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# Confirming Judge Restrepo to the Third Circuit

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## CONFIRMING JUDGE RESTREPO TO THE THIRD CIRCUIT

*Carl Tobias\**

From the moment that the Grand Old Party (GOP) won the Senate in November 2014,<sup>1</sup> Republicans have directly and incessantly vowed to establish “regular order” in the upper chamber again. Lawmakers employed this phrase to depict the purported restoration of strictures that prevailed until Democrats subverted them. In January 2015, when the 114th Congress began, Senator Mitch McConnell (R-Ky.), the Majority Leader, proclaimed, “[w]e need to return to regular order,” while the legislator has dutifully recited that mantra ever since.<sup>2</sup> Senator Charles Grassley (R-Iowa), the head of the Senate Judiciary Committee, espoused analogous concepts. Illustrative was his January 2015 pledge to duly exercise “regular order” in scrutinizing President Barack Obama’s excellent mainstream judicial nominees.<sup>3</sup> Because senators have diligently completed practically both sessions of the 114th Congress throughout which the majority trumpeted “regular order,” its application to a daunting constitutional responsibility—providing advice and consent on nominees—deserves review. This survey ascertains that counterproductive partisanship suffuses appointments—particularly evidenced by slow panel consideration and the confirmation of *eleven* jurists all last year, the fewest since President Dwight Eisenhower occupied the White House, and merely nine thus far over 2016.

A striking example is Judge Luis Felipe Restrepo. This exceptional, consensus prospect waited seven months on a hearing after President Obama had initially designated him for the Third Circuit at the powerful suggestion of

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\* Williams Chair in Law, University of Richmond. I wish to thank Margaret Sanner and Katie Lehen for exceptional suggestions, Leslee Stone for excellent processing, as well as Russell Williams and the Hunton Williams Summer Endowment Fund for generous, continuing support. Remaining errors are mine.

1. 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, *GOP Takes Senate*, N.Y. TIMES, Nov. 5, 2014, at A1.

2. 161 CONG. REC. S27–28 (daily ed. Jan. 7, 2015) (statement of Sen. McConnell); *accord id.* at S2,767 (daily ed. May 12, 2015). *But see id.* at S3,850 (daily ed. June 8, 2015) (statement of Sen. Reid); *id.* at S3,223 (daily ed. May 21, 2015) (statement of Sen. Leahy); Jennifer Steinhauer & Jonathan Weisman, *Vote on N.S.A. Shows Discord Rules in Senate*, N.Y. TIMES, May 24, 2014, at A1.

3. *Hearings on Nominees Before the S. Judiciary Comm.*, 114th Cong. (Jan. 21, 2015) (statement of Sen. Chuck Grassley, Chairman, Sen. Judiciary Comm.) [hereinafter *January 21st Hearings*]; *see also* 161 CONG. REC. S1,426 (daily ed. Mar. 11, 2015); David Catanese, *Chuck Grassley’s Gavel Year*, U.S. NEWS & WORLD REP. (Jan. 28, 2015, 12:01 AM), <http://www.usnews.com/news/articles/2015/01/28/chuck-grassleys-gavel-year>.

Pennsylvania Senators Robert Casey (D) and Pat Toomey (R).<sup>4</sup> The committee only arranged a hearing on June 10, 2015 because the GOP lawmaker finally returned the “blue slip”—a custom which advances judicial nominees—on May 14, 2015, even though Casey proffered his during November 2014, immediately after Obama made Restrepo’s nomination.<sup>5</sup> Toomey should have produced the blue slip long before then, while the chamber ought to have promptly evaluated Restrepo, as the Third Circuit needs all of its members to deliver justice, especially because the vacancy for which he was nominated had been classified as a “judicial emergency.”

President Obama has robustly consulted with applicable home-state politicians.<sup>6</sup> Since 2011, Casey and Toomey have collaborated to fill two empty Pennsylvania Third Circuit seats and fourteen district court open positions.<sup>7</sup> The senators invoke merit selection nominating commissions—which encompass distinguished practitioners—that solicit and review candidate applications, carefully interview dynamic persons, and specify the finest picks. Casey and Toomey correspondingly examine these submissions and develop proposals for White House consideration. The Republican legislator selects one in every four people and then both senators send names to President Obama,<sup>8</sup> who next chooses among the possibilities. However, the GOP majority has failed to process swiftly the individuals once the chief executive tenders the persons.

Senator Grassley promptly scheduled the initial panel hearing on January 21, 2015, fourteen days after the Senate commenced, and promised that he would

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4. Press Release, White House, Office of the Press Sec’y, President Obama Nominates Two to Serve on the U.S. Courts of Appeals (Nov. 12, 2014); *see also* Press Release, White House, Office of the Press Sec’y, Presidential Nominations Sent to the Senate (Jan. 7, 2015); Press Release, Sen. Robert P. Casey, Jr., & Sen. Pat Toomey, Casey, Toomey Applaud Nomination of Judge Luis Felipe Restrepo to U.S. Court of Appeals for the Third Circuit (Nov. 12, 2014).

