Filling the California Ninth Circuit Vacancies

Carl Tobias

University of Richmond - School of Law, ctobias@richmond.edu

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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, and the current standoff enjoys greatest relevance. One aspect is the permanent difficulty that results from enhanced federal jurisdiction, cases and judges. Significant now is the modern concern, which is political and emanates from contrasting Senate and presidential control that started four decades ago. 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. Mounting partisanship also undermined confirmations by slowing and halting nominees. 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.


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.


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. 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. 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. Smooth appointments prevailed for most of George H.W. Bush’s time but slowed in 1992, meaning that a California appellate position was empty.

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. 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.

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. 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. 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. Even with Obama’s assertive pleading, some did not coordinate by forwarding accomplished prospects.

The GOP collaborated with regular hearings but “held over” discussions and votes a week for all except one circuit nominee. Republicans slowly allowed chamber debates, if required, and ballots, forcing strong centrists to languish months until Democrats pursued cloture. 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. This left some Ninth Circuit vacancies across Obama’s initial half decade; yet he appointed several preeminent, consensus, diverse judges the first three years.
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

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 California 35 and has carefully resolved major litigation, including her effective disposition of

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.
32. See generally Carl Tobias, Confirm Judge Koh to the Ninth Circuit, 74 WASH. & LEE L. REV. 449 (2016); Tobias, supra note 31.
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.
Apple’s patent infringement case against Samsung. The nominee earned a well-qualified rating from a substantial majority of the American Bar Association (“ABA”) evaluation committee.

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. Increased ethnic, gender, and sexual orientation diversity improves comprehension and resolution of critical questions which tribunals decide. Minority judges also curtail prejudices that undermine justice, and they instill public confidence.

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. The panel fully investigated her by cooperating with the ABA, FBI, and Department of Justice (“DOJ”). The Chair only set a hearing five months after nomination, although the Ninth Circuit required all posts filled. Feinstein and Barbara Boxer (D-Cal.) introduced Koh, praising her as the classic “American success story.” Members robustly queried the nominee who duly responded. Koh appeared to satisfy most. A few next posited written questions that she promptly answered. Grassley

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).
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).
46. Hearing, supra note 44. Most were uncontroversial; her responses were careful.
convened a September panel debate where the members rigorously discussed the nominee. Four Republicans, including Grassley, favored Koh, who earned approval.

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. McConnell had numerous weeks to vote on Koh but refused once Trump captured the presidency. Excellent centrists usually attain final ballots, so her proponents should have pursued cloture and senators who honor custom must have agreed. 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.

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. He created records for appointing circuit jurists the initial year

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).
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.
with a dozen and eighteen the next but has tapped eight Ninth Circuit picks and only three won confirmation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{57} Those procedures continue applying because the Society’s Executive Vice President, Leonard Leo, advises Trump on selection.\textsuperscript{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.\textsuperscript{59}

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


which Presidents use that is a critical reason for blue slips.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{63} However, Trump nominated six prospects with this rating.\textsuperscript{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,\textsuperscript{65} in fact, these emergency vacancies have multiplied since Republicans won the chamber.\textsuperscript{66}

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


\textsuperscript{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-
Trump as well nominates fewer picks in states which Democrats represent, even though most have plentiful emergencies. 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. 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.69 Among Trump’s eighty-
nine lower federal court confirmees, only Amul Thapar, James Ho, John Nalbandian, Neomi Rao, Karen Gren Scholer, Jill Otake, Fernando Rodriguez, and Terry Moorer 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, Moorer 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_5b19b351e4b09d7e3d70f461.


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


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.

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.\(^{86}\)


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


\(^{82}\) 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.


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).


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.


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

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. 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. 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.

IV. REASONS FOR AND IMPLICATIONS OF PROBLEMATIC SELECTION

The reasons for selection problems are complex, but some commentators trace the “confirmation wars” to Judge Bork.

94. See supra notes 88–89.
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.

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.
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 decisions\(^{110}\) 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


\(^{112}\) 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.\textsuperscript{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.\textsuperscript{115} Related is renominating and easily confirming able, centrist Obama nominees who almost captured appointment, namely Judge Koh.\textsuperscript{116} The ideas are constructive, as the chamber has already carefully evaluated and confirmed federal jurists.\textsuperscript{117} Many state justices’ activities resemble those of federal circuit judges.\textsuperscript{118} Other promising sources are dynamic federal court litigators.\textsuperscript{119}

Republican and Democratic Presidents afford White House Counsel abundant responsibility for circuit court nominees.\textsuperscript{120} Trump assigns many courts preference yet accorded California little and excluded the ABA.\textsuperscript{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.\textsuperscript{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

\begin{footnotesize}
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\item \textsuperscript{114} The California senators ranked and explained preferences. See supra note 68 and infra note 140.
\item \textsuperscript{115} Examples are Thapar, his first confirmee, and Joan Larsen, another early circuit appointee. Elisha Savchak et al., \textit{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).
\item \textsuperscript{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 (\textit{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).
\item \textsuperscript{117} Obama and Trump seated many with full records, expediting review. See, e.g., supra note 19 (Murguia); supra note 115 (Thapar).
\item \textsuperscript{118} Obama and Trump appointed many. See, e.g., supra note 21 (Hurwitz); supra note 115 (Larsen).
\item \textsuperscript{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, \textit{They Dismissed Her as a Lightweight}, \textit{L.A. Times} (May 28, 2017), \url{https://www.latimes.com/local/lanow/la-me-chief-justice-20170528-story.html}.
\item \textsuperscript{120} Goldman et al., supra note 13, at 14–16; Tobias, supra note 13, at 2239; see also supra notes 56–59.
\item \textsuperscript{121} See supra notes 63–64, 78 and accompanying text (rating 6 not qualified).
\item \textsuperscript{122} This may occur, devouring resources, and suggests why picking and ranking a few is preferable to sending one.
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should help by fully completing questionnaires. 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. 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. 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 slips—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.”

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. 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.

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 prejudices 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.


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. Promptly filling all vacancies is compelling for myriad litigants, jurists, and California active circuit judge representation.

Trump ought to have assessed renaming Koh, 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.

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.

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 renominees, 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. 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.

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

Once the senators concurred, they proposed several strong prospects for each slot to Trump, who should have proffered mutually satisfactory nominees. 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.


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.


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 (renomination 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. 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.” For example, Trump may nominate one stellar, conservative, young aspirant, the politicians might send Koh and the third nominee would be a Bush district confirmee whom all favor. When he and senators concur, they ought to apply efficient, comprehensive and fair confirmation processes like those reviewed.

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.