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FILLING THE CALIFORNIA NINTH CIRCUIT VACANCIES

CARL TOBIAS*

INTRODUCTION

At President Donald Trump’s inauguration, the United States Court of Appeals for the Ninth Circuit faced ample vacancies that the United States Courts’ Administrative Office labeled “judicial emergencies” because of their protracted length and its huge caseload. Recent departures by Circuit Judge Stephen Reinhardt and former Chief Judge Alex Kozinski, who occupied California posts, and other jurists’ decision to change their active status mean that the circuit has five emergencies, three in California, because Trump has appointed only three nominees. The court also resolves the most filings least expeditiously.

Limited clarity about whether more judges will leave active service over Trump’s presidency suggests that additional confirmations may be necessary; however, the selection process’s stunning politicization will compromise this initiative. For example, when the tribunal enjoined Trump’s controversial determinations which excluded immigrants from seven predominately Muslim nations, he excoriated multiple jurists of the circuit. Trump afforded numerous candidates, but merely three have received approval, partly because home state Democratic politicians retained “blue slips” when the White House minimally consulted. The vacancies—which exceed seventeen percent, and three California openings, which are ten—show the crucial need to fill more vacancies.

This piece first analyzes the vacancy conundrum’s history. It evaluates selection throughout the presidencies of Barack Obama and Trump, while

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scrutinizing California's pressing situation. Ascertaining that the predicament comes from reduced Democratic and Republican cooperation and some jurists' departures, this Article reviews that complication's impacts and detects that systematic partisanship has subverted confirmations, attributes which Trump could exacerbate. Because the plentiful vacancies injure myriad litigants by eroding judicial resources to decide lawsuits, the final Part proffers solutions for the President and the Senate to promptly fill the California openings.

I. MODERN SELECTION DIFFICULTIES

The history warrants little treatment here, as others have canvassed the background,¹ and the current standoff enjoys greatest relevance. One aspect is the permanent difficulty that results from enhanced federal jurisdiction, cases and judges.² Significant now is the modern concern, which is political and emanates from contrasting Senate and presidential control that started four decades ago.³ Both constituents have affected California. For instance, rampant population growth driven by rising financial expansion and immigration enlarged district cases with related appeals; thus, circuit seats increased to twenty-eight in 1984.⁴ Mounting partisanship also undermined confirmations by slowing and halting nominees.⁵ However, certain phenomena tempered appointments problems. Over most of the Ninth Circuit's 128 years, it faced nominal difficulties. The judicial complement was extremely small, openings were rare, and the chamber easily filled many positions. Indeed, until 1968, the tribunal performed efficaciously with merely nine members.

1. MILLER CTR. COMM'N NO. 7, REPORT OF THE COMMISSION ON SELECTING FEDERAL JUDGES 3-6 (1996); Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319, 320-33 (1994). California has fourteen active Ninth Circuit judgeships.

2. It needs less scrutiny; some delay is intrinsic, resists meaningful change and has been analyzed. Carl Tobias, *Combating the Ninth Circuit Judicial Vacancy Crisis*, 73 WASH. & LEE L. REV. ONLINE 687, 689-91 (2017).

3. Some periods, as 2017 to 2018, have one-party control. For fuller treatment, see generally MILLER CTR. COMM'N, *supra* note 1; Bermant, *supra* note 1, and Tobias, *Combating Ninth Circuit Vacancies*, *supra* note 2.

4. See, e.g., Pub. L. No. 95-486, 92 Stat. 1629 (1978) (increasing the number of circuit and district court judgeships); Pub. L. No. 98-353, 98 Stat. 345 (1984) (same); Pub. L. No. 110-177 §509, 121 Stat. 2534, 2543 (2008) (transferring a D.C. Circuit judgeship to the Ninth Circuit and bringing the Ninth Circuit judgeships to 29).

5. That partisanship was incremental, declining after Judge Robert Bork's monumental Supreme Court battle. However, even later, some cooperation occurred. See discussion *infra* notes 7-9, 12. See generally CHARLES GEYH, *WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* (2007) (discussing the relationship between Congress and the federal courts).

A 1978 statute authorized manifold posts, while President Jimmy Carter had success, primarily because Democrats held the upper chamber, so President Ronald Reagan had no vacancy upon election.⁶ He quickly confirmed jurists, although five positions were created, as the GOP had the chamber Reagan's initial six years and once Democrats became the majority they coordinated.⁷ Senator Joe Biden (D-Del.), the able Judiciary Committee Chair, astutely canvassed nominees, and the majority confirmed Justice Anthony Kennedy *and* six circuit jurists across the U.S. over 1988, yet three posts, two located in California, were open upon year's end.⁸ Smooth appointments prevailed for most of George H.W. Bush's time but slowed in 1992, meaning that a California appellate position was empty.⁹

President Bill Clinton appointed a judge for this slot partially because Democrats acquired a majority in his first half term, but Republicans recaptured Senate control during 1995. At various later times, openings reached ten, including three California posts with his tenure's end.¹⁰ This situation improved over George W. Bush's presidency, especially when the GOP enjoyed a majority. He approved several jurists primarily by consulting Democrats; yet controversy arose, leaving a sole vacancy at his time's close.¹¹

In short, judicial appointments were mixed, but certain periods allowed relatively successful endeavors. Illustrations were Bush *père* and son; yet circumstances gradually deteriorated after United States Court of Appeals for the District of Columbia Circuit Judge Robert Bork's confirmation fight for the Supreme Court until 2009 when they markedly declined.¹²

6. See U.S. CTS., VACANCIES IN THE FEDERAL JUDICIARY: AUGUST 1, 1981, at 4 (1981); see also SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 285–345 (1997).

7. See 143 CONG. REC. S2,541 (daily ed. Mar., 19, 1997) (statement of Sen. Biden); see also GOLDMAN, *supra* note 6, at 285–345.

8. See U.S. CTS., VACANCIES IN THE FEDERAL JUDICIARY (ARTICLE III JUDGES ONLY): NOVEMBER 1, 1988, at 3 (1988). Bork was an exception to collegial selection.

9. U.S. CTS., VACANCIES IN THE FEDERAL JUDICIARY (ARTICLE III JUDGES ONLY): NOVEMBER 1, 1993, at 3 (1993).

10. Clinton's naming fine centrists and a few GOP senators' help meant that some states functioned well. See generally U.S. CTS., VACANCIES IN THE FEDERAL JUDICIARY (ARTICLE III JUDGES ONLY): NOVEMBER 1, 1995; U.S. CTS., VACANCIES IN THE FEDERAL JUDICIARY (ARTICLE III JUDGES ONLY): NOVEMBER 1, 2000.

11. See generally U.S. CTS., VACANCIES IN THE FEDERAL JUDICIARY (ARTICLE III JUDGES ONLY): NOVEMBER 1, 2007; U.S. CTS., VACANCIES IN THE FEDERAL JUDICIARY (ARTICLE III JUDGES ONLY): NOVEMBER 1, 2008 (confirming ten 2007 to 2008 George W. Bush circuit picks); S. Judiciary Comm., *Exec. Business Mtg.* (Feb. 15, 2018) (evaluating a California-Idaho dispute over which state would fill Judge Stephen Trott's vacancy).

12. E.g., MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT 11–12 (1992); JEFFREY TOOBIN,

II. OBAMA ADMINISTRATION SELECTION

The practices worked rather effectively across Obama's initial six years when Democrats had a chamber majority. He actively consulted home state Republicans, seeking, and normally following, proposals of capable, mainstream nominees.¹³ Those initiatives encouraged cooperation in the early Obama era because senators received deference, as they may slow the process through keeping blue slips, which the Senate respected in Obama's tenure.¹⁴ Even with Obama's assertive pleading, some did not coordinate by forwarding accomplished prospects.¹⁵

The GOP collaborated with regular hearings but "held over" discussions and votes a week for all except one circuit nominee.¹⁶ Republicans slowly allowed chamber debates, if required, and ballots, forcing strong centrists to languish months until Democrats pursued cloture.¹⁷ The GOP also sought plenty of roll call votes and debate hours on capable, moderate aspirants, who felicitously captured approval, thus consuming rare floor time.¹⁸ This left some Ninth Circuit vacancies across Obama's initial half decade; yet he appointed several preeminent, consensus, diverse judges the first three years.¹⁹

THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 18 n.14 (2007). See generally GEYH, *supra* note 5.

13. Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2239–40, 2253 (2013); see also Sheldon Goldman et al., *Obama's First Term Judiciary*, 97 JUDICATURE 7, 8–17 (2013).

14. No nominee moved without two slips. Carl Tobias, *Senate Blue Slips and Senate Regular Order*, YALE L. & POL'Y REV. INTER ALIA (Nov. 20, 2018). But see discussion *infra* notes 78–83 and accompanying text.