5. P. J. D’Annunzio, *Confirmation Hearing Date Set for Restrepo*, LEGAL INTELLIGENCER (June 5, 2015), <http://www.thelegalintelligencer.com/id=1202728390767/Confirmation-Hearing-Date-Set-for-Restrepo?slreturn=20151005150546>; *see also* Laura Olson, *What’s Holding Up a Pa. Appeals Court Nominee?*, ALLENTOWN MORNING CALL (May 6, 2015, 3:32 PM), <http://www.mcall.com/news/nationworld/pennsylvania/capitol-ideas/mc-whats-holding-up-a-pa-appeals-court-nominee-20150506-story.html>; Jonathan Tamari, *A Judicial Nominee Waits, Toomey Gets Blamed*, PHILA. INQUIRER (May 8, 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).

6. Carl Tobias, *Pennsylvania’s Missing Judges*, PITTSBURGH POST-GAZETTE, May 8, 2015.

7. *Id.* “Toomey bears much responsibility for [many] longstanding vacancies. Obama nominated candidates for three of the four Western District openings and an Eastern District vacancy in July 2015. The committee granted all four December 9 hearings and two Western District nominees January 28 voice vote approval. Nonetheless, ever since January, the two nominees reported have languished, while the other two have not received panel votes. Toomey has secured no further movement on any of the four. The two who lack committee votes are Casey choices, so panel inaction clearly violates the senators’ agreement, which allows Toomey to recommend one in four nominees.” Carl Tobias, *Voting Toomey? Consider His Judicial Obstructionism*, THE HILL (Nov. 4, 2016, 3:59 PM), <http://thehill.com/blogs/pundits-blog/campaign/304383-voting-toomey-consider-his-judicial-obstructionism>.

8. Tobias, *supra* note 6; *see also* Michael Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 688 (2003) (describing judicial nominations under past presidents).

efficiently canvass able, moderate nominees using “regular order.”<sup>9</sup> The chair asserted that citizens should anticipate no “discernible difference” between how the committee operates under Republican versus Democratic leadership, intimating he would provide hearings every several weeks, a regime that Senator Patrick Leahy (D-Vt.), who served as Grassley’s predecessor, maintained the last three Congresses with Grassley’s assistance.<sup>10</sup> Nonetheless, salient disparities materialized. For instance, the panel only convened the next hearing *seven* weeks after the first with the third coming *eight* weeks later, and the committee had yet to arrange others—compellingly, for Judge Restrepo—until June.<sup>11</sup> Merely a pair of nominees appeared for the March session, which contrasts with the five nominees Leahy usually had testify, a norm that Grassley had endorsed.<sup>12</sup>

Despite abundant pledges, which the chair reiterated at the Senate Judiciary Committee’s February 12 Executive Business Meeting, the GOP held over nominee votes.<sup>13</sup> This behavior continued a policy—systematically practiced throughout the Obama Administration—of suspending discussions and ballots for excellent, uncontroversial prospects listed at the initial time until the ensuing meeting.<sup>14</sup> Selections postponed were five strong, noncontroversial United States

9. *January 21st Hearings*, *supra* note 3; Jennifer Jacobs, *Grassley’s Checklist of Priorities*, DES MOINES REG. (Jan. 7, 2015), <http://www.desmoinesregister.com/story/news/politics/2015/01/07/grassley-checklist-priorities-judiciary-committee/21394233/>.

10. *January 21st Hearings*, *supra* note 3. *But see* 161 CONG. REC. S3,850 (daily ed. June 8, 2015) (statement of Sen. Reid). Grassley was ranking member for four years.

11. *Compare Hearings on Nominees Before the S. Judiciary Comm.*, 114th Cong. (June 10, 2015) [hereinafter *June 10th Hearings*], *Hearings on Nominees Before the S. Judiciary Comm.*, 114th Cong. (May 6, 2015) [hereinafter *May 6th Hearings*], *Hearings on Nominees Before the S. Judiciary Comm.*, 114th Cong. (Mar. 11, 2015) [hereinafter *March 11th Hearings*], and *January 21st Hearings*, *supra* note 3, with *Hearings on Nominees Before the S. Judiciary Comm.*, 113th Cong. (Jan. 28, 2014) [hereinafter *January 28th Hearings*], *Hearings on Nominees Before the S. Judiciary Comm.*, 113th Cong. (Jan. 8, 2014), *Hearings on Nominees Before the S. Judiciary Comm.*, 112th Cong. (Feb. 13, 2013), and *Hearings on Nominees Before the S. Judiciary Comm.*, 112th Cong. (Jan. 23, 2013).

12. *See January 21st Hearings*, *supra* note 3 (Leahy claiming that the panel had never required a strong, consensus nominee to have a second hearing in his four-decade Senate career, but Grassley asserting that he considered this the first hearing under “regular order,” as the November 2014 hearing was improper and the GOP wanted regular order restored); *Senate Judiciary Committee Agenda*, C-SPAN.ORG (Apr. 27, 2015), <http://www.c-span.org/video/?325608-1/senator-chuck-grassley-ria-remarks-senate-judiciary-committee-agenda> (Grassley’s endorsement of that norm). *Compare March 11th Hearings*, *supra* note 11, with *Hearings on Nominees Before the S. Judiciary Comm.*, 113th Cong. (Sept. 9, 2014), and *January 28th Hearings*, *supra* note 11.

13. *Exec. Business Mtg. Before the S. Judiciary Comm.*, 114th Cong. (Feb. 26, 2015); *Exec. Business Mtg. Before the S. Judiciary Comm.*, 114th Cong. (Feb. 12, 2015); Josh Voorhees, *Procedural Purgatory*, SLATE (Mar. 29, 2015, 7:41 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2015/03/loretta\\_lynch\\_confirmation\\_mitch\\_mcconnell\\_and\\_the\\_gop\\_have\\_delayed\\_it\\_but.html](http://www.slate.com/articles/news_and_politics/politics/2015/03/loretta_lynch_confirmation_mitch_mcconnell_and_the_gop_have_delayed_it_but.html). See also *supra* note 3 and accompanying text for a description of Senator Grassley’s pledge to restore regular order.

