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Carl Tobias

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

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FILLING THE NINTH CIRCUIT VACANCIES

Carl Tobias*

ABSTRACT

Upon Republican President Donald Trump’s inauguration, the United States Court of Appeals for the Ninth Circuit experienced some pressing appellate vacancies, which the Administrative Office of the United States Courts (AO) carefully identified as “judicial emergencies” because the tribunal resolves a massive docket. Last year’s death of the iconic liberal champion Stephen Reinhardt and the late 2017 departure of libertarian former Chief Judge Alex Kozinski—who both assumed pivotal circuit leadership roles over numerous years—and a few of their colleagues’ decision to leave active court service thereafter, mean the tribunal presently confronts four judicial emergencies and resolves most slowly the largest number of appeals.

The 2016 and 2018 federal election cycles—which render uncertain the party that will capture the presidency and the Senate at the polls in 2020—show that more posts could open when additional jurists determine that they will change status across the Trump Administration. Nevertheless, striking partisanship will frustrate the effort to appoint Ninth Circuit judges. For example, rapidly following his inauguration, Trump prescribed controversial dictates that banned virtually all travelers from seven primarily Muslim nations. District courts enjoined those measures, which, in turn, the Ninth Circuit affirmed several times. This action prompted the chief executive to aggressively criticize the tribunal and many jurists of the court. The White House also initially tendered rather few candidates for the four unfilled positions, but none realized approval before 2019, mainly because concerned home-state Democratic politicians refused to return “blue slips” due primarily to the White House’s minimal consultation with the legislators. The Grand Old Party (GOP) accuses Democrats of slowing down Trump’s competent nominees when they persistently withhold slips and pursue cloture and roll call ballots for many aspirants. Because the Ninth Circuit among the thirteen federal appellate courts addresses the most cases the least swiftly, the vacancies—which are nearly fourteen percent of the judicial complement—starkly illuminate the mounting need for the President and the upper chamber to fill the voluminous openings with highly capable, mainstream jurists.

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This Article first scrutinizes the vacancy problem's specific history. It then descriptively and critically explores appointments for the Ninth Circuit in the tenure of Presidents Barack Obama and Trump while reviewing the court of appeals' circumstances today. Finding that the complication emanates from severely limited collaboration between Republicans and Democrats together with the fortuity that three preeminent judges completed active service close to the Obama Administration's conclusion and other prominent circuit jurists more recently departed, the piece surveys the vacant posts' important ramifications. Part IV detects that Republican *and* Democratic obstruction magnified the corrosive partisanship, strident rancor, and continuous "paybacks" that subverted appointments. Trump constantly exacerbates these phenomena, as witnessed in his divisive practices for choosing and confirming nominees and caustic rhetoric spewed at jurists of the courts, most notably judges of the Ninth Circuit. Because those empty positions decrease judicial resources for the Ninth Circuit to decide cases, and thereby harm myriad individuals and groups engaged in federal litigation, the final part posits suggestions for President Trump and the Senate to expeditiously fill the appellate court openings.

I. CONTEMPORARY SELECTION PROBLEMS

The background of this issue merits nominal recounting because additional observers have chronicled its beginnings and development and the existing conditions have greatest relevance.¹ One attribute has been the permanent vacancies dilemma that resulted from immense federal court jurisdiction, lawsuits, and judgeships.² Especially salient today is the modern concern, which is essentially political and derives from conflicting White House and Senate control that commenced thirty-nine years ago.³

The Ninth Circuit has manifested both aspects of the national conundrum. For instance, rampant population growth driven by financial expansion and rising immigration enlarged district cases and concomitant appeals; thus, court seats increased, reaching twenty-eight in the mid-1980s.⁴ Accentuated partisanship correspondingly

¹ See MILLER CTR. REPORT, IMPROVING THE PROCESS FOR APPOINTING FEDERAL JUDGES (1996); Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. COLL. L. REV. 319 (1994).