15. Some sent none. Goldman et al., *supra* note 13, at 17; see also 161 CONG. REC. S6,151 (daily ed. July 30, 2015).

16. S. Judiciary Comm., *Exec. Business Mtg.* (Mar. 22, 2013); see also Tobias, *supra* note 13, at 2242–43.

17. I depend below on Goldman et al., *supra* note 13, at 26–29; Tobias, *supra* note 13, at 2243–46.

18. Tobias, *supra* note 13, at 2244; see also Juan Williams, *The GOP's Judicial Logjam*, HILL (July 27, 2015), <https://thehill.com/opinion/juan-williams/249196-juan-williams-the-gops-judicial-logjam>.

19. *Judicial Vacancy List for December 2009*, U.S. CTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2009/12/vacancies/html> (last visited Feb. 18, 2019); *Judicial Vacancy List for December 2014*, U.S. CTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2014/12/vacancies/html> (last visited Feb. 18, 2019); see also 156 CONG. REC. S4,608 (daily ed. June 7, 2010) (discussing and confirming judicial nominee Lucy Koh); *id.* at S10,986 (daily ed. Dec. 22, 2010) (discussing and confirming judicial nominee Mary Murguia); 157 CONG. REC. S8,625 (daily ed. Dec. 15, 2011) (discussing and confirming judicial nominee Morgan Christen).

In the 2012 presidential election year, Republicans coordinated less.²⁰ Delay increased, while appellate confirmations ended in June.²¹ Upon Obama's reelection, Democrats hoped for improved collaboration, but recalcitrance expanded in 2013 when he proffered three fine, mainstream, diverse nominees for the D.C. Circuit, the nation's second most important tribunal.²² Republicans provided them no Senate ballots, and protracted obstruction made Democrats unleash the "nuclear option" which confined filibusters, allowing the Ninth Circuit to have every seat filled at 2014's conclusion.²³

The following year, once Republicans held a Senate majority,²⁴ already negligible cooperation decreased. GOP leaders promised to reinstitute "regular order," the approach which governed before Democrats ostensibly eroded this. In January, Mitch McConnell (R-Ky.), the new Majority Leader, stated, we must "return to regular order."²⁵ Chuck Grassley (R-Iowa), the Judiciary Chair, pledged that he would similarly assess prospects.²⁶ Despite incessant vows, Republicans slowly offered Obama picks hearings and committee votes and chamber debates and ballots. With 2015's close, these phenomena meant that eight appellate emergencies lacked nominees for states which GOP senators represented, and California had one, when Harry Pregerson took senior status that December.²⁷

20. Tobias, *supra* note 13, at 2246; 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>; Michael Shear et al., *Obama Pick Opens Court Battle*, N.Y. TIMES, Mar. 17, 2016, at A1; *see also* S. Judiciary Comm., *Exec. Business Mtg.* (Mar. 17, 2016) (statement of Sen. Leahy); S. Judiciary Comm., *Exec. Business Mtg.* (May. 19, 2016) (statement of Sen. Grassley); Carl Tobias, *Confirming Circuit Judges in a Presidential Election Year*, 84 GEO. WASH. L. REV. ARGUENDO 160, 169 (2016).

21. 158 CONG. REC. S4,108 (daily ed. June 12, 2012) (elevating Andrew Hurwitz). Jacqueline Nguyen and Paul Watford won 2012 approval to California seats. *Id.* at S2,931 (daily ed. May 14, 2012); *id.* at S3,388 (daily ed. May 21, 2012).

22. *See generally* Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L.J. 121 (2015) (discussing the filling of three D.C. Circuit vacancies at this time).

23. John Owens and Michelle Friedland won approval to California seats. 160 CONG. REC. S1,881 (daily ed. Mar. 31, 2014); *id.* at S2,426 (daily ed. Apr. 28, 2014).

24. Jerry Markon et al., *Republicans Win Senate Control as Polls Show Dissatisfaction with Obama*, WASH. POST (Nov. 4, 2014), http://wapo.st/1rZ20TB?tid=ss_tw&utm_term=.d7667ffae95a; Jonathan Weisman, *G.O.P. Takes Senate*, N.Y. TIMES, Nov. 5, 2014, at A1.

25. He repeats the mantra. 161 CONG. REC. S27 (daily ed. Jan. 7, 2015); *id.* at S2,767 (daily ed. May 12, 2015).

26. S. Judiciary Comm., *Hearing on Nominees* (Jan. 21, 2015).

27. They helped little, so Obama sent no 2015 nominee. *See Judicial Emergencies for December 2015*, U.S. CTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2015/12/emergencies> (last visited Feb. 18, 2019); *Judicial Emergencies for December 2016*, U.S. CTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2016/12/emergencies> (last visited Feb. 18, 2019).

In Obama's last half term, the chamber promptly approved Kara Farnandez Stoll, an expert, moderate lawyer, but slowly confirmed District Judge Felipe Restrepo, a prominent centrist, to the Federal and Third Circuits.²⁸ Appointing so few jurists over two years was nearly unprecedented.²⁹ In 2016—a presidential election year when circuit approvals conventionally halt early—GOP denial of review to Judge Merrick Garland, Obama's exceptional Supreme Court nominee,³⁰ intensified these attributes. Despite the tradition ensuring that preeminent, mainstream nominees receive floor ballots after May, this did not materialize.³¹ Obama nominated seven well qualified, moderate candidates—including District Judge Lucy Koh for the California opening—yet none realized appointment.³²

Judge Koh merits emphasis because she possesses superb abilities, deserved prior confirmation, and warrants Ninth Circuit renomination, and California Democratic Senators Dianne Feinstein and Kamala Harris powerfully favor her elevation.³³ The judge is distinctly qualified.³⁴ She was the initial Asian American on the Northern District of California³⁵ and has carefully resolved major litigation, including her effective disposition of

28. Carl Tobias, *Confirming Judge Restrepo to the Third Circuit*, 88 TEMPLE L. REV. ONLINE 37, 38 n.4, 45–46 (2017).

29. Chris Kang, *GOP Obstruction Could Be Worst Since the 1800s*, HUFFINGTON POST (Apr. 20, 2016), https://www.huffingtonpost.com/christopher-kang/republican-obstruction-of_b_9741446.html; see also discussion *supra* notes 8, 11 and accompanying text.

30. Wheeler, *supra* note 20; Shear et al., *supra* note 20, at A1.

31. Tobias, *Confirming Circuit Judges in a Presidential Election Year*, *supra* note 20, at 169; see also S. Judiciary Comm., *Exec. Business Mtg.* (Mar. 17, 2016) (statement of Sen. Leahy); S. Judiciary Comm., *Exec. Business Mtg.* (May. 19, 2016) (statement of Sen. Grassley).

32. See generally Carl Tobias, *Confirm Judge Koh to the Ninth Circuit*, 74 WASH. & LEE L. REV. 449 (2016); Tobias, *supra* note 31.

33. Emily Cadei, *Dianne Feinstein, Kamala Harris Try to Cut a Deal with Trump*, SACRAMENTO BEE (May 22, 2018), <https://www.sacbee.com/news/politics-government/capitol-alert/article211603954.html>; Zoe Tillman, *Here's How Trump Is Trying to Remake His Least Favorite Court*, BUZZFEED NEWS (Mar. 15, 2018), <https://www.buzzfeednews.com/article/zoetillman/heres-who-the-white-house-pitched-for-the-federal-appeals>; see also Letter from Sen. Dianne Feinstein to Donald McGahn, White House Counsel (Oct. 5, 2018), https://www.feinstein.senate.gov/public/_cache/files/d/4/d4757388-8ebc-446c-8283-1719f1054d60/C0422EA4863812AFB2A2BEF78E242426.2018.10.5-df-letter-to-mcgahn-re-ninth-circuit.pdf.

34. She was a well-respected prosecutor, law firm partner, and Superior Court and Northern District of California judge, earning an excellent reputation since 2010. For these ideas and more, see Tobias, *supra* note 32, at 450.

35. Bob Egelko, *Lucy Koh Nominated for U.S. Court of Appeals in S.F.*, S.F. GATE (Feb. 25, 2016), <https://www.sfgate.com/bayarea/article/Obama-nominates-local-judge-to-federal-appeals-6855113.php>; Howard Mintz, *San Jose Judge Lucy Koh Nominated to Federal Appeals Court*, MERCURY NEWS (Feb. 25, 2016), <https://www.mercurynews.com/2016/02/25/san-jose-judge-lucy-koh-nominated-to-federal-appeals-court>.

Apple's patent infringement case against Samsung.³⁶ The nominee earned a well-qualified rating from a substantial majority of the American Bar Association ("ABA") evaluation committee.³⁷

Accordingly, Koh was a dynamic pick who merited appointment, while she resembles many fine Obama confirmees who afford benefits. Circuits with all their jurists can rapidly, economically, and fairly treat huge caseloads.³⁸ Increased ethnic, gender, and sexual orientation diversity improves comprehension and resolution of critical questions which tribunals decide.³⁹ Minority judges also curtail prejudices that undermine justice, and they instill public confidence.⁴⁰

Selection and election year politics should not have undercut Koh's review. Koh is a district jurist, which speeds the process; her ABA and FBI analyses only required updating; she was confirmed once and compiled a long, accessible record.⁴¹ The panel fully investigated her by cooperating with the ABA, FBI, and Department of Justice ("DOJ").⁴² The Chair only set a hearing five months after nomination, although the Ninth Circuit required all posts filled.⁴³ Feinstein and Barbara Boxer (D-Cal.) introduced Koh, praising her as the classic "American success story."⁴⁴ Members robustly queried the nominee who duly responded.⁴⁵ Koh appeared to satisfy most. A few next posited written questions that she promptly answered.⁴⁶ Grassley

36. *Apple v. Samsung*, No. 11–CV–01846–LHK, 2011 WL 7036077 (N.D. Cal. Dec. 2, 2011); *see also In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012) (settling ably 3000 workers' antitrust claims).