14. *E.g.*, *Exec. Business Mtg. Before the S. Judiciary Comm.*, 113th Cong. (Nov. 13, 2014); *Exec. Business Mtg. Before the S. Judiciary Comm.*, 113th Cong. (Sept. 11, 2014); *see also* Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2242–43 (2013).

Court of Federal Claims renominees whom the panel had approved in 2014 on unopposed voice votes<sup>15</sup> and four equally talented consensus district renominees, including two designated for judicial emergencies, with support of their Republican Party home-state of Texas and Utah committee members.<sup>16</sup>

Equally problematic has been the continual delay related to nominees' Senate floor debates, if those debates are necessary, and final chamber ballots. Senator McConnell never entered prompt voting accords when he served as the minority leader in President Obama's first term and a half,<sup>17</sup> provoking Democrats to seek cloture on plentiful nominees and cautiously reform filibusters.<sup>18</sup> The senator promised more cooperation once he was named the majority leader, while setting floor debates and ballots created a valuable opportunity to respect this promise.<sup>19</sup> Nonetheless, McConnell did not schedule votes regarding any of the five Court of Federal Claims or four district renominees, whom the panel dutifully reported on February 26, until a month thereafter when he arranged confirmation on a date nearly three weeks later for one of the trial level renominees.<sup>20</sup> The senator made no public statement about ballots on the five Court of Federal Claims and three other district court renominees, yet duly permitted them for a second trial level nominee on April 20 with a pair more considered four weeks later; he denied votes to all but one circuit court aspirant until October and has yet to grant any of the five Court of Federal Claims nominees a ballot.<sup>21</sup>

In short, notwithstanding Republicans' continuous dissemination of the "regular order" mantra, they helped approve eleven jurists over the course of the

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15. *Exec. Business Mtg. Before the S. Judiciary Comm.*, 114th Cong. (Feb. 26, 2015); *Exec. Business Mtg. Before the S. Judiciary Comm.*, 114th Cong. (Feb. 12, 2015); *Exec. Business Mtg. Before the S. Judiciary Comm.*, 113th Cong. (Nov. 20, 2014).

16. John Cornyn, Ted Cruz, Orrin Hatch, and Mike Lee are panel members. *See January 21st Hearings*, *supra* note 3 (showing senators' support for home-state, Republican nominees); *Exec. Business Mtg. Before the S. Judiciary Comm.*, 114th Cong. (Feb. 26, 2015) (showing senators' votes for home-state, Republican nominees); *see also Judicial Emergencies for December 2015*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2015/12/emergencies> (listing judicial emergencies as of December 1, 2015).

17. *See Tobias*, *supra* note 14, at 2243.

18. *E.g.*, 159 CONG. REC. S8,418 (daily ed. Nov. 21, 2013) (cloture vote on Patricia Ann Millett); *see also* Carl Hulse, *Harry Reid to Retire from Senate in 2016*, N.Y. TIMES, Mar. 28, 2015, at A12; Jeffrey Toobin, *How Harry Reid Changed the Federal Courts*, NEW YORKER (Mar. 27, 2015), <http://www.newyorker.com/news/news-desk/how-harry-reid-changed-the-federal-courts>.

19. Sarah Binder, *Can Mitch McConnell Repair the Senate?*, WASH. POST: MONKEY CAGE (Nov. 12, 2014), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2014/11/12/can-mitch-mcconnell-repair-the-senate/>.

20. *E.g.*, 161 CONG. REC. S2,104-05 (daily ed. Apr. 13, 2015); *id.* at S2,029-30 (daily ed. Mar. 26, 2015) (statement of Sen. Leahy); *see also* Editorial, *Grassley Can Press "Go" on Judicial Nominees*, DES MOINES REG., June 11, 2015.

21. 161 CONG. REC. S3,224 (daily ed. May 21, 2015); *id.* at S2,265 (daily ed. Apr. 20, 2015) (statement of Sen. Leahy); *see also* Jennifer Steinhauer, *Majority Leader Brings Changes, but Gridlock Remains in Senate*, N.Y. TIMES, Mar. 21, 2015, at A12. *See supra* notes 15-16 and accompanying text for a description of the renominees. *See also infra* notes 61-64 and accompanying text for a description of the only July 2015 ballot vote for an appellate judicial nominee.

whole year. The panel concomitantly staged only three judicial nominee hearings during the protracted time before June, and one session had merely two nominees while reporting only five Court of Federal Claims, and four district court nominees on February 26, and two additional picks.<sup>22</sup> That dispiriting record compares unfavorably with Democratic success over the past six years and even during President George W. Bush's administration.<sup>23</sup>

The failure to schedule Judge Restrepo's Senate Judiciary Committee hearing epitomizes GOP inaction. Senators Casey and Toomey had previously submitted Judge Restrepo, who easily secured Eastern District of Pennsylvania confirmation in a June 2013 voice vote.<sup>24</sup> The lawmakers assumed credit for proposing the stellar nominee's elevation with a press release voicing firm support in which Toomey declared that the prospect would "make a superb addition to the Third Circuit."<sup>25</sup> However, Restrepo was noticeably absent from the May panel hearing on four district court nominees—merely the third panel hearing the entire year—although Congress had been in session fifteen weeks and President Obama had tapped none of the four candidates who testified before Restrepo.<sup>26</sup>