² The permanent vacancies difficulty warrants less review; considerable delay is intrinsic, resists meaningful alteration, and has been analyzed elsewhere. Comm. on the Fed. Cts., *Remedying the Permanent Vacancy Problem in the Federal Judiciary*, 42 REC. ASS'N B. CITY N.Y. 374, 374 (1987); Bermant et al., *supra* note 1. For more comprehensive assessment of the permanent vacancies dilemma, see Carl Tobias, *Combating the Ninth Circuit Judicial Vacancy Crisis*, 73 WASH. & LEE L. REV. ONLINE 687, 689–91 (2017).

³ Some periods, namely 2017–18, experienced one-party control. For recent, more comprehensive treatment, see sources cited *supra* note 2.

⁴ Judgeships legislation that enlarged the number of judicial positions shows these ideas. See, e.g., Act of July 10, 1984, Pub. L. No. 98-353, 98 Stat. 345 (1984); Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629–30 (1978). The privacy needs of candidates, senators, and

undermined approvals by insistently stalling many nominees.⁵ However, certain matters ameliorated Ninth Circuit appointments problems. During much of the tribunal's 128-year existence, the court of appeals encountered no vacancy crisis.⁶ The appellate contingent was small and openings remained infrequent, while the President and the Senate easily filled most unoccupied posts.⁷ Indeed, before the late 1960s, the court operated efficaciously with merely nine members.⁸

Judgeships legislation which Congress passed in 1978 created many positions, and Jimmy Carter enjoyed appointments success principally because Democrats had the chamber, ensuring that there was no vacancy when Ronald Reagan became President.⁹ Reagan's administration smoothly confirmed judges, although Congress authorized five additional circuit posts, as the GOP held the Senate during Reagan's first six years, and once Democrats recaptured the chamber they actively cooperated.¹⁰ Senator Joe Biden (D-DE)—who astutely chaired the Judiciary panel—speedily processed all superb, consensus prospects, and the Senate promptly confirmed Justice Anthony Kennedy and six court of appeals jurists nationwide in 1988. However, multiple Ninth Circuit positions were open at Congress's adjournment.¹¹ Felicitous judicial selection prevailed for much of President George H.W. Bush's tenure, yet confirmations slowed in 1992 meaning that he left one appellate post empty.¹²

the President thwart attempts to offer a complete picture. *But see* Press Release, White House, Office of the Press Sec'y, Keeping His Promise: President Trump's Transparent, Consistent, and Principled Process for Choosing a Supreme Court Nominee (July 9, 2018) [hereinafter Press Release, Keeping His Promise], <https://www.whitehouse.gov/briefings-statements/keeping-promise-president-trumps-transparent-consistent-principled-process-choosing-supreme-court-nominee> [<https://perma.cc/X3GV-8PAN>].

⁵ This decline was gradual after United States Court of Appeals for the District of Columbia Circuit Judge Robert Bork's controversial Supreme Court fight. However, even later, some collaboration occurred. *See* CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 5–6 (2007); *see also* sources cited *infra* notes 10–12, 17.

⁶ Tobias, *supra* note 2, at 693.

⁷ *Id.*

⁸ *Id.*

⁹ *See* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 236–84 (1997) (evaluating selection during President Carter's Administration); *Archive of Judicial Vacancies*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> [<https://perma.cc/L7PA-R8AQ>] [hereinafter *Judicial Vacancies*].

¹⁰ *See* 143 CONG. REC. S4,254 (daily ed. Mar. 19, 1997) (statement of Sen. Biden); *see also* GOLDMAN, *supra* note 9, at 285–345 (analyzing selection in President Reagan's Administration); sources cited *supra* note 5.

¹¹ *Judicial Vacancies*, *supra* note 9 (showing three vacancies in 1988–89). The controversial battle over Judge Bork was an exception to collegial selection.

