, complex filings.<sup>33</sup> Enlarged diversity also improves comprehension and review of essential questions, notably involving constitutional and criminal law, and experiential diversity can supply those and related benefits.<sup>34</sup> People of color, women and

26 157 CONG. REC. S6027 (daily ed. Oct. 3, 2011) (statement of Sen. Leahy); Tobias, *supra* note 2, at 2253.

27 JOHN ROBERTS, 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7-8 (2010); Jennifer Bendery, *Federal Judges Are Burned Out, Overworked and Wondering Where Congress Is*, HUFFINGTONPOST (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).

28 Tobias, *supra* note 2, at 2253.

29 Federal Judicial Center, History of the Federal Judiciary, *Biographical Directory of Judges*, <http://www.fjc.gov/history/home.nsf/page/judges.html> (2016); *This is the First Time Our Judge Pool Has Been So Diverse*, WHITE HOUSE.GOV (June 8, 2016), <https://www.whitehouse.gov/share/judicial-nominations>.

30 Todd Ruger, *Obama Names Record Number of Gay Judges*, NAT'L L. J., (July 21, 2014); Mark Joseph Stern, *Obama's Most Enduring Gay Rights Achievement*, SLATE, (June 17, 2014); Toobin, *supra* note 6.

31 President Obama also appointed two female Justices, Sonia Sotomayor and Elena Kagan. Toobin, *supra* note 6; WHITE HOUSE.GOV, *supra* note 29.

32 JUDICIAL VACANCIES, *supra* note 1 (2016). Insufficient time remains to fill all thirteen appellate court vacancies in 2016.

33 When courts have full judicial complements, this relieves overworked judges. Leahy statement, *supra* note 3; Tobias, *supra* note 2, at 2254.

34 RICHARD DELGADO, THE RODRIGO CHRONICLES (1995); SALLY KENNEY, GENDER AND JUSTICE (2013); FRANK WU, YELLOW (2003). *But see* Stephen Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504 (2011)(finding that gender does not affect judicial decision making).

LGBT individuals could mitigate ethnic, gender and similar biases that impair justice.<sup>35</sup> Courts that mirror America enhance public confidence.<sup>36</sup>

In short, the advantages of confirming able, consensus, diverse jurists eclipse the adverse impacts which can result from politicization and obstruction. Thus, in the lame duck session, both sides need to maximize collaboration that will promote the appointment of numerous such choices and carefully minimize the detriments which partisanship and obstruction create.

### III. SUGGESTIONS

Republicans and Democrats should redouble their efforts to confirm the largest possible number of trial and circuit judges in the lame duck session.<sup>37</sup> Approving remarkable, consensus, diverse persons affords multiple benefits. For example, these jurists invariably could help to speedily, economically, and fairly resolve courts' huge dockets and furnish perceptive insights on complex fields of litigation.

The GOP may argue the Senate failed to confirm judges after Presidents captured election in 1988, 1992, 2000, and 2008.<sup>38</sup> However, more telling was Stephen Breyer's 1980 circuit appointment once Ronald Reagan defeated Jimmy Carter, a process eased by Strom Thurmond, who fashioned the "rule" providing that approvals can be delayed and stopped in presidential election years.<sup>39</sup> Republicans also should remember that GOP home state politicians recommended a majority of the twenty well qualified, mainstream district nominees whom the Judiciary Committee approved by voice vote without dissent.<sup>40</sup> Republicans as well should keep in mind the substantial waste entailed in failing to consider these nominees, the huge amount of time, money, and energy that the government must expend to

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35 REPORT OF THE FIRST CIRCUIT GENDER, RACE AND ETHNIC BIAS TASK FORCES (1999); FINAL REPORT, NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS, AND ETHNIC FAIRNESS (1997).

36 Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 253 (1978); Sylvia Lazos, *Only Skin Deep?*, 83 IND. L. J. 1423, 1442 (2008); Toobin, *supra* note 6.

37 Senate confirmation of appellate court nominees is critical, given Senate approval of two circuit judges in the last two years; three nominees have waited months on floor debates and votes. *See supra* notes 23, 25.

38 These were the final years of two-term Presidents (except for Bush *père*), who confronted many fewer vacancies, and all elected but him were opposition party members. End of presidency legislative matters also assumed precedence. Kelsey Snell, *Senate Considers Making a Short Pre-Election Session Even Shorter*, WASH. POST, (Sept. 9, 2016) <https://www.washingtonpost.com/news/powerpost/wp/2016/09/09/senate-considering-making-a-short-session-even-shorter/>.