On April 30, Senator Leahy asked that Grassley designate Restrepo for the May hearing, a plea to which the chair did not respond.<sup>27</sup> Six days later, the press queried Toomey, who answered that he supported Restrepo, was confident about 2015 confirmation, and deemed vetting confidential, thus eschewing more comment—particularly as to the blue slip—over the nomination's pendency.<sup>28</sup> Grassley said that he would mount a hearing once Toomey proffered the blue slip, which the press claimed Toomey neglected to supply.<sup>29</sup> A panel staffer asserted that the committee was analyzing the choice's "background

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22. *Exec. Business Mtg. Before the S. Judiciary Comm.*, 114th Cong. (Apr. 23, 2015); *supra* notes 11–12, 15–16; *see also infra* note 57 and accompanying text (describing how Judge Restrepo's nomination languished in the Senate); 161 CONG. REC. S4,591 (daily ed. June 24, 2015) (statement of Sen. Leahy) (describing how six months into the new Congress, the Senate still had failed to confirm a single appellate nominee).

23. 161 CONG. REC. S4,591 (daily ed. June 24, 2015) (statement of Sen. Leahy); *id.* at S3,223 (daily ed. May 21, 2015) (statement of Sen. Leahy); *id.* at S2,029 (daily ed. Mar. 26, 2015) (statement of Sen. Leahy); *see also infra* notes 33, 50 and accompanying text (describing how Democrats' actions, like the nuclear option, fueled the "confirmation wars"); Tobias, *supra* note 14, at 2261.

24. 159 CONG. REC. S4,515–16 (daily ed. June 17, 2013); Saranac Hale Spencer, *Political Maneuvers Holding Up Nominee for Third Circuit*, LEGAL INTELLIGENCER, May 6, 2015. He was serving as a Magistrate Judge in the Eastern District. *Id.* Elevation is a venerable tool that all modern Presidents invoke. *See* Tobias, *supra* note 14, at 2258.

25. *Casey & Toomey, Press Release*, *supra* note 4.

26. *May 6th Hearings*, *supra* note 11; *see also Mar. 11th Hearings*, *supra* note 11; *January 21st Hearings*, *supra* note 3.

27. *Exec. Business Mtg.*, *supra* note 22. Leahy is now ranking member. *See id.*

28. Jennifer Bendery, *Pat Toomey Is Blocking His Own Judicial Nominee, For Some Reason*, HUFFINGTON POST (May 5, 2015, 4:18 PM), [http://www.huffingtonpost.com/2015/05/05/pat-toomey-luis-restrepo\\_n\\_7214790.html](http://www.huffingtonpost.com/2015/05/05/pat-toomey-luis-restrepo_n_7214790.html); Tracie Mauriello, *Pa. Judge Awaits Confirmation Vote; Toomey Says He Supports Nominee*, PITTSBURGH-POST GAZETTE, May 7, 2015, at A1; Spencer, *supra* note 24.

29. Bendery, *supra* note 28; Mauriello, *supra* note 28.

information, following the *regular process*,<sup>30</sup> and politicians often hold blue slips until panel evaluation concludes, as concerns do surface in this process.<sup>31</sup>

On May 6, before the afternoon Senate Judiciary Committee hearing, Senator Harry Reid (D-Nev.), the Minority Leader, detailed Toomey's earlier praise for Restrepo, while he speculated that Pennsylvania citizens "[a]re . . . left wondering why the qualified judicial candidate is not moving," and Toomey declined to explain why the GOP had stymied Restrepo.<sup>32</sup> That day, Grassley posted a statement putatively showing that the Republican party's 2015 confirmations resembled numbers that the Democratic majority in the Senate realized when assessing President Bush picks in the comparable (2007) year.<sup>33</sup>

The subsequent day, Toomey passionately "rejected the allegation" that he created delay for Restrepo with no mention of the blue slip question.<sup>34</sup> The lawmaker argued that the panel was diligently canvassing Restrepo and would conduct a hearing after the endeavor's completion, while he distinctly repeated support and confidence in approval "certainly this year," adding there was "nothing [he] could have done at this point" that would have made Restrepo's circumstances better.<sup>35</sup> Democrats found that Toomey's approach was unconventional, especially for home-state officers, who clearly and persuasively recommend choices, while Democrats immediately finished their examination, as the committee had fully investigated the nominee with his 2013 appointment.<sup>36</sup>

A May 10 Pittsburgh newspaper editorial castigated Senator Toomey for Restrepo's delay, asserted that the politician had yet to return his blue slip, which "is a tired ploy that advances no one's agenda," and championed quick

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30. Spencer, *supra* note 24 (emphasis added). The panel staffer claimed that nominees are processed in the order received. *See also* Olson, *supra* note 5 (Senate Judiciary Committee spokesperson commenting that committee works through the nominations in the order they are received); Tamari, *supra* note 5 (spokesperson for Senator Grassley commenting that Restrepo's hearing would not occur before an ongoing background check concluded). But see *infra* notes 47, 57–58 and accompanying text for an illustration of the difficulties in Restrepo's nomination process compared to other nominees.