¹² *Id.* Biden attempted to collaborate with President Bush, who tendered a number of nominations rather late in his presidency. *Id.* (showing one post open in 1993); *see also* Neil

President Bill Clinton filled this slot with Judge Michael Daly Hawkins partially because Democrats acquired a chamber majority during his first two years.¹³ However, the GOP earned ample Senate control in 1995, frustrating appointments while more jurists only captured confirmation early in 1996.¹⁴ Over time, after this, vacancies reached ten out of twenty-eight seats, which included three upon the presidency's close, extending stalled appeals.¹⁵ This circumstance improved across President George W. Bush's tenure, especially when Republicans commanded a chamber majority. The chief executive approved a number of judges mainly by consulting Democrats, although controversy arose leaving a Ninth Circuit opening at the administration's conclusion.¹⁶

In short, modern appointments have been checkered, but there were a few periods which yielded relatively successful endeavors. The Bush presidencies are illustrative, even though general conditions gradually declined after Circuit Judge Robert Bork's imbroglio over his Supreme Court appointment. From 2009, circumstances deteriorated significantly.¹⁷

II. OBAMA ADMINISTRATION SELECTION

The selection process functioned rather efficaciously across Obama's first six years when the Democratic Party controlled the Senate. The White House assiduously consulted politicians from home states—predominantly Republicans—soliciting, and usually following proposals of exceptional, diverse, moderate nominees.¹⁸ These

A. Lewis, *Waiting for Clinton, Democrats Hold Up Court Confirmations*, N.Y. TIMES (Sept. 1, 1992), <https://nyti.ms/2NZyHb9>.

¹³ S. REP. 104-343, at 16 (1996).

¹⁴ Party Division, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/72UF-JXGM>] (last visited Apr. 11, 2019).

¹⁵ Clinton's predisposition to nominate accomplished moderates and compromise, and certain Republican senators' cooperation, meant that processes in some states functioned rather well. *Judicial Vacancies*, *supra* note 9 (showing 1995–2001 vacancies).

¹⁶ *Id.* (showing one post open in 2009). When Ninth Circuit Judge Stephen Trott, whose chambers were located in Idaho, departed active status, California senators argued that his seat belonged to their state, a dispute that lasted one decade. Todd Ruger, *Senate Vote Ends Feud Over Ninth Circuit Seat*, LEGAL TIMES (Mar. 31, 2014), <https://legaltimes.typepad.com/blt/2014/01/senate-judiciary-committee-approves-29-judicial-nominees.html> [<https://perma.cc/YVG5-M3SE>]; *Executive Business Meeting Before the S. Judiciary Comm.*, 115th Cong. (Feb. 15, 2018) (statement of Sen. Crapo).

¹⁷ See, e.g., MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT (1992); JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 18 (2007); sources cited *supra* notes 5, 12; see also GEYH, *supra* note 5; DAVID O'BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY TASK FORCE ON JUDICIAL SELECTION 20–21 (1988) (recounting considerable relevant previous history).

¹⁸ See Sheldon Goldman et al., *Obama's First Term Judiciary: Picking Judges in the*

initiatives fostered collaboration, as elected officials from states with unfilled positions receive deference because they can readily delay by retaining blue slips, which the panel steadfastly honored throughout Obama's eight years.¹⁹ Despite Obama's assertive pleas, many senators did not cooperate by suggesting acceptable picks.²⁰

The GOP coordinated with the arrangement of routine hearings yet "held over" panel discussions and committee votes each week for all but one in sixty-plus excellent, mainstream appellate court nominees.²¹ Republicans slowly permitted most aspirants' chamber debates (when necessary) and ballots, requiring that superb centrists languish for weeks until Democrats asked for and won cloture.²² The GOP sought and employed plentiful roll call votes and debate time on capable, moderate attorneys who strongly captured approval, consuming rare floor hours.²³ These procedures affirmatively undercut confirmations, leaving twenty appellate court vacancies—some that bedeviled the Ninth Circuit—for practically all of the half decade after late 2009.²⁴