37. *See generally* ABA STANDING COMM. ON THE FED. JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES: 114TH CONGRESS (2017).

38. 160 CONG. REC. S5,364 (daily ed. Sept. 8, 2014) (statement of Sen. Leahy); Tobias, *Senate Gridlock and Federal Judicial Selection*, *supra* note 13, at 2239, 2254.

39. They resolve cases that involve critical issues like civil rights and abortion. For additional discussion on these issues, see SALLY KENNEY, GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER (2013); FRANK WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE (2003). *But see* Stephen Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504 (2011).

40. REPORT, FIRST CIRCUIT GENDER, RACE AND ETHNIC BIAS TASK FORCES (1999); Sylvia Lazos, *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 13, at 2249.

41. Tobias, *Senate Gridlock and Federal Judicial Selection*, *supra* note 13, at 2258; *see also* discussion *supra* note 36 and accompanying text for more on Koh's qualifications.

42. Koh had been vetted, so evaluation was brief. *See* Egelko, *supra* note 35; Mintz, *supra* note 35.

43. *See supra* notes 8, 29 and accompanying text. He also needed to reciprocate for Democrats' appointing ten circuit judges, one to an Idaho seat, in Bush's last two years.

44. S. Judiciary Comm., *Hearing on Nominees* (July 13, 2016).

45. John Cornyn (R-Tex.) asked why she "effectively invalidated the Electronic Privacy Act." *Id.*; *In re Google Inc. Gmail Litigation*, No. 13–MD–02430–LHK, 2014 WL 1102660 (N.D. Cal. Mar. 18, 2014). Her circuit lacked precedent, so she consulted other cases.

46. *Hearing*, *supra* note 44. Most were uncontroversial; her responses were careful.

convened a September panel debate⁴⁷ where the members rigorously discussed the nominee.⁴⁸ Four Republicans, including Grassley, favored Koh, who earned approval.⁴⁹

Many ideas show why she deserved rapid appointment. The GOP leader had a duty to follow the regular order that he always lauds and distinctly relevant Bush precedent.⁵⁰ McConnell had numerous weeks to vote on Koh but refused once Trump captured the presidency.⁵¹ Excellent centrists usually attain final ballots, so her proponents should have pursued cloture and senators who honor custom must have agreed.⁵² When Koh reached the floor, the leader ought to have arranged a respectful debate, which robustly canvassed many questions, and a chamber vote. In short, Republican obstruction meant that Koh lacked a final ballot and her nomination expired in early 2017.⁵³

III. TRUMP ADMINISTRATION SELECTION

A. NOMINATION PROCESS

Over the campaign, Trump promised to name and seat ideological conservatives and kept the vows by sending and confirming Neil Gorsuch and Brett Kavanaugh and manifold similar circuit and certain district nominees.⁵⁴ He created records for appointing circuit jurists the initial year

47. The GOP held over Koh like most nominees. S. Judiciary Comm., *Exec. Business Mtg.* (Sept. 8, 2016); S. Judiciary Comm., *Exec. Business Mtg.* (Mar. 22, 2013); *see also* Tobias, *supra* note 13, at 2242–43.

48. Cornyn based opposition on the *Google* opinion. S. Judiciary Comm., *Exec. Business Mtg.* (Sept. 15, 2016); *see supra* note 45 for further discussion.

49. S. Judiciary Comm., *Exec. Business Mtg.* (Sept. 15, 2016). Obama-elevated judges—whom Judge Nguyen typifies—easily won panel votes, as they had captured them and appointment once. S. Judiciary Comm., *Exec. Business Mtg.* (Dec. 1, 2011); *see supra* note 21 for further discussion.

50. Tobias, *Confirm Judge Koh to the Ninth Circuit*, *supra* note 32, at 454, 455 n.29 (urging regular order and confirmation of 2008 Bush nominees).

51. Tobias, *Confirming Circuit Judges in a Presidential Election Year*, *supra* note 31; *see also* 162 CONG. REC. S5,312 (daily ed. Sept. 7, 2016) (denying Obama nominees floor votes). Many GOP senators opposed any Supreme Court choice; few opposed Koh. Ted Cruz, *The Scalia Seat: Let the People Speak*, WALL ST. J. (Mar. 6, 2016), <https://www.wsj.com/articles/the-scalia-seat-let-the-people-speak-1457307358>.

52. Tobias, *Confirm Judge Koh to the Ninth Circuit*, *supra* note 32, at 457 nn.36–41; *see also supra* note 2 and accompanying text.

53. 162 CONG. REC. S7,183 (daily ed. Jan. 3, 2017).

54. Carl Tobias, *Confirming Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1093, 1103 (2017); *Judicial Vacancy List for December 2017*, U.S. CTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/12/vacancies> (last visited Feb. 18, 2019); *Judicial Vacancy List for December 2018*, U.S. CTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/12/vacancies> (last visited Feb. 18, 2019); Amber Phillips, *Another Big Mitch McConnell Supreme Court Gamble Looks Set to Pay Off*, WASH.

with a dozen and eighteen the next but has tapped eight Ninth Circuit picks and only three won confirmation.⁵⁵

Trump applies some customs, yet discards, reverses or deemphasizes others. For instance, he, like modern predecessors, assigned lead nomination efforts to the White House Counsel, located related duties in DOJ and stressed circuit openings.⁵⁶ When proffering appellate nominees, former White House Counsel McGahn emphasized conservative perspectives and youth. The Counsel relied on litmus tests, including opposition to the administrative state, and proposed aspirants in their forties, while he often used the list of twenty-five potential Supreme Court picks whom the Federalist Society and Heritage Foundation assembled.⁵⁷ Those procedures continue applying because the Society's Executive Vice President, Leonard Leo, advises Trump on selection.⁵⁸ The White House stresses the circuits, as they comprise tribunals of last resort for virtually all cases, announce greater policy than district courts and issue rulings which cover multiple states.⁵⁹

However, Trump omits and downplays myriad traditions. Crucial is failing to assiduously consult home state politicians, an effective convention

POST (Oct. 4, 2018), <https://www.washingtonpost.com/politics/2018/10/04/another-big-mitch-mcconnell-supreme-court-gamble-looks-set-pay-off/>.

55. *Judicial Confirmations for December 2009*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2009/12/confirmations/html> (last visited Feb. 18, 2019); *Judicial Confirmations for December 2017*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/12/confirmations> (last visited Feb. 18, 2019); *Judicial Confirmations for December 2018*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/12/confirmations> (last visited Feb. 18, 2019); for further discussion see *infra* notes 67–68, 87–88. I rely below on Jason Zengerle, *Bench Warfare*, N.Y. TIMES, Aug. 26, 2018, at SM30.

56. Tobias, *Senate Gridlock and Federal Judicial Selection*, *supra* note 13, at 2240; Robert Costa, *McGahn's Last Stand*, WASH. POST (Oct. 4, 2018), https://wapo.st/2RoSiiY?tid=ss_tw&utm_term=.c4cbd464d2de; see also Michael Schmidt & Maggie Haberman, *Lawyer for President Steps Down*, N.Y. TIMES, Oct. 18, 2018, at A13.

57. Jeremy Peters, *Trump's New Judicial Litmus Test: Shrinking the 'Administrative State'*, N.Y. TIMES (March 26, 2018), <https://www.nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html>; Charlie Savage, *Courts Reshaped at Fastest Pace in 5 Decades*, N.Y. TIMES, Nov. 12, 2017, at A1; see also *infra* note 77 for further discussion.

58. Zoe Tillman, *After Eight Years on the Sidelines, This Conservative Group Is Primed to Reshape the Courts Under Trump*, BUZZFEED NEWS (Nov. 20, 2017), <https://www.buzzfeednews.com/article/zoetillman/after-eight-years-on-the-sidelines-this-conservative-group>. For more discussion of Leo's impact, see Richard Patterson, *The Man Behind Trump's Judicial Nominees*, BOSTON GLOBE (Sept. 16, 2018), <https://www.bostonglobe.com/opinion/2018/09/06/the-man-behind-trump-conservative-judicial-nominees/bJOU7yNNHSGKkcSEXbb4KM/story.html>.