31. Mauriello, *supra* note 28; Olson, *supra* note 5; *accord* Jennifer Bendery, *Pat Toomey Insists He's Not Holding up a Judicial Nominee He's Holding Up*, HUFFINGTON POST (May 13, 2015), [http://www.huffingtonpost.com/2015/05/13/pat-toomey-judge-restrepo\\_n\\_7277332.html](http://www.huffingtonpost.com/2015/05/13/pat-toomey-judge-restrepo_n_7277332.html) (asserting the same idea the next week); Tamari, *supra* note 5 (asserting the same idea the next day).

32. *May 6th Hearings*, *supra* note 11; *see also* Tamari, *supra* note 5 (quoting Senator Reid's criticism of the GOP for delaying Restrepo's and other nominees' confirmation processes). *See supra* notes 2 and 11 for additional statements from Senator Reid reiterating his criticism of the GOP for delaying Restrepo and other nominees in the committee and on the floor.

33. Press Release, Sen. Chuck Grassley, Prepared Statement for Hearing on the Nominations of: Drozd, Donnelly, Vilaro & Hall (May 6, 2015); *accord* Press Release, Sen. Chuck Grassley, Prepared Statement for Hearing on the Nominations of: Restrepo, McDonough & Crenshaw (June 10, 2015); Editorial, *Grassley Can Press "Go" on Judicial Nominees*, *supra* note 20. But see *supra* note 23, *infra* note 50, and accompanying text for sources disputing this proposition.

34. Tamari, *supra* note 5; *accord* Bendery, *supra* note 28.

35. Tamari, *supra* note 5.

36. *Id.* *See infra* notes 46–47 and accompanying text for aspects of the unusually long judicial nominee investigation.

blue slip delivery and Restrepo's prompt confirmation.<sup>37</sup> Three days later, the senator addressed these contentions and mounting criticism over Restrepo's progress with adamant denial of the stalling charges and reiterating that the background check delayed the hearing and that he planned to "turn in [his] 'blue slip' . . . the day that investigation is completed, provided no issues of concern" arise.<sup>38</sup>

On May 14, the legislator relented, tendering his blue slip, ostensibly due to the probe's conclusion.<sup>39</sup> Nevertheless, the hearing for Restrepo was only held on June 10; in that session, Toomey dramatically proclaimed his support and Restrepo candidly and comprehensively answered committee members' numerous questions.<sup>40</sup> Had the GOP adhered to the 2014 calendar, the hearing might have been conducted in July;<sup>41</sup> President Obama's Third Circuit aspirants from Pennsylvania who captured appointment needed half the time Restrepo consumed simply pursuing a hearing.<sup>42</sup>

Toomey summarized by asserting that criticism for his awaiting the evaluation "was a completely manufactured controversy," as the politician consistently displayed support for Restrepo, and desired thorough inquiry regarding the nominee prior to blue slip production, a salutary procedure which he claimed "most . . . senators follow."<sup>43</sup> Nonetheless, conspicuously absent from Toomey's public comments was any suggestion that he requested a hearing, much less fast consideration.

The lawmaker's protestations do not withstand analysis.<sup>44</sup> First, many

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37. Editorial, *Unjust Delay: Toomey Is to Blame for Stalled Nominee*, PITTSBURGH POST-GAZETTE, May 10, 2015, at D2.

38. Pat Toomey, *I Am Not Delaying Judge L. Felipe Restrepo's 3rd Circuit Nomination*, PITTSBURGH POST-GAZETTE (May 13, 2015, 12:00 AM), <http://www.post-gazette.com/opinion/letters/2015/05/13/I-am-not-delaying-Judge-L-Felipe-Restrepo-s-3rd-Circuit-nomination/stories/201505130068>. *But see* Pittsburgh City Council, City Council Resolution 2015-1635 (May 12, 2015), <http://www.judgingtheenvironment.org/library/letters/Restrepo-Pgh-City-Council-Legislation-Details-With-Text.pdf> (last visited Mar. 3, 2016) (criticizing the delay and urging a fast blue slip return, hearing, and confirmation).

39. See Jonathan Tamari, *Senate Panel to Take Up Restrepo Nomination*, PHILA. INQUIRER, June 10, 2015, at A11; Tracie Mauriello, *Toomey Signs Off on Nominee for Federal Appeals Court*, PITTSBURGH POST-GAZETTE (May 15, 2015, 8:12 PM), <http://www.post-gazette.com/local/region/2015/05/14/Toomey-signs-off-on-nominee-for-federal-appeals-court/stories/201505140325>.

40. *June 10th Hearings*, *supra* note 11; see also Alex Wolf, *3rd Circ. Nominee Edges Closer to Long-Vacant Seat*, LAW360 (June 10, 2015, 6:11 PM), <http://www.law360.com/articles/665701/3rd-circ-nominee-edges-closer-to-long-vacant-seat>.

41. See *supra* notes 11, 22, and accompanying text for examples of how the Senate delayed multiple judicial hearings.

42. Judge Cheryl Krause waited thirty-four days and Judge Thomas Vanaskie waited ninety days. Bendery, *supra* note 31.

43. He said Republicans ended "chronic stalemates when Democrats were in charge." Tom Fontaine, *Toomey: Senate Finally in Gear Again*, PITTSBURGH TRIBUNE-REVIEW, May 15, 2015.