In the 2012 presidential election year, Republicans collaborated less.²⁵ Delay increased, and chamber ballots stopped that June. With Obama's reelection, Democrats hoped for improved cooperation, which failed to materialize; instead, resistance expanded the next year when he provided three esteemed, diverse, mainstream aspirants for the D.C. Circuit, the nation's second most important tribunal.²⁶ The GOP would

Minefield of Obstructionism, 97 JUDICATURE 7, 8–17 (2013); Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2239–40, 2253 (2013).

¹⁹ Senator Patrick Leahy (D-VT), who chaired the Judiciary Committee in Obama's first six years, and Senator Chuck Grassley (R-IA), who served as Chair during Obama's last two years, refused to process nominees who lacked two blue slips from home-state senators. See Ryan Owens et al., *Ideology, Qualifications, and Covert Senate Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347; Tobias, *supra* note 18, at 2242; sources cited *infra* note 67; see also Russell Wheeler, *Kavanaugh Aside, Consider What's Happening to the Courts*, BROOKINGS INST. (2018), <https://www.brookings.edu/blog/fixgov/2018/08/02/kavanaugh-aside-consider-whats-happening-to-the-courts> [<https://perma.cc/4M86-EY2A>].

²⁰ Some home state senators tendered few or no candidates. ALLIANCE FOR JUSTICE, TEXAS: STATE OF JUDICIAL EMERGENCY (2016); Goldman et al., *supra* note 18, at 17; see also 161 CONG. REC. S6,151 (daily ed. July 30, 2015) (statement of Sen. Schumer).

²¹ *Executive Business Meeting Before the S. Judiciary Comm.*, 114th Cong. (Mar. 22, 2013) (voting on the nomination of Jane Kelly to the Eighth Circuit but holding over the nomination of Kenneth Gonzalez to the District of New Mexico); see also Tobias, *supra* note 18, at 2242–43.

²² Goldman et al., *supra* note 18, at 26–29; Tobias, *supra* note 18, at 2243–46; Wheeler, *supra* note 19.

²³ Tobias, *supra* note 18, at 2244; see also Juan Williams, *The GOP's Judicial Logjam*, THE HILL (July 27, 2015), <https://thehill.com/opinion/juan-williams/249196-juan-williams-the-gops-judicial-logjam>.

²⁴ See *Judicial Vacancies*, *supra* note 9 (describing vacancies from 2009–14).

²⁵ Tobias, *supra* note 18, at 2246; see also sources cited *infra* notes 39–40.

²⁶ Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L. J. 121, 134–37 (2015); Carl

not grant them final votes and protracted recalcitrance made Democrats explode the “nuclear option” that constricted filibusters.²⁷ This move allowed the Ninth Circuit to have all of its jurists upon 2014’s end.

The subsequent year, when Republicans held a chamber majority,²⁸ already nominal collaboration progressively diminished. The leadership continuously pledged to again install the chamber’s “regular order,” the system that applied before Democrats ostensibly eroded the construct beginning in 2007.²⁹ In January 2015, Mitch McConnell (R-KY), the new Majority Leader, announced, “We need to return to regular order.”³⁰ Chuck Grassley (R-IA), the Chair of the Judiciary Committee, promised to analogously survey prospects.³¹ Notwithstanding manifold vows, the GOP slowly furnished possibilities for Obama to canvass—nominee hearings and committee ballots as well as chamber debates and votes. With 2015’s close, those machinations left eight out of nine appellate openings, which the AO categorized as emergencies: missing nominees for jurisdictions that GOP politicians

Hulse, *Should Democrats Have Saved Their Filibuster for the New Court Fight?*, N.Y. TIMES (July 14, 2018), <https://nyti.ms/2JndJLP>; Jeffrey Toobin, *The Obama Brief*, NEW YORKER (Oct. 27, 2014), <https://www.newyorker.com/magazine/2014/10/27/obama-brief> [<https://perma.cc/VPF7-YDU4>].