59. Tobias, *Senate Gridlock and Federal Judicial Selection*, *supra* note 13, at 2240–41; Joan Biskupic, *Trump Fast-Tracks Appeals Judges, but Lags on Lower Courts*, CNN (May 25, 2018), <https://www.cnn.com/2018/05/25/politics/appeals-district-court-trump/index.html>.

which Presidents use that is a critical reason for blue slips.⁶⁰ Peculiarly relevant are the conflicting approaches deployed when filling two Ninth Circuit vacancies. McGahn suggested, and Trump nominated, Ryan Bounds without consulting Oregon Democratic Senators Ron Wyden and Jeff Merkley or allowing invocation of a bipartisan selection committee, provoking slips' aggressive retention.⁶¹ In profound contrast, McGahn avidly consulted Hawaii Democratic Senators Mazie Hirono and Brian Schatz prior to sending Mark Bennett, prompting their full support of him and praise for McGahn's endeavors in a smooth hearing and Bennett's quick approval.⁶²

A related abandonment of efficacious precedent is the ABA's nearly complete exclusion from judicial selection. All Presidents after Dwight Eisenhower, save George W. Bush, had employed ABA ratings when proposing candidates, and Obama eschewed candidates whom the ABA ranked not qualified.⁶³ However, Trump nominated six prospects with this rating.⁶⁴

He also deletes or ignores effective tools. One is not prioritizing nominations by initially filling eighty-seven emergency vacancies, which courts ground in their substantial length or caseloads;⁶⁵ in fact, these emergency vacancies have multiplied since Republicans won the chamber.⁶⁶

60. Thomas Kaplan, *Trump Is Putting Indelible Stamp on Judiciary*, N.Y. TIMES, Aug. 1, 2018, at A15; Tillman, *supra* note 33.

61. Press Release, White House, Office of the Press Sec'y, President Donald Trump Announces Seventh Wave of Judicial Nominees (Sept. 7, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-seventh-wave-judicial-candidates>; Letter from Donald McGahn, White House Counsel, to Sens. Ron Wyden & Jeff Merkley (Sept. 6, 2017), <https://assets.documentcloud.org/documents/4042623/9-6-17-McGahn-Letter.pdf>; Letter from Sens. Ron Wyden & Jeff Merkley to Don McGahn, White House Counsel (Sept. 7, 2017), <http://static.politico.com/59/2a/f5b886e44d6ba505b1551125a32e/wh-judicial-vacancy-signed.pdf>; *see also infra* notes 81–82, 90 for more on later history.

62. Press Release, White House, Office of the Press Sec'y, President Donald Trump Announces Eleventh Wave of Judicial Nominees (Feb. 12, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-eleventh-wave-judicial-nominees>; *see also* S. Judiciary Comm., *Hearing on Nominees* (Apr. 11, 2018). For more on later history, *see infra* note 89.

63. 163 CONG. REC. S8,022, S8,024 (daily ed. Dec. 14, 2017) (statements of Sens. Leahy & Feinstein).

64. *Ratings, 115th Cong.*, *supra* note 37. The GOP contested Steven Grasz's rating, alleging that the ABA is a liberal interest group. *See* S. Judiciary Comm., *Hearing on Nominees* (Nov. 1, 2017); S. Judiciary Comm., *Exec. Business Mtg.* (Dec. 7, 2017); *see also* 163 CONG. REC. S7,965 (daily ed. Dec. 12, 2017) (Grasz's approval); Adam Liptak, *White House Cuts A.B.A. Out of Judge Evaluations*, N.Y. TIMES, Apr. 1, 2017, at A16.

65. *Judicial Emergencies for March 2019*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2019/03/emergencies> (last visited Mar. 11, 2019) (showing that seven of eight circuit vacancies are emergencies).

66. They soared from twelve to eighty-seven. *Id.* (2019 Judicial Emergencies); *Judicial Emergencies for December 2015*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-emergencies>.

Trump as well nominates fewer picks in states which Democrats represent, even though most have plentiful emergencies.⁶⁷ California includes three Ninth Circuit emergencies, but Trump only named Patrick Bumatay, Daniel Collins and Kenneth Lee last October, although the senators opposed confirmation, favoring as nominees Collins, James Rogan and Koh; Bumatay, Collins and Lee received no 2018 hearing, saw their nominations expire and received renomination, with Bumatay receiving renomination to the Southern District of California and Daniel Bress receiving nomination to the Ninth Circuit.⁶⁸

Another useful idea, which Trump rejects or deemphasizes, is enhancing minority individuals' bench representation, particularly vis-à-vis Democrats.⁶⁹ For example, he seemingly effectuated no initiatives that suggest and confirm ethnic minority or lesbian, gay, bisexual, transgender, or queer ("LGBTQ") prospects by assigning diverse staff to selection or urging that politicians send numerous minorities.⁷⁰ Among Trump's eighty-

vacancies/archive-judicial-vacancies/2015/12/emergencies (last visited Feb. 19, 2019). *But see* Press Release, White House, Office of the Press Sec'y, President Donald Trump Nominates Tenth Wave of Judicial Nominees (Jan. 23, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-tenth-wave-judicial-nominees>.

67. For more blue state nominees, see Press Release, White House, Office of the Press Sec'y, President Donald Trump Nominates Ninth Wave of Judicial Nominees (Dec. 20, 2017); Press Release, White House, Office of the Press Sec'y, President Donald Trump Nominates Fourteenth Wave of Judicial Nominees, May 10, 2018; Press Release, White House, Office of the Press Sec'y, President Donald Trump Nominates Sixteenth Wave of Judicial Nominees, July 13, 2018; Press Release, White House, Office of the Press Sec'y, President Donald Trump Nominates Eighteenth Wave of Judicial Nominees, Oct. 10, 2018. Data verify "red" state priority. *Judicial Emergencies*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies> (last visited Feb. 19, 2019).

68. When the White House issued a notice of intent to renominate fifty of the seventy-three candidates whose nominations expired on January 2, which excluded all three, the *Wall Street Journal* published an editorial that criticized the White House Counsel for negotiating with the California senators and urged prompt renomination. Editorial, *A Bad Judges Deal*, WALL ST. J. (Jan. 29, 2019), <https://www.wsj.com/articles/a-bad-judges-deal-11548807717>. The editorial ignited a firestorm of criticism from conservative media that apparently triggered the renominations, leaving the situation unclear. Press Release, White House, Office of the Press Sec'y, President Donald Trump Announces His Intent to Nominate Judicial Nominees (Jan. 22, 2018); Press Release, White House, Office of the Press Sec'y, President Donald Trump Announces His Intent to Nominate Judicial Nominees (Jan. 30, 2018); Press Release, Feinstein, Harris on Ninth Circuit Nominees (Jan. 30, 2019); Eighteenth Wave, *supra* note 67; Letter from Sen. Dianne Feinstein to Donald McGahn, *supra* note 33; 165 CONG. REC. S23 (daily ed. Jan. 2, 2018) (expired nominations). The nominees are lawyers. Rogan is a respected California Superior Court Judge.

69. Carl Tobias, *President Donald Trump and Federal Bench Diversity*, 74 WASH. & LEE L. REV. ONLINE 400 (2018); Michael Nelson & Rachel Hinkle, *Trump Appoints Lots of White Men as Federal Judges. Here's Why It Matters.*, WASH. POST (Mar. 13, 2018), http://wapo.st/2Hn6aUT?tid=ss_tw&utm_term=.e00c0046f478.

70. LGBTQ means "out" sexual orientation; it is possible that some may not have revealed theirs. LGBTQ people are considered "minorities" here. Jennifer Bendery, *Trump Finally Has an LGBTQ*

nine lower federal court confirmees, only Amul Thapar, James Ho, John Nalbandian, Neomi Rao, Karen Gren Scholer, Jill Otake, Fernando Rodriguez, and Terry Moorner are persons of color, and of 170 nominees, twenty-one are - the initial six confirmed, Bumatay, Lee, and five more constitute Asian Americans, while Rodriguez and two others are Latinos, Moorner and four more comprise African Americans, Bumatay is gay, and Mary Rowland is a lesbian.⁷¹

McGahn consulted Feinstein and Harris somewhat respecting the three California appellate vacancies. Feinstein has marshaled astute panel service, operating collegially with GOP politicians, especially Grassley, and is now the Ranking Member.⁷² For example, she promoted controversial Bush circuit nominees, like Kavanaugh, who secured a panel vote, which should ingratiate her with Republicans, but they demonize Feinstein over his recent promotion.

At Trump's election and for much of 2017, California had one vacancy; yet the Kozinski and Reinhardt departures left it with three, changing the dynamics.⁷³ In Trump's first year, Feinstein held productive selection meetings with Mike Pence and the White House Counsel, Donald McGahn.⁷⁴

Judicial Nominee, HUFFINGTON POST (June 7, 2018), https://www.huffingtonpost.com/entry/trump-lesbian-judicial-nominee-mary-rowland_us_5b19b351e4b09d7a3d708461.

71. For confirmees, see *Judicial Confirmations for December 2017*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/12/confirmations> (last visited Feb. 19, 2019); *Judicial Confirmations for December 2018*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/12/confirmations> (last visited Feb. 19, 2019). For nominees, see Seventh Wave, *supra* note 61; Tenth Wave, *supra* note 66; 4 Waves, *supra* note 67; Press Release, White House, Office of the Press Sec'y, President Donald Trump Nominates Twelfth Wave of Judicial Nominees (Apr. 10, 2018); Press Release, White House, Office of the Press Sec'y, President Donald Trump Nominates Thirteenth Wave of Judicial Nominees (Apr. 26, 2018); Press Release, White House, Office of the Press Sec'y, President Donald Trump Nominates Fifteenth Wave of Judicial Nominees (June 7, 2018).