39 Carl Tobias, *The Transformation of the Thurmond Rule in 2016*, 66 EMORY L. J. 2001 (2016); *see supra* note 24.

40 *Report Pending Judicial Nominations*, ALLIANCE FOR JUSTICE (Nov. 11, 2016) [www.afj.org/wp-content/uploads/2014/11/ReportPendingNominees.pdf](http://www.afj.org/wp-content/uploads/2014/11/ReportPendingNominees.pdf).



restart the process<sup>41</sup> and the judgeships could well remain vacant for more than a year, given numerous other higher priorities, such as creating a government as well as nominating and confirming a new Justice and sixteen circuit judges.<sup>42</sup>

These ideas demonstrate that Republicans should actively cooperate with Democrats. They ought to alternate final votes on candidates whom each party mustered while swiftly according them ballots. If the GOP eschews collaboration by, for instance, aggressively “cherry picking” nominees whom Republicans actually submitted, Democrats might protest unanimous consent or assertively recruit GOP centrists to filibuster nominees.<sup>43</sup>

Activities effectively must begin immediately to facilitate endeavors when Congress does assemble. Obama should vigorously pursue creative ideas from resources knowledgeable about strong consensus prospects and keep assiduously cultivating home state politicians, asking that lawmakers support people he suggested.<sup>44</sup> Until, and even after, Congress arrives, both parties’ Judiciary Committee staff may amply review the twenty nominees awaiting hearings. The panel concomitantly ought to set as many hearings and meetings as possible during the week politicians convene and conduct the maximum number practicable until adjournment.

When the session commences, legislators must probe nominees’ capability, ethics, and temperament with expeditious committee hearings and ballots speedily followed by complete, robust floor debates and votes. More particularly, lawmakers ought to seriously consider reinstating numerous longstanding traditions. Most pertinent would be scrutinizing numbers of prominent, moderate, trial level aspirants throughout the lame duck session, a nuanced custom which modern Presidents and Senates conventionally respected.<sup>45</sup>

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41 For example, President Donald Trump must consult home state politicians, some of whom must create merit selection commissions or recalibrate existing ones to recommend candidates whom the politicians suggest to the White House, which must evaluate prospects and nominate. The Senate must investigate nominees, conduct panel hearings, discussions and votes, and convene floor debates and votes.

42 The process is considerably more extensive and time consuming for appellate nominees and even more so for Supreme Court nominees, whose confirmation processes can essentially suspend lower court efforts for months.

43 Examples are Susan Collins (Me.) and Mark Kirk (Ill.). A cherry picking example was Republicans’ offer to vote on three nominees whom they favored and one whom Democrats picked by skipping two African Americans whom Democrats favored. This provoked Democratic objections to unanimous consent. 162 CONG. REC. S5900 (daily ed. Sept. 20, 2016).

44 Obama also may ask home state politicians to swiftly proffer for the 37 district openings without nominees excellent consensus picks whom he analyzes expeditiously and nominates when Congress arrives, but they will lack time for 2016 approval, yet could have hearings then and 2017 approval, if re-nominated. JUDICIAL EMERGENCIES, *supra* note 1 available at <http://www.uscourts.gov/judges-judgeships/judicial-vacancies>.

45 Judith Schaeffer, *What’s Good for One Lame Duck Ought to be Good for Another*, HUFFINGTON POST (Nov. 11, 2010), <http://www.huffingtonpost.com/judith-e-schaeffer/whats-good-for-one->

This year, the President and legislators should especially honor that custom. The district courts desperately need the open slots filled, and the vast majority of those possibilities received nomination because they are competent, uncontroversial, and diverse, rather than ideological.<sup>46</sup>

Another custom to which Senators must adhere would be permitting final ballots on quite a few of these excellent choices before recesses, namely during Thanksgiving.<sup>47</sup> The politicians also should restore the convention of proffering abundant deference to home state colleagues and the President, who has meticulously consulted, indulged Senators' preferences, and tapped numerous selections whom Republicans designated.<sup>48</sup>

The GOP must correspondingly revisit the determination to refuse many nominees' floor votes, which has delayed even the most accomplished, noncontroversial, diverse candidates. If Republicans aggressively continue enforcing this approach, Democrats might again implement rather dramatic reforms, which occurred earlier when they cautiously jettisoned anonymous chamber holds placed on nominees and the sixty-vote cloture proviso.<sup>49</sup> Democrats may even allow final ballots on a number of competent trial judge submissions proposed by GOP lawmakers in exchange for Republican agreements to have chamber votes on many whom Democrats favor.<sup>50</sup>