²⁷ The 113th Senate approved 130 circuit and district judges. *See* 161 CONG. REC. S3,223 (daily ed. May 21, 2015) (statement of Sen. Leahy); *Judicial Vacancies*, *supra* note 9 (describing vacancies from 2013–14). The GOP made Democrats file cloture on all pre-2015 nominees.

²⁸ Jerry Markon et al., *Republicans Win Senate Control as Polls Show Dissatisfaction with Obama*, WASH. POST (Nov. 4, 2014), https://www.washingtonpost.com/politics/senate-control-at-stake-in-todays-midterm-elections/2014/11/04/e882353e-642c-11e4-bb14-4cfea1e742d5_story.html?noredirect=on&utm_term=.3df1409ae638 [<https://perma.cc/QU7X-DMJU>]; Jonathan Weisman & Ashley Parker, *Riding Wave of Discontent, G.O.P. Takes Senate*, N.Y. TIMES (Nov. 5, 2014), <https://nyti.ms/10rGDUE>.

²⁹ 161 CONG. REC. S28 (daily ed. Jan. 7, 2015) (statement of Sen. McConnell); *see also id.* at S133 (daily ed. Jan. 12, 2015) (statement of Sen. McConnell) (commenting on Congress “getting back to work under a new Republican majority”); *id.* at S2,767 (daily ed. May 12, 2015) (statement of Sen. McConnell) (“I know the opportunity to consider complex legislation via regular order became too uncommon in recent years, but that is changing now.”). *But see id.* at S2,949 (daily ed. May 18, 2015) (statement of Sen. Reid) (commenting on “[t]he Republicans’ refusal to consider the President’s judicial nominations”); *id.* at S3,223 (daily ed. May 21, 2015) (statement of Sen. Leahy) (blaming the Republicans for the limited number of Senate confirmations); Jim Manley, *Has the Senate Really Turned a Corner?*, WALL STREET J.: WASH. WIRE (June 24, 2015, 6:04 PM), <https://blogs.wsj.com/washwire/2015/06/24/has-the-senate-really-turned-a-corner> [<https://perma.cc/R9T3-87ES>].

³⁰ Sen. McConnell kept reciting the mantra. 161 CONG. REC. S28 (daily ed. Jan. 7, 2015); *id.* at S2,767 (daily ed. May 12, 2015). *But see* 163 CONG. REC. S8,022 (daily ed. Dec. 14, 2017) [hereinafter Leahy Statement] (statement of Sen. Leahy).

³¹ *Hearing on Nominations Before the S. Judiciary Comm.*, 115th Cong. (Jan. 21, 2015); David Catanese, *Chuck Grassley’s Gavel Year*, U.S. NEWS & WORLD REP. (Jan. 28, 2015), <https://www.usnews.com/news/articles/2015/01/28/chuck-grassleys-gavel-year> [<https://perma.cc/B343-X5GE>].

represented.³² The Senate confirmed only a pair of circuit jurists throughout Obama's last two years.³³

In November 2014, the administration tapped Kara Farnandez Stoll, an experienced, mainstream counsel, and Eastern District of Pennsylvania Judge Luis Felipe Restrepo, a dynamic, centrist jurist, as Federal Circuit and Third Circuit nominees.³⁴ Stoll's March 2015 panel hearing progressed well; she easily gained committee approval the following month with confirmation in July.³⁵ Restrepo's processing stalled. The nominee waited practically seven months for a hearing because Senator Patrick Toomey (R-PA) retained the nominee's blue slip until May 2015, although Senator Robert Casey (D-PA) had presented his during November 2014.³⁶ A June hearing smoothly proceeded; Toomey lauded Restrepo, who answered questions cautiously and easily captured July approval.³⁷ Nonetheless, the chamber demanded that the aspirant wait until January 2016 for his confirmation.³⁸

This was a presidential election year, a year in which the appointments process customarily slows and halts. These parameters—enhanced by the GOP's refusal to consider Judge Merrick Garland, Obama's accomplished Supreme Court nominee—frustrated circuit approvals.³⁹ Despite the longstanding convention under which

³² Republican senators cooperated little, so Obama sent zero picks in 2015 and seven in 2016; none won approval. *See* sources cited *infra* notes 34–41.