44. For examples of articles analyzing Toomey's inaction, see Spencer, *supra* note 24; Bendery, *supra* note 31; Paul Gordon, *Toomey's Explanation for Restrepo Delay Raises More Questions*, HUFFINGTON POST (May 13, 2015, 1:37 PM), <http://www.huffingtonpost.com/paulgordon/toomeys->



home-state officials, who constantly advocate candidates they propose, return blue slips quickly after nominations, particularly for court members being elevated.<sup>45</sup> There also was insufficient explanation why the investigation necessitated six months—especially when the nominee had undergone a comprehensive 2013 inquiry and had been a prominent trial court judge ever since—which meant that the panel was not “starting from scratch,”<sup>46</sup> and Democrats in turn felicitously concluded assessment.<sup>47</sup> Related was the committee’s deployment of less time examining, and convening hearings for, additional possibilities—mainly the U.S. Court of Appeals for the Federal Circuit designee, tapped simultaneously or later “but who had *not*” received previous full vetting.<sup>48</sup> Third, Grassley’s admission that he would conduct the hearing “[w]hen [he] [got] the blue slips” and consequent failure to mention any ongoing investigation cast doubt upon Toomey’s excuse for procrastinating for over a half year.<sup>49</sup> Finally, observers surmised that partisanship animated GOP slow walking of numerous prospects because only a few jurists realized 2015 confirmation as contrasted with Democrats’ helping marshal approval for twenty-nine lower court nominees at the same juncture of President Bush’s seventh year.<sup>50</sup>

That inactivity leaves federal tribunals registering thirteen circuit, and eighty-three district court vacancies, while the Administrative Office of the U.S. Courts—the courts’ administrative arm—pinpoints thirty-eight comprising

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explanation-for-restrepo-delay-raises-more-questions\_b\_7276448.html; and Judith E. Schaeffer, *Toomey Slow-Walking the Restrepo Nomination*, CONST. ACCOUNTABILITY CTR., TEXT & HISTORY BLOG (May 13, 2015), <http://theusconstitution.org/text-history/3273/toomey-slow-walking-restrepo-nomination>.

45. See *supra* text accompanying notes 4–5, 24–25, which demonstrate that Restrepo had the qualifications necessary for swift blue slip action). But see *supra* text accompanying notes 31 and 43 for the assertion that blue slip delay can be common practice.

46. Schaeffer, *supra* note 44; see also Mauriello, *supra* note 39 (theorizing that prior vetting should speed nomination process). But see Bendery, *supra* note 31 (quoting Grassley aide claiming that vetting “starts from scratch”).

47. Schaeffer, *supra* note 44; see also Gordon, *supra* note 44 (criticizing the unnecessary delay on previously vetted nominees). See *supra* notes 24, 36 and accompanying text for a description of the expedited process of review for the elevation of sitting judges.

48. Gordon, *supra* note 44 (emphasis added). See *supra* text accompanying note 26 and *infra* notes 57–58 and accompanying text for references to five nominees, each nominated the same day as Restrepo or after, but considered for a vote before him.

49. Bendery, *supra* note 31. After Toomey’s media scrutiny, Grassley claimed the panel inquiry, not the blue slip, caused delay. Gordon, *supra* note 44. See *supra* notes 30–31 and accompanying text for an account of Grassley and his staff’s handling of the delay.

50. See 161 CONG. REC. S3,850 (daily ed. June 8, 2015) (statement of Sen. Reid); *id.* at S3,223 (daily ed. May 21, 2015) (statement of Sen. Leahy). Toomey should have urged swift review, because Restrepo would be joining a court that would have a new vacancy soon. Gordon, *supra* note 44. That vacancy finally had a nominee in March 2016. Press Release, White House, Office of the Press Sec’y, President Obama Nominates Rebecca Ross Haywood to the U.S. Court of Appeals (Mar. 15, 2016). However, Senator Toomey announced that he would not return Haywood’s blue slip after he interviewed her. Sen. Pat Toomey, Toomey’s Statement on the Nomination of Rebecca Haywood to the Third Circuit (Mar. 16, 2016).

judicial emergencies,<sup>51</sup> a figure that Republicans have allowed to more than triple since they regained a chamber majority.<sup>52</sup> Delayed confirmations require that accomplished, uncontroversial nominees place careers on hold, discourage myriad accomplished lawyers from realistically envisioning bench service,<sup>53</sup> deprive circuits (notably the Third) of judicial resources for which they have much need,<sup>54</sup> and can make parties wait interminably on appellate disposition.<sup>55</sup>

Judge Restrepo's hearing was long overdue because his nomination to an emergency opening languished for seven months.<sup>56</sup> This process vividly contrasts with that of an impressive U.S. Court of Appeals for the Federal Circuit aspirant, Kara Fernandez Stoll, proffered the same day Restrepo was; she deftly navigated a March 2015 hearing and the Senate panel easily reported her six weeks later.<sup>57</sup> President Obama correspondingly proposed the four nominees with May 2015 hearings the same day as Restrepo or later.<sup>58</sup>

Once Senator Toomey had seemingly ended delay of Judge Restrepo by providing the blue slip, the nominee deserved fast consideration. The jurist is an excellent centrist, whom Toomey powerfully asked President Obama to choose in mid-November 2014, effusively lauding him as a superior Third Circuit addition,<sup>59</sup> while the tribunal must possess its entire complement for supplying justice.<sup>60</sup> However, the chamber delayed processing of Restrepo. The panel needed to immediately convene Restrepo's hearing, but waited until June 10, to

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51. See *Judicial Emergency Definition*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition> (last visited Dec. 7, 2016) (basing emergencies on length of vacancies or size of dockets).