72. Michael Doyle, *What's Ahead for West's Liberal Appeals Court, Once Trump Takes Over?*, SACRAMENTO BEE (Nov. 23, 2016), https://www.sacbee.com/news/politics-government/article116777848.html?utm_medium=referral&utm_campaign=amp&utm_source=www.sacbee.com-RelayMediaAMP; see Sarah Wire, *Is Trump Finally Ready To Turn His Sights Toward Remaking the Ninth Circuit?*, L.A. TIMES (Aug. 15, 2018), <https://www.latimes.com/politics/la-na-pol-ninth-circuit-vacancies-20180815-story.html>.

73. Maura Dolan, *Ninth Circuit Judge Alex Kozinski Steps Down After Allegations of Sexual Misconduct*, L.A. TIMES (Dec. 18, 2017), <https://www.latimes.com/politics/la-pol-ca-judge-alex-kozinski-20171218-story.html>; Noah Feldman, *The 9th Circuit Court Battle Falls Silent*, BLOOMBERGVIEW (Apr. 2, 2018), <https://www.bloomberg.com/opinion/articles/2018-04-02/stephen-reinhardt-alex-kozinski-and-the-battle-for-9th-circuit>; Carl Hulse, *Judge's Death Gives Trump a Chance to Remake a Vexing Court*, N.Y. TIMES, Apr. 8, 2018, at A13.

74. Seung Min Kim, *Trump Has Not Taken Aim at the Court That Annoys Him Most*, WASH. POST (May 6, 2018), <https://www.washingtonpost.com/politics/trump-is-transforming-the-judiciary-but-he->

In August 2017, a source claimed that McGahn had analyzed twenty-five people to fill the California vacancy and offered the senators “possible nominees;”⁷⁵ while in 2018, outlets said that Feinstein’s panel had reviewed several Trump picks and some candidates whom it first vetted.⁷⁶ Despite much press coverage of the two newer California vacancies and speculation proclaiming how Trump might remake the circuit, he named Bumatay, Collins, and Lee in late 2018, notwithstanding the senators’ opposition and concerted efforts to reach a deal by proffering Collins, Rogan, and Koh.⁷⁷

B. CONFIRMATION PROCESS

The appointments process resembled the nomination system’s detrimental features in certain ways by omitting, altering or diluting effective customs or mechanisms. Instructive examples were changing (1) the 100-year-old blue slip procedure—which denies nominee consideration when politicians retain slips—and (2) valuable committee duties.

In fall 2017, Grassley amended the slip policy for *circuit* nominees by processing aspirants without two home state politicians’ slips, particularly

[has-yet-to-take-aim-at-the-court-that-annoys-him-most/2018/05/06/53886d30-4f9d-11e8-b966-bfb0da2dad62_story.html](https://www.buzzfeednews.com/article/zoetillman/why-trump-will-have-to-work-with-democrats-to-get-his-has-yet-to-take-aim-at-the-court-that-annoys-him-most/2018/05/06/53886d30-4f9d-11e8-b966-bfb0da2dad62_story.html); Zoe Tillman, *Why Trump Must Work with the Senate, Including Democratic Senators, To Confirm His Judges*, BUZZFEED NEWS (Mar. 31, 2017), <https://www.buzzfeednews.com/article/zoetillman/why-trump-will-have-to-work-with-democrats-to-get-his>.

75. David Lat, *Federal Judicial Nominations: A Quick Recap*, ABOVE THE LAW (Aug. 18, 2017), <https://abovethelaw.com/2017/08/federal-judicial-nominations-a-quick-recap>.

76. *Id.*; Kim, *supra* note 74; *see also supra* notes 33, 68.

77. The senators first suggested the third be mutually agreeable but substituted Collins to increase the offer’s appeal. The initial White House decision to not renominate the three California October nominees apparently reflected ongoing negotiations between it and the senators, which the conservative media onslaught extinguished. *See supra* note 68; *see also* Letter from Sens. Feinstein and Harris to Pat Cipollone, White House Counsel, Nov. 19, 2018; Emily Cadei, *Trump Will Have to Nominate 9th Circuit Judges All Over Again in 2019*, SACRAMENTO BEE (Dec. 28, 2018), <https://www.sacbee.com/latest-news/article223580900.html>; *supra* notes 33, 57, 67, 73, 75.

The committee scheduled a March 13 hearing for Collins and Lee, despite the California senators’ powerful opposition and retention of blue slips. S. Judiciary Comm., *Hearing on Nominees* (Mar. 13, 2019); Press Release, Feinstein and Harris: Kenneth Lee Nomination Hearing Should Not Move Forward (Mar. 4, 2019); Marianne Levine, *Trump Judicial Pick Facing Scrutiny Over Extreme Views in Past Writings*, POLITICO (Mar. 3, 2019), <https://www.politico.com/story/2019/03/04/kenneth-lee-9th-circuit-1202707>; *But see* Editorial, *Kenneth Kiyul Lee’s White Privilege*, WALL ST. J. (Mar. 5, 2019), <https://www.wsj.com/articles/kenneth-kiyul-lees-white-privilege-11551741146>; Senators Feinstein and Harris also opposed, and retained blue slips on, Bress partly because the nominee lacks California ties. S. Judiciary Comm., *Exec. Business Mtg.* (Mar. 7, 2019); Press Release, Feinstein Speaks on Blue Slips, Ninth Circuit Nominees (Mar. 7, 2019); Michael Macagnone, *Trump Ninth Circ. Pick’s Lack of Calif. Ties May Imperil Chances*, LAW360 (Mar. 7, 2019), https://www.law360.com/legalindustry/articles/1136369?utm_source=rss&utm_medium=rss&utm_campaign=section.

when senators oppose them for “political or ideological” reasons.⁷⁸ This altered the construct which both parties applied during Obama’s years, the most recent similar precedent,⁷⁹ especially as the Chair modestly supported placing in himself much discretion to decide if the White House “adequately consulted.”⁸⁰ Most pertinent was resolution of the dispute between the executive and the Oregon lawmakers.⁸¹ Grassley had not forced the issue by denying the slips effect. He conferred with the politicians and seemingly recognized that Counsel minimally consulted, because Grassley delayed a hearing while the senators tendered candidates whom their panel suggested but ultimately acceded by convening a hearing.⁸² He urged that slips are intended to ensure Presidents consult and protect home state prerogatives in the selection process.⁸³

The Chair also changed many panel hearing rules and conventions. Integral was arranging ten sessions for two circuit nominees without the minority’s permission and the Ninth Circuit one during a recess for campaigning; ten hearings acutely contrast to Democratic use of three sessions in Obama’s eight years which the GOP had clearly allowed.⁸⁴ Circuit hearings were rushed, and they lacked care for nominees who may be life-tenured appointees on courts of last resort.⁸⁵ Some appeared to intentionally stall by reiterating questions, and they evasively answered queries.⁸⁶

78. 163 CONG. REC. S7,174 (daily ed. Nov. 13, 2017); S. Judiciary Comm., *Hearing on Nominees* (Nov. 29, 2017); Letter from Sen. Chuck Grassley to Sens. Patty Murray & Maria Cantwell, Oct. 18, 2018. *But see* Letter from Sen. Murray to Sen. Grassley, Oct. 22, 2018.

79. Grassley honored this Obama’s last two years; Patrick Leahy (D-Vt.) did the first six. *See Mtg.*, *supra* note 11.

80. *Id.*; S. Judiciary Comm., *Hearing on Nominees* (June 6, 2018) (hearing when Sen. Casey kept slip); S. Judiciary Comm., *Hearing on Nominees* (Oct. 10, 2018) (same for Sen. Brown); S. Judiciary Comm., *Hearing on Nominees* (Oct. 24, 2018) (same for Sens. Murray & Cantwell); *see supra* note 78; 164 CONG. REC. S2,607 (daily ed. May 10, 2018).

82. Maxine Bernstein, *Oregon U.S. Senators Say Federal Prosecutor Ryan Bounds Unsuitable for 9th Circuit*, OREGONIAN (Feb. 12, 2018), <https://www.oregonlive.com/portland/2018/02/oregons-us-senators-say-federa.html>; Jimmy Hoover, *9th Circ. Pick Forces Grassley to Choose: Trump or Tradition?*, LAW360 (Mar. 29, 2018), <https://www.law360.com/articles/1025855>. For further discussion *see supra* note 61.

82. S. Judiciary Comm., *Hearing on Nominees* (May 9, 2018); *see also* Bernstein, *supra* note 81 (analyzing the four picks, including Bounds, the panel recommended and senators’ reasons for continuing to oppose Bounds). For further discussion *see supra* notes 13–15, 61.

83. *See supra* notes 13–15.

84. *E.g.*, S. Judiciary Comm., *Hearing on Nominees* (Oct. 10, 24, 2018); S. Judiciary Comm., *Hearing on Nominees* (Oct. 17, 2018) (this and second hearing held in recess); Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2174–76 (2011) (Obama example).