³³ Russell Wheeler, *Senate Obstructionism Handed a Raft of Judicial Vacancies to Trump—What Has He Done with Them?*, BROOKINGS INST. (June 4, 2018), <https://www.brookings.edu/blog/fixgov/2018/06/04/senate-obstructionism-handed-judicial-vacancies-to-trump> [<https://perma.cc/H5CQ-7898>].

³⁴ Press Release, White House, Office of the Press Sec'y, President Obama Nominates Two to Serve on the United States Courts of Appeals (Nov. 12, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/13/president-obama-nominates-two-serve-united-states-court-appeals> [<https://perma.cc/HPD8-EJBZ>].

³⁵ Carl Tobias, *Confirming Judge Restrepo to the Third Circuit*, 88 TEMPLE L. REV. ONLINE 37, 45–46 (2017); *see also id.* at 46 n.62 (noting McConnell said circuit votes might stop in June 2015).

³⁶ Jonathan Tamari, *Toomey Moves to Advance Stalled Judicial Nominee*, PHILA. INQUIRER (May 14, 2015), <https://www.philly.com/philly/blogs/capitolinq/Toomey-moves-to-advance-Restrepo-nomination.html> [<https://perma.cc/4ZRJ-R8YP>]. *But see* Pat Toomey, *I Am Not Delaying Judge L. Felipe Restrepo's 3rd Circuit Nomination*, PITT. POST-GAZETTE (May 13, 2015), <https://www.post-gazette.com/opinion/letters/2015/05/13/I-am-not-delaying-Judge-L-Felipe-Restrepo-s-3rd-Circuit-nomination/stories/201505130068> [<https://perma.cc/44FP-VZTD>].

³⁷ Tobias, *supra* note 35, at 45–46 nn.59, 62.

³⁸ *Compare* 162 CONG. REC. S21 (daily ed. Jan. 11, 2016) (confirming Judge Restrepo to the Third Circuit), *with* Tobias, *supra* note 35, at 45 (contrasting Judge Stoll's expeditious confirmation).

³⁹ *Executive Business Meeting Before the S. Judiciary Comm.*, 114th Cong. (Mar. 17, May 19, 2016) (statements of Sens. Leahy & Grassley); Michael Shear et al., *Obama Pick Opens Court Battle*, N.Y. TIMES, Mar. 17, 2016, at A1; Russell Wheeler, *The 'Thurmond Rule' and Other Advice and Consent Myths*, BROOKINGS INST. (May 25, 2016), <https://www.brookings.edu/blog/fixgov/2016/05/25/the-thurmond-rule-and-other-advice-and-consent-myths>

prominent, moderate nominees realize floor ballots after May, this did not happen for seven prospects whom the White House recommended.⁴⁰ Confirming only two jurists in the final half term was essentially unprecedented.⁴¹

III. TRUMP ADMINISTRATION SELECTION

A. Nomination Process

Throughout his presidential campaign, Trump strenuously pledged to nominate and confirm ideological conservatives.⁴² The chief executive honored these promises by mustering and confirming Justice Neil Gorsuch and many similar circuit and district nominees, as well as promoting Judge Brett Kavanaugh.⁴³ This White House established records by appointing a dozen circuit judges in its first year, and more the next; all, while eclipsing or matching predecessors' nomination initiatives.⁴⁴ However, Trump has tapped only eight picks who might become Ninth Circuit jurists and merely four have realized confirmation.⁴⁵

[<https://perma.cc/7ZS6-8JGT>]. Delaying Judge Garland slowed consideration of the seven appellate nominees.