52. Judicial emergency vacancies included, most pertinently until January 11, 2016, the slot for which Obama had tapped Restrepo. See 161 CONG. REC. S6,693 (daily ed. Sept. 16, 2015) (statement of Sen. Leahy). Vacancies approached ninety for most of the five years after July 2009; courts had only thirty-nine openings after Democrats used the nuclear option to limit filibusters. See *Archive of Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> (providing data on judicial vacancies by year, including 2009 to 2014).

53. Tobias, *supra* note 14, at 2253; Todd Ruger, *Nominees Are Living on Hold: Caught in a Political Game, Judicial Candidates Get Used to Waiting*, NAT'L L.J., Dec. 17, 2012.

54. See JOHN ROBERTS, 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2010); Joe Palazzolo, *In Federal Courts, Civil Cases Pile up*, WALL ST. J., Mar. 6, 2015. See *supra* notes 52–53 for sources on the impact delays have on judicial resources.

55. See Schaeffer, *supra* note 44.

56. 161 CONG. REC. S6,693 (daily ed. Sept. 16, 2015). See *supra* note 4 and accompanying text for a brief account of Judge Restrepo's nomination.

57. 161 CONG. REC. S3,850 (daily ed. June 8, 2015) (statement of Sen. Reid); *Exec. Business Mtg. Before the S. Judiciary Comm.*, 114th Cong. (Apr. 23, 2015); *March 11th Hearings*, *supra* note 11.

58. He nominated Dale Drozd, LaShann DeArcy Hall, and Ann Donnelly that day, and Lawrence Vilardo on February 4, 2015. *Confirmation Listing*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/confirmation-listing> (last visited Mar. 3, 2016); see also Presidential Nominations Sent to the Senate, *supra* note 4.

59. *June 10th Hearings*, *supra* note 11. See *supra* text accompanying notes 4, 25, and 32 for examples of Senator Toomey praising Judge Restrepo.

60. See *supra* notes 52, 54–56 and accompanying text for evaluation of the impact judicial vacancies have on courts.

quickly conduct a discussion and to vote—yet it refused the latter until June 25, which meant the vote only happened July 9.<sup>61</sup> McConnell should then have expeditiously calendared a rigorous floor debate and ballot. Nevertheless, on June 4, he intimated that Republicans could preclude up or down votes for additional appeals court nominees of President Obama.<sup>62</sup> Reid excoriated the majority leader for unprecedented obstruction—specifically, denying a yes or no ballot to any circuit recommendation—which ignored his explicit constitutional duty, by astutely parroting McConnell’s 2008 floor remarks that urged speedy confirmation of Bush appellate court nominees.<sup>63</sup> The majority leader has neglected to clarify his June 2015 pronouncement about consideration of appellate court designees, but arrangement of the Stoll final vote in early July appeared to make possible Restrepo’s Senate floor ballot during the autumn.<sup>64</sup>

However, that failed to occur. Indeed, when it seemed that the chamber would recess for the year without arranging a yes or no vote on Restrepo, Senator Toomey finally wrote the majority leader urging him to schedule an up or down ballot.<sup>65</sup> McConnell ultimately relented and chose on December 9 to schedule a vote for January 11, 2016.<sup>66</sup> After Senators Casey and Toomey praised Restrepo, Senator Leahy castigated Republicans for delaying the excellent, consensus nominee, and no member criticized Restrepo, the chamber voted eighty-two to six to confirm the nominee on January 11.<sup>67</sup>

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61. *Exec. Business Mtg. Before the S. Judiciary Comm.*, 114th Cong. (June 25, 2015). He won approval on an unopposed voice vote. *Exec. Business Mtg. Before the S. Judiciary Comm.*, 114th Cong. (July 9, 2015).

62. Burgess Everett & Nick Gass, *McConnell Vows to Slow Judicial Nominees*, POLITICO (June 5, 2015, 1:06 PM), <http://www.politico.com/story/2015/06/mitch-mcconnell-judicial-nominations-118674>. *But see* Alexander Bolton, *McConnell Backs Away from Shutdown Talk*, THE HILL (June 6, 2015, 1:05 PM), <http://thehill.com/homenews/senate/244196-mcconnell-backs-away-from-judicial-shutdown-talk>.

63. 161 CONG. REC. S3,849–50 (daily ed. June 8, 2015) (statement of Sen. Reid). *Accord* 161 CONG. REC. S4,591 (daily ed. June 24, 2015) (statement of Sen. Leahy); *see also* Russell Wheeler, *With Senate Control, Will the GOP Stop Confirming Circuit Judges?*, BROOKINGS INSTITUTION: FIXGOV (June 10, 2015, 3:00 PM), <http://www.brookings.edu/blogs/fixgov/posts/2015/06/10-circuit-court-confirmations-wheeler> (providing a comparison to judicial confirmations during the George W. Bush administration). *But see supra* note 33 for Grassley’s comparison of judicial confirmations between the majority Republican Senate in 2015 and the majority Democratic Senate in 2007.

64. 161 CONG. REC. S4,678 (daily ed. July 7, 2015); *see also id.* at S8,443 (daily ed. Dec. 7, 2015) (conducting a December 7 final vote for a district nominee but not for Restrepo); *id.* at S4,591 (daily ed. June 24, 2015) (statement of Sen. Leahy) (his criticism of GOP obstruction apparently provoked the Stoll vote).