85. Feinstein statement, *supra* note 63; Leahy statement, *supra* note 63.

86. Judge Ho did not discuss his DOJ torture advice, which DOJ did not disclose, and Judge Don Willett dodged many queries. S. Judiciary Comm., *Hearing on Nominees* (Nov. 15, 2017); *see also* Leahy

Many discussions before panel votes similarly lacked content. Legislators rarely engaged on issues about core judicial qualifications. One pernicious deviation was setting hearings, and even votes, *before* the ABA finished ratings, despite Feinstein's importuning to have ballots *after* rankings' completion. Grassley strenuously asserted that this exogenous political group must not drive scheduling.⁸⁷ It was predictable, therefore, that controversial aspirants would secure party-line votes.⁸⁸

These phenomena did not affect the Hawaii vacancy, as McGahn fully consulted the senators about Bennett which prompted their support and rapid chamber analysis.⁸⁹ However, the Chair's determination to not honor the Wyden and Merkley blue slips meant that he processed Bounds, thus undermining slips' purpose, although when Senator Tim Scott (R-S.C.) raised concerns over his deleterious writings about diversity and people of color, Trump summarily withdrew Bounds.⁹⁰

After the committee reported nominees, analogous, yet less problematic, dynamics frustrated effective canvasses: Both parties forced cloture and roll call ballots on most nominees; members voted in lockstep; and the nuclear option's 2013 explosion permitted selections to win confirmation on majority ballots.⁹¹ Problematic was compressing six 2018 appellate nominees' chamber action into one week,⁹² this left the minority with deficient resources for preparing.⁹³ The quality of Senate debates

Statement, *supra* note 63.

87. S. Judiciary Comm., *Exec. Business Mtg.* (June 14, 2018); Patrick Gregory, *ABA Rates Picks Not Qualified*, BLOOMBERGLAW (Sept. 17, 2018), <https://news.bloomberglaw.com/us-law-week/trump-picks-more-not-qualified-judges-1>; Statements, *supra* note 63 (ABA input's value); *see also supra* notes 57–58 (external group).

88. For committee approval and Senate confirmation of Judge Michael Brennan, *see* S. Judiciary Comm., *Exec. Business Mtg.* (Feb. 15, 2018), *supra* note 11; 164 CONG. REC. S2,607 (daily ed. May 10, 2018); *supra* note 64 (same for Grasz).

89. S. Judiciary Comm., *Exec. Business Mtg.* (May 10, 2018); 164 CONG. REC. S4,858 (daily ed. July 10, 2018); *see also supra* note 62; David Lat, *President Trump's Eleventh Wave of Judicial Nominees*, ABOVE THE LAW (Feb. 23, 2018), <https://abovethelaw.com/2018/02/president-trumps-eleventh-wave-of-judicial-nominees>.

90. The members failed to discuss Bounds before voting. S. Judiciary Comm., *Exec. Business Mtg.* (June 7, 2018); 164 CONG. REC. S5,098 (daily ed. July 19, 2018) (nomination's withdrawal); *see also supra* notes 61, 82.

91. *See* sources cited *supra* notes 17–18, 22–23, 89.

92. U.S. SENATE DEMOCRATS, Schedule for May 7, Apr. 26, 2018. Bush and Obama never approved so many. *Judicial Vacancy List for December 2017*, U.S. CTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/12/vacancies> (last visited Feb. 18, 2019); *Judicial Vacancy List for December 2018*, U.S. CTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/12/vacancies> (last visited Feb. 18, 2019); *supra* note 6 (Bush); *see* the judicial vacancy list from 2009 to 2017 for Obama.

93. 2017 notice on four came Thursday evening as senators recessed. S. Judiciary Comm., *Exec.*

resembled numerous panel discussions,⁹⁴ while many of the thirty hours reserved for debate after cloture examined questions lacking relationships to individual nominees.⁹⁵

The GOP Senate majority, like Trump, prioritized seating appellate, over district, judges, nominees in states with Republican senators, conservative white males, and filling non-emergency openings, ideas which mostly derived from the nomination regime.⁹⁶ Those facets allowed Trump to set appellate records yet left twenty-plus 2017 district picks without floor votes, while few realized approval in states with two Democrats, only two minority nominees won confirmation and emergencies soared.⁹⁷ McGahn neglected blue state Ninth Circuit vacancies, especially in California. Negligible consultation delayed the Oregon effort, and Trump's deteriorated relations with Republican Senators John McCain, who died, and Jeff Flake, who eschewed reelection, slowed the Arizona nomination.⁹⁸

IV. REASONS FOR AND IMPLICATIONS OF PROBLEMATIC SELECTION

The reasons for selection problems are complex,⁹⁹ but some commentators trace the "confirmation wars" to Judge Bork.¹⁰⁰ The process

Business Mtg. (Nov. 2, 2017); U.S. SENATE DEMOCRATS, Schedule for Oct. 31, Oct. 26, 2017.

94. See *supra* notes 88–89.

95. When senators address nominees, few members hear them. GOP senators find the thirty-hour post-cloture rule so unhelpful they urge limiting it. S. Rules Comm., *Hearing on S. Res. 355* (Dec. 19, 2017); S. Rules Comm., *Hearing on S. Res. 355*, (Apr. 25, 2018) (approving resolution); S. Rules Comm., *Exec. Business Mtg.* (Feb. 13, 2019) (approving S. Res. 50); Burgess Everett & Marianne Levine, *McConnell Preps New Nuclear Option to Speed Trump Judges*, POLITICO (Mar. 5, 2019), <https://www.politico.com/story/2019/03/06/trump-mcconnell-judges-1205722>; Carl Hulse, *Ghost of Garland Lurks as GOP Brandishes Nuclear Option Again*, N.Y. TIMES, Feb. 13, 2019, at A14, <https://www.nytimes.com/2019/02/20/us/politics/senate-nuclear-option-trump.html>.

96. See sources cited *supra* notes 55–62, 65–71.

97. U.S. SENATE, Exec. Calendar, Dec. 23, 2017; see *id.*, Dec. 31, 2018 (31 awaited floor votes); *Judicial Vacancy List for March 2019*, U.S. CTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2019/03/vacancies> (last visited Mar. 11, 2019) (129 district openings); *Judicial Emergency List for March 2019*, U.S. CTS, [https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2019/03/emergencies\(87\)](https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2019/03/emergencies(87)); see *supra* notes 23–24, 68, 92, 97 and accompanying text.

98. Lat (*Part 2*), *supra* note 73; Robert McFadden, *John McCain Dies*, N.Y. TIMES, Aug. 27, 2018, at A18; *Oct. 24 Hearing*, *supra* note 80 (Arizona & Washington resolution); see *supra* notes 33, 61, 72–78, 82–83. But see *supra* notes 62, 90; 164 CONG. REC. S6,883 (daily ed. Oct. 11, 2018) (Ryan Nelson's confirmation, so Idaho resembles Hawaii).

99. Compare Michael Gerhardt & Michael Stein, *The Politics of Early Justice*, 100 IOWA L. REV. 551 (2014), with Orrin Hatch, *The Constitution as Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL'Y 1035 (2009).

100. Hugh Hewitt, *Supreme Court 30 Years War Is Over*, WASH. POST (Oct. 22, 2018), <https://www.washingtonpost.com/opinions/the-supreme-courts-30-years-war-is-finally-over/2018/10>

has unraveled, as seen with constant partisanship and striking divisiveness—manifested in slowing Kavanaugh and denying Garland review, exploding nuclear options to confirm Gorsuch and Obama nominees whom Republicans blocked and demanding cloture and roll call votes for most nominees.¹⁰¹

The effects are crucial. The 2015 to 2016 inaction and Trump's deficiencies leave eight circuit, and eighty-seven emergency, vacancies, many in the Ninth.¹⁰² Circuits had "few" empty slots at 2014's close only *after* Democrats mustered the nuclear option.¹⁰³ However, 2015 to 2016 inactivity and judges' later departures multiplied Ninth Circuit emergencies; California lacked nominees for three until October 2018 while Trump has approved merely three Ninth Circuit jurists.¹⁰⁴ Slow appointments deprive the court of judicial resources to deliver myriad litigants justice.¹⁰⁵ Few circuits address conditions so daunting as the Ninth that resolves immense filings most slowly.¹⁰⁶

In sum, this canvass elucidates the appellate process' state, which inattention to California worsened, and the need for speedy action. The Constitution grants the executive and chamber many appointments duties. Clear precedent that supports approvals near a presidency's institution should govern.¹⁰⁷ The parties, thus, ought to cooperate and fill the California emergencies.

[/22/c443d566-d62d-11e8-aeb7-ddcad4a0a54e_story.html](https://www.courts.ca.gov/cases-and-orders/2019-01-22/c443d566-d62d-11e8-aeb7-ddcad4a0a54e_story.html); see *supra* note 12.

101. The latest began with stalling claims at the end of Bush's time. The GOP retaliated with huge delay in approving Obama's nominees. Democrats then used the nuclear option. The GOP next slowed all nominees. See sources cited *supra* notes 11, 13, 53, 92.