In the end, Republicans and Democrats should precisely balance the competing needs to thoroughly review suggestions and quickly fill myriad vacancies. Particularly with numerous fine, mainstream individuals availa-

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lame-d\_b\_782130.html. See Tobias, *supra* note 39, at 2002 (noting that Strom Thurmond, the architect of the Thurmond rule, helped facilitate Stephen Breyer's appellate confirmation); *id.* at 2005 n.19 (discussing recent situations that seem to demonstrate that lame duck sessions are more prevalent in mid-term, than presidential, election years).

46 Robert Carp et al., *A First Term Assessment: The Ideology of Barack Obama's District Court Appointees*, 97 JUDICATURE 128, 136 (2013); Tobias, *supra* note 2, at 2249. The Judicial Conference recommendation for Congress that it authorize 73 new judgeships was premised on conservative case and workload estimates in empirical data, which show the critical need. U.S. Jud. Conf., Proceedings 18 (Mar. 10, 2015). See Federal Judgeship Act of 2013, S. 1385, 113th Cong. (2013) (proposing the creation of additional judgeships for the circuit and district courts).

47 Excellent, consensus Bush district nominees had expeditious approval, especially at recesses. Goldman et al., *supra* note 2, at 281; Michael L. Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 292 (2012).

48 Goldman et al., *supra* note 2, at 16-17; Carl Tobias, *Justifying Diversity in the Federal Judiciary*, 106 NW. U. L. REV. COLLOQUY 283, 296 (2012).

49 S. Res. 28, 115th Cong., 157 CONG. REC. S296 (daily ed. Jan. 27, 2011) (adopted) (secret holds); Everett, *supra* note 18 (nuclear option). Democrats may even decide to reinstitute the latter rule. Burgess Everett, *Confirmation Battles Are Back*, POLITICO, (Sept. 28, 2014), 6:06 PM, updated 7:07 PM, <http://www.politico.com/story/2014/09/senate-confirmation-battles-111402>.

50 Michael Teter, *Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process*, 73 OHIO ST. L. J. 287, 289, 335 (2012); Michael Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 688 (2003); Carl Tobias, *Fixing Federal Judicial Selection*, 65 EMORY L. J. ONLINE 2051, 2056 (2016).

ble to fill the many vacancies, this balance should favor expeditious consideration and approval. The Constitution envisions that Senators will probe nominee ability, character, and temperament.<sup>51</sup> Legislators should, as the chief executive deftly has, deemphasize ideology, which possesses minimal relevance for those criteria,<sup>52</sup> and cabin speculation about how jurists would resolve legal issues, because that can erode judicial independence.<sup>53</sup> The GOP also ought to cease delaying nominees essentially for political gain alone, as this could harm them, litigants, jurists, and selection procedures' integrity. One salutary remedy for the difficulties would be a presumption that capable, moderate nominees merit rapid final ballots.<sup>54</sup>

#### CONCLUSION

Obama and Senators cooperating with the President enjoyed success when they appointed talented, centrist, diverse judges. If Republicans and Democrats recalibrate the process by cooperating again over the lame duck session, they can confirm numbers of these jurists, felicitously enabling the bench to more promptly, inexpensively, and fairly treat cases.

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51 U.S. CONST., art. 2; *The Judicial Nomination and Confirmation Process: Hearings Before the S. Judiciary Subcomm. on Admin. Oversight & the Courts*, 107th Cong. 5-7, 262-64 (2001).

52 *See Carp*, *supra* note 46, at 136; Goldman et al., *supra* note 3, at 18. *See generally*, STEFANIE LINDQUIST & FRANK CROSS, *MEASURING JUDICIAL ACTIVISM* (2009) (attempting an empirical analysis of judicial activism).

53 THOMAS SARGENTICH ET AL., *CITIZENS FOR INDEP. CTS., UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS* 1-75, 121-205 (2000); Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 337-338 (1999).

54 For instance, ten Republican Senators agreed to cloture on Judge David Hamilton, but nine voted against confirmation. 155 CONG. REC. S11,421 (daily ed. Nov. 17, 2009) (cloture); *id.* at S11,552 (daily ed. Nov. 19, 2009) (approval). For many other ideas for improvement, *see* Shenkman, *supra* note 47, at 298-311; Tobias, *supra* note 2, at 2255-65.