65. Letter from Sen. Pat Toomey to Sen. Mitch McConnell (Dec. 7, 2015); *see* Jonathan Tamari, *Toomey Urges End to Delay on Restrepo Confirmation*, PHILA. INQUIRER (Dec. 9, 2015), [http://articles.philly.com/2015-12-09/news/68870246\\_1\\_toomey-voice-vote-judiciary-committee](http://articles.philly.com/2015-12-09/news/68870246_1_toomey-voice-vote-judiciary-committee).

66. Jonathan Tamari, *Senate Schedules Vote on Long-Delayed Pa. Nominee Restrepo*, PHILA. INQUIRER (Dec. 9, 2015, 9:22 PM), <http://www.philly.com/philly/blogs/capitolinq/Senate-schedules-vote-on-long-delayed-PA-nominee-Restrepo.html>; *Agreement on Restrepo Nomination*, U.S. SENATE DEMOCRATS (Dec. 9, 2015, 5:50 PM), <http://democrats.senate.gov/2015/12/09/agreement-on-restrepo-nomination/#.VtjHtZwrLIU>.

67. 162 CONG. REC. S21 (daily ed. Jan. 11, 2015); *see* Jonathan Tamari, *After 14 Months, Senate Finally Approves Phila. Judge*, PHILA. INQUIRER (Jan. 13, 2016), <http://articles.philly.com/2016-01->

In November 2014, President Obama nominated Judge Restrepo to the Third Circuit mainly at the Pennsylvania senators' instigation, but Senator Toomey did not promptly transmit the blue slip. The chamber failed to rapidly process him and numerous other similarly talented, moderate nominees, particularly for emergencies. The Senate finally confirmed Restrepo fourteen months after his nomination. Restrepo's severely delayed appointment is a stunning cautionary tale about the broken federal judicial selection process, which Republicans and Democrats must remedy for the good of the Senate, the courts, and the nation. If Casey and Toomey, Senate colleagues, and the chief executive learn from this story that they must assiduously collaborate, all participants in the selection process will fill the other Pennsylvania Third Circuit vacancy and ninety-five additional openings with judges who can swiftly, inexpensively and equitably decide cases.<sup>68</sup>

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13/news/69707967\_1\_toomey-judicial-nominees-pennsylvania-judge.

68. The day after the Senate confirmed Restrepo, President Obama tendered a pair of Seventh Circuit nominees, Donald Schott and Myra Selby. Press Release, White House, Office of the Press Sec'y, President Obama Nominates Two to Serve on the U.S. Courts of Appeals (Jan. 12, 2016); see also Craig Gilbert, *Obama Nominates Madison Lawyer for 7th Circuit Vacancy*, MILWAUKEE J. SENTINEL (Jan. 12, 2016), <http://www.jsonline.com/news/statepolitics/obama-nominates-madison-lawyer-for-7th-circuit-vacancy-b99650722z1-365064531.html>; Maureen Groppe, *Obama Nominates Indiana Lawyers to Federal Bench*, INDIANAPOLIS STAR (Jan. 12, 2016, 8:09 PM), <http://www.indystar.com/story/news/politics/2016/01/12/obama-nominates-indiana-lawyers-federal-bench/78710858/>. Obama subsequently nominated five more circuit nominees, including Rebecca Ross Haywood for the Third Circuit. See Press Release, White House, Office of the Press Sec'y, President Obama Nominates Justice Lisabeth Tabor Hughes to Serve on the United States Court of Appeals (Mar. 17, 2016); Press Release, *supra* note 50; Press Release, White House, Office of the Press Sec'y, Press Release, White House, Office of the Press Sec'y, President Obama Nominates Judge Lucy Haeran Koh to Serve on the United States Court of Appeals (Feb. 25, 2016); Press Release, White House, Office of the Press Sec'y, President Obama Nominates Judge Abdul K. Kallon to Serve on the United States Court of Appeals (Feb. 11, 2016); Press Release, White House, Office of the Press Sec'y, President Obama Nominates Jennifer Klemetsrud Puhl to Serve on the United States Court of Appeals (Jan. 28, 2016).

The chamber should have accorded them and the many other well qualified, consensus selections whom Obama has tapped better treatment than Judge Restrepo. The committee did grant Schott, Puhl and Koh hearings and approval, but the Senate has yet to grant any of them a final vote. Home state senators have refused to return blue slips on the remaining four. Carl Tobias, *Confirming Circuit Judges in a Presidential Election Year*, 84 GEO. WASH. L. REV. ARGUENDO 160, 173 (2016). Most important, the day after Obama nominated Haywood, who would be the first African American female Third Circuit judge, if confirmed, Toomey issued a press release announcing that he would retain her blue slip. Toomey Statement, *supra* note 50; see also Jonathan Tamari & Jeremy Roebuck, *Obama's Pick for Judgeship Here Draws Toomey's Ire*, PHILLY.COM (Mar. 15, 2016, 8:45 PM), [http://www.philly.com/philly/news/politics/20160316\\_Obama\\_nominates\\_Pittsburgh\\_federal\\_prosecutor\\_for\\_Third\\_Circuit\\_vacancy.html](http://www.philly.com/philly/news/politics/20160316_Obama_nominates_Pittsburgh_federal_prosecutor_for_Third_Circuit_vacancy.html). Toomey premised retention on his dissatisfaction with Haywood's answers to Toomey's questions in a private meeting. However, it would have been preferable to have the full committee probe relevant issues in a public hearing.