102. Wheeler, *supra* note 20; see also *supra* notes 66, 98.

103. See *supra* notes 23–24, 92 and accompanying text.

104. Hulse, *supra* note 74. For more, review the U.S. Court's website and their archive of judicial vacancies.

105. JOHN ROBERTS, YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2010); Tobias, *supra* note 13, at 2253; Jennifer Bendery, *Federal Judges Burned Out, Overworked, and Wondering Where Congress Is*, HUFFINGTON POST (Sept. 30, 2015), https://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_us_55d77721e4b0a40aa3aaf14b.

106. JUDICIAL BUSINESS OF THE U.S. COURTS, Courts of Appeals - Median Times for Merits Terminations in 12 Months Ending Sept. 30, 2017, Tbl. B-4 (2017); Kimberly Robinson, *Heavy Caseload Creates 9th Circuit's Bad Rap*, BLOOMBERGLAW (May 3, 2018), <https://news.bloomberglaw.com/us-law-week/heavy-caseload-to-blame-for-ninth-circuits-bad-rap?context=article-related>.

107. Approval is easier at a presidency's outset, but the duties always apply. See *supra* notes 30–32.

V. SUGGESTIONS FOR FILLING THE VACANCIES

A. GENERAL SUGGESTIONS

Trump's major task remains creating an effective government. Confirming Gorsuch and Kavanaugh consumed resources that would have been dedicated to circuits.¹⁰⁸ Trump's nominal familiarity with judges and selection may explain the California vacancies, but his presidency is rather nascent and ideas may be derived from efforts thus far.¹⁰⁹

Some behavior inspires little confidence. Trump's degrading remarks on jurists and their decisions¹¹⁰ suggest that he confronts more appointments problems than other new executives but may rectify the situation. Because crafting the government and confirming two Justices devoured resources and Trump gave California nominal priority, he must emphasize it.¹¹¹

Trump needed to avidly consult the senators. Cultivation helps in states with two opposition lawmakers, as they could delay processing by retaining slips.¹¹² The Oregon stalemate manifested the perils of not consulting, while smooth Hawaii approval showed the benefits.¹¹³ Trump ought to have cultivated the Californians, who cooperated and supplied fine, consensus

108. Adam Liptak, *Gorsuch Clinched Spot After Long Process*, N.Y. TIMES, Feb. 7, 2017, at A15; see also *supra* note 54.

109. He seated many circuit judges who may be too new, and too little hard data exist to posit definitive conclusions. Jasmine Lee, *Trump Could Flip the Supreme Court. His Impact on the Lower Courts Is Less Clear*, N.Y. TIMES (Sept. 4, 2018), <https://www.nytimes.com/interactive/2018/09/04/us/politics/trump-federal-judge-appointments.html>. But see Alison Frankel, *Trump Appellate Judges Are Paving the Way to Challenge Precedent*, REUTERS (Oct. 3, 2018), <https://www.reuters.com/article/us-otc-courtingchange/trump-appellate-judges-are-paving-the-way-to-challenge-precedent-idUSKCN1MD2RD>. See generally PEOPLE FOR THE AMERICAN WAY, CONFIRMED JUDGES, CONFIRMED FEARS (2019).

110. David Cole, *'So-Called Judges' Trump Trump*, WASH. POST (Feb. 10, 2017), https://www.washingtonpost.com/opinions/so-called-judges-trump-trump/2017/02/10/573fd1c8-ef42-11e6-b4ff-ac2cf509efe5_story.html. But see *Hawaii v. Trump*, 438 S. Ct. 923 (2018). He might ignite unproductive circuit-splitting efforts. *Transcript of Trump Press Confer.*, N.Y. TIMES (Feb 16, 2017), <https://www.nytimes.com/2017/02/16/us/politics/donald-trump-press-conference-transcript.html>; see Cadei, *supra* note 33; Bob Egelko, *Trump May Reopen 9th Circuit Split Debates*, S.F. CHRON. (Feb. 18, 2017), <https://www.sfgate.com/nation/article/Trump-attack-may-reopen-debate-on-splitting-Ninth-10943304.php>.

111. Emergencies reflect conservative work and case load estimates and vacancy length; they show California needs priority. *Emergencies, Judicial Emergency Definition*, U.S. CTS <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition> (last visited Feb. 18, 2019).

112. Kim, *supra* note 75; see *supra* note 66 (finding that presidents and senators deem circuits critical). But see *supra* notes 80–84 (finding Judiciary Chair Grassley eroded blue slips' protection regarding seven nominees by processing them without home state senators' slips).

113. See sources cited *supra* notes 61–62, 82–3, 90–91 (two states); *supra* note 11 (Bush's effective consultation).

suggestions.¹¹⁴

The chief executive should also keep applying earlier Presidents' salient practices. When appointing circuit judges, one would be nominating federal district judges and state Supreme Court jurists.¹¹⁵ Related is renominating and easily confirming able, centrist Obama nominees who almost captured appointment, namely Judge Koh.¹¹⁶ The ideas are constructive, as the chamber has already carefully evaluated and confirmed federal jurists.¹¹⁷ Many state justices' activities resemble those of federal circuit judges.¹¹⁸ Other promising sources are dynamic federal court litigators.¹¹⁹

Republican and Democratic Presidents afford White House Counsel abundant responsibility for circuit court nominees.¹²⁰ Trump assigns many courts preference yet accorded California little and excluded the ABA.¹²¹ Thus, he should assure California priority, ABA input, and designee canvassing that is more careful. Lawmakers' sending a few picks and swift, open communications permitted Trump and the senators flexibility. If each persistently rejects all his choices, they should reconcile prolonged differences, as chronic opposition imposes delay, cost and the need to restart consideration.¹²²

After nomination, the parties must ensure efficient, intensive and fair confirmation systems. Republicans and Democrats ought to astutely conclude scrutiny by expediting panel, ABA and FBI checks, and nominees

114. The California senators ranked and explained preferences. *See supra* note 68 and *infra* note 140.

115. Examples are Thapar, his first confirnee, and Joan Larsen, another early circuit appointee. Elisha Savchak et al., *Taking It to the Next Level: The Elevation of District Judges to the U.S. Courts of Appeals*, 50 AM. J. POL. SCI. 478 (2006); Tobias, *supra* note 13, at 2243–46; *supra* note 71 (Thapar); 163 CONG. REC. S6,944 (daily ed. Nov. 1, 2017) (Larsen).

116. This saves time used to restart selection, cultivates relationships with Democrats and rapidly fills California seats. *See supra* notes 32–53 (California senators favor Koh); Lat (*Part 2*), *supra* note 73 (affiliations); *see also supra* note 67 (nominating Collins and Lee to the Ninth Circuit and Rosen to the Central District); *infra* note 130 (discussing Obama nominees whom Trump renominated).

117. Obama and Trump seated many with full records, expediting review. *See, e.g., supra* note 19 (Murguia); *supra* note 115 (Thapar).

118. Obama and Trump appointed many. *See, e.g., supra* note 21 (Hurwitz); *supra* note 115 (Larsen).

119. Obama and Trump confirmed many. *See, e.g., supra* note 21 (Watford); *supra* note 23 (Friedland); *supra* note 64 (Grasz); *see supra* note 75; Maura Dolan, *They Dismissed Her as a Lightweight*, L.A. TIMES (May 28, 2017), <https://www.latimes.com/local/lanow/la-me-chief-justice-20170528-story.html>.

120. Goldman et al., *supra* note 13, at 14–16; Tobias, *supra* note 13, at 2239; *see also supra* notes 56–59.

121. *See supra* notes 63–64, 78 and accompanying text (rating 6 not qualified).

122. This may occur, devouring resources, and suggests why picking and ranking a few is preferable to sending one.

should help by fully completing questionnaires.¹²³ Senators may retain slips, if nominees are unacceptable *after* they exhaust initiatives to have Trump change aspirants' path, elements which California senators are pursuing. The core is merit: independence, ethics, intelligence, diligence and temperament.¹²⁴ When the White House renominated Collins and Lee and nominated Bress for the Ninth Circuit, the California senators urged Senator Lindsey Graham (R-S.C.), who replaced Grassley as Judiciary Chair, to honor their blue slips.¹²⁵ However, Graham stated that "once (Democrats) changed the rules on circuit courts—they did it, not me—to expect that the blue slip system would survive is pretty naïve," refused to respect the senators' blue slips¹²⁶—and observed that he was "very supportive of the nominees submitted by President Trump to serve on the Ninth Circuit" because they are "highly qualified nominees."¹²⁷

Once lawmakers provide slips for qualified nominees, the panel must swiftly convene hearings. Despite when they are fine centrists and nominees' ABA, FBI, and committee reviews are probing and strong, yielding untroubling conclusions, few members attend sessions that proceed well.¹²⁸ Should controversy arise, hearings ought to feature robust, comprehensive and equitable questioning. Senators pose written queries, which nominees carefully answer, while holding meetings to discuss them and vote. If the panel approves, but the majority refuses chamber ballots, designee advocates file cloture that able, mainstream nominees win.¹²⁹ The Majority Leader then stages floor debates, which must be complete, rigorous discussions that respect nominees and the process, and conducts fast votes.

B. SPECIFIC VACANCIES

Trump should have assiduously consulted Feinstein and Harris, who

123. Certain nominees ignored some questions or omitted critical matters. *See supra* note 121 (Jeff Mateer & Brett Talley); *Hearing, supra* note 62 (Wendy Vitter); *Hearing, supra* note 82 (Bounds).

124. Senators must insure that nominees possess (1) mainstream perspectives, (2) ample respect for Supreme Court precedent and legitimate federal or state conduct and (3) no prejudgments on relevant issues.

125. Emily Cadei, *Showdown Looms Over Trump's Picks for 9th Circuit Court*, SACRAMENTO BEE (Jan. 31, 2019), <https://www.sacbee.com/latest-news/article225349515.html>; *see also supra* note 68.

126. Cadei, *supra* note 126.

127. Patrick Gregory, *New Trump Appeals Nominee Kirkland Partner, Ex-Scalia Clerk*, BLOOMBERGLAW (Jan. 31, 2019), <https://news.bloomberglaw.com/us-law-week/new-trump-appeals-nominee-kirkland-partner-ex-scalia-clerk-3>; Niels Lesniewski, *Debate Over Ninth Circuit Seats Is Latest Battle in Trump-Senate Judicial Wars*, ROLL CALL (Jan. 31, 2019), <https://www.rollcall.com/news/congress/debate-ninth-circuit-seats-latest-round-judicial-wars>.

128. Restrepo's hearing was typical. Some members posed mundane queries he easily fielded. Tobias, *supra* note 28, at 45–46.

129. *E.g.*, Tobias, *supra* note 13, at 2244–46; *see supra* notes 23, 50–52.

cooperated by proffering multiple able, consensus designees for every opening. The senators asked him to rename Judge Koh, who achieved February 2016 nomination.¹³⁰ Promptly filling all vacancies is compelling for myriad litigants, jurists, and California active circuit judge representation.

Trump ought to have assessed renaming Koh,¹³¹ because she deserved a 2016 final vote which GOP obstruction prevented, but Koh would now have to secure only that and a panel ballot. The last idea shows why she merits selection and approval: California needs three jurists, the panel, ABA and FBI recently scrutinized Koh fully and their prior surveys necessitate mere updating. Precedent sustains that effort. Koh warrants no hearing, as Grassley mandated none for the many Obama district nominees Trump renamed, yet members who opposed Koh earlier and newer colleagues might favor a hearing.¹³²

California requires each vacancy filled, so the politicians agreed on a few candidates they support, but the President named others, despite the endeavors of the senators, who pointedly retain blue slips. They must keep slips, which the Chair needs to honor. During October, the senators proposed Collins, Rogan, and Koh, who merit Trump's serious review, as they would promote quick, smooth confirmation, which fills half the circuit vacancies with one nominee he tapped, another on the White House list, who is an experienced jurist, and a third who is on the senators' list and is a respected federal judge.¹³³

Because Trump may reject the senators' deal and needs multiple nominees, Feinstein and Harris might assemble other prospects. One source is the twenty-plus Obama California district appointees—most have been superb jurists across years. For instance, Central District Judge Dolly Gee affords ethnic, and rare experiential, diversity, from prodigious work on

130. Tobias, *supra* note 32, at 450 n.1. When senators concur on a single choice, Trump may want to defer, as they know more strong aspirants who best represent California and can slow review by keeping slips.

131. The senators favor Koh. *See supra* note 33. I rely below on Tobias, *supra* note 32.

132. The sixteen nominees had 2016 panel approval; nine have won confirmation. Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9 (2017); *see also supra* notes 45–49. *But see Jan. 22 & Jan. 30, 2018 Notices of Intent, supra* note 68 (excluding five Obama district nominees whom Trump had renominated). The Chair should poll members; if some prefer another session, he should arrange that.

133. The White House was apparently considering this possibility, as the President did not include any of the three October nominees in the January 22 package of fifty nominees, although the White House did include the three in the January 30 package of nominees. *See supra* notes 68, 78. *But see supra* note 67; Letter, *supra* note 78.

labor issues.¹³⁴ Twenty-one Bush confirmees have served well over more than a decade. For example, Gee's colleague, Andrew Guilford, would impart expertise from dozens of years being a revered civil litigator and federal jurist.¹³⁵

The California Supreme Court is another possibility. Justices Goodwin Liu and Mariano-Florentino Cuéllar were groundbreaking law faculty, while Justice Leandra Kruger practiced at the U.S. Solicitor General's Office.¹³⁶ Trump could also prefer more conservative aspirants, notably Chief Justice Toni Cantil-Sakauye.¹³⁷ Active federal court litigators would be apt sources. For instance, Obama confirmees Paul Watford and Michelle Friedland were excellent attorneys with a respected firm.¹³⁸ Counsel whom Trump or Feinstein's panel assessed were Daniel Bress, Collins, Lee and Jeremy Rosen.¹³⁹

Once the senators concurred, they proposed several strong prospects for each slot to Trump, who should have proffered mutually satisfactory nominees.¹⁴⁰ The many exceptional California attorneys and three vacancies offer much flexibility vis-à-vis ethnic, gender, sexual orientation, ideological and experiential diversity. A finely-calibrated analysis of these diversity facets and other relevant criteria, namely diligence, intelligence and ethics, was merited.

134. *Biographical Directory of Judges*, U.S. CTS., <http://www.uscourts.gov/JudgesAndJudgeships-/BiographicalDirectoryOfJudges.aspx> (last visited Feb. 27, 2019); Tim Arango, *Who Is Dolly Gee?*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/us/immigration-judge-executive-order-trump.html> (defly treating immigration cases).

135. *Directory*, *supra* note 135; Cadei, *supra* note 33 (senators proposed him). McGahn assessed Bush District Judge James Otero and Judge Rogan. *Lat (Part 2)*, *supra* note 73; *Lat*, *supra* note 76; Tillman, *supra* note 33.

136. Each would increase diversity. Bob Egelko, *Liu Confirmed to Supreme Court*, S.F. CHRON. (Aug. 31, 2011), <https://www.sfchronicle.com/bayarea/article/Gov-Brown-s-senior-legal-adviser-wins-13485312.php>; David Siders, *Jerry Brown Names Law Professor to California Supreme Court*, SACRAMENTO BEE (July 22, 2014), <https://www.sacbee.com/news/politics-government/capitol-alert/article2604510.html>; see Maura Dolan, *As Brown Ponders Supreme Court Vacancy, Earlier Appointee Defies Expectations*, L.A. TIMES (June 1, 2018), <https://www.latimes.com/local/lanow/la-me-ln-kruger-court-20180531-story.html>.

137. See generally Cadei, *supra* note 33; Dolan, *supra* note 120.

138. It was Munger, Tolles & Olson where Judge Owens and nominee Lee also worked. *Directory*, *supra* note 135; see Eighteenth Wave, *supra* note 67; *supra* notes 21, 23 (approvals); Cadei, *supra* note 33 (senators' choices).

139. *Lat (Part 2)*, *supra* note 73 (affiliations); see also *supra* note 67 (nominating Collins and Lee to the Ninth Circuit and Rosen to the Central District); *supra* note 68 (renominating Collins and Lee to the Ninth Circuit, Bumatay to the Southern District, and Rosen to the Central District and nominating Bress to the Ninth Circuit).

140. The senators' approach can facilitate disputes' resolution and avoid restarting the process. See *supra* note 122.

Because Trump and the senators differ, they could use a more dramatic approach: the “bipartisan judiciary,” which a few states’ lawmakers employ.¹⁴¹ Members of the party lacking executive control suggest a percentage of nominees. Reasoning by analogy, Trump may choose one and the senators can propose a second, while he and they might agree on a third. A related option is “trades.”¹⁴² For example, Trump may nominate one stellar, conservative, young aspirant, the politicians might send Koh and the third nominee would be a Bush district confirmer whom all favor.¹⁴³ When he and senators concur, they ought to apply efficient, comprehensive and fair confirmation processes like those reviewed.¹⁴⁴

CONCLUSION

The Ninth Circuit addresses least promptly the biggest docket mainly because it confronts five emergencies, three affecting California. If President Trump, Senators Feinstein and Harris, and the chamber robustly adopt the mechanisms scrutinized, they can expeditiously fill these vacancies with able, consensus jurists.

141. For more on this idea, see Carl Tobias, *Fixing the Federal Judicial Selection Process*, 65 EMORY L. J. ONLINE 2051 (2016); Michael Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 694 (2003). New York nominees suggest use of a similar regime or perhaps trades. Thirteenth Wave, *supra* note 71; Eighteenth Wave, *supra* note 67.

142. Tobias, *supra* note 13, at 2260 n.126; *see* Letter, *supra* note 33 (suggesting trades); *supra* note 77.

143. *See supra* note 142 (Bush appointees Guilford whom the senators proposed and Otero whom McGahn interviewed) They must only do this, if the situation is dire. Biden statement, *supra* note 7 (trades are controversial).

144. *See, e.g., supra* notes 79–99, 124–27.