⁴⁰ Carl Tobias, *Confirming Circuit Judges in a Presidential Election Year*, 84 GEO. WASH. L. REV. ARGUENDO 160, 169 (2016); sources cited *supra* note 39. One was District Judge Lucy Koh, a Ninth Circuit nominee, who received a hearing and panel vote but no final ballot. See sources cited *infra* notes 119, 165–72.

⁴¹ Christopher Kang, *GOP Obstruction of Courts Could Be Worst Record Since 1800s*, HUFF. POST (Apr. 20, 2016), https://www.huffingtonpost.com/christopher-kang/republican-obstruction-of_b_9741446.html [<https://perma.cc/R5NJ-Y944>] (demonstrating that the two confirmations were virtually unprecedented because they were the fewest since the 1800s when the courts of appeals comprised 25 judgeships); *Judicial Vacancies*, *supra* note 9 (describing how, in 2007–08, Democrats helped appoint ten of George W. Bush's appellate court nominees, and in 1988, six of Reagan's appellate nominees and Justice Kennedy).

⁴² Deanna Paul, *'Damaging Precedent': Conservative Federal Judge Installed Without Consent of Home-State Senators*, WASH. POST (Feb. 28, 2019), https://www.washingtonpost.com/politics/2019/02/27/dangerous-first-conservative-judge-installed-after-vetting-by-only-two-senators/?utm_term=.def1f4b78d03 [<https://perma.cc/8587-CMUP>].

⁴³ See *Judicial Vacancies*, *supra* note 9 (listing confirmations from 2017–18); see also Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1093, 1103 (2017); Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES MAG. (Aug. 25, 2018), <https://nyti.ms/2nZ1AXX>.

⁴⁴ *President Trump's Judicial Appointments May Prove His Most Lasting Legacy*, ECONOMIST (Jan. 13, 2018), <https://www.economist.com/united-states/2018/01/13/donald-trumps-judicial-appointments-may-prove-his-most-enduring-legacy> [<https://perma.cc/3JG7-87G5>]; Ann E. Marimow, *Two Years in Trump's Appeals Confirmations at a Historic High Point*, WASH. POST (Feb. 4, 2019), https://www.washingtonpost.com/local/legal-issues/two-years-in-trumps-appeals-court-confirmations-at-a-historic-high-point/2019/02/03/574226e6-1a90-11e9-9ebf-c5fed1b7a081_story.html?utm_term=.02549f590ba5 [<https://perma.cc/YE2N-MMG7>].

⁴⁵ See *Judicial Vacancies*, *supra* note 9 (describing nominees from 2017–18). Bush confirmed six appellate judges and Obama appointed three during their respective first years. *Id.*

The administration has deployed a few highly respected customs, even as it disavowed, reversed, or downplayed several effective conventions. For instance, Trump, like all contemporary Presidents, assigned a leading selection role to the first White House Counsel, Donald McGahn, placed analogous central responsibilities in the Department of Justice (DOJ), and emphasized court of appeals vacancies.⁴⁶ In tendering appellate nominees, McGahn stressed conservative perspectives and youth.⁴⁷ For example, the Counsel Office relied on litmus tests—notably, clear opposition to the modern administrative state—combined with proffering aspirants in their forties who could potentially serve for decades; the White House often employed the list of twenty-five possible Supreme Court prospects whom the Federalist Society and Heritage Foundation comprehensively assembled.⁴⁸ Those procedures continue because Leonard Leo, the Society’s Executive Vice-President, directly advises President Trump on court selection.⁴⁹ No administration in United States history has conferred this much responsibility upon a non-governmental entity, although

(listing confirmations from 2001–02, 2009–10, and 2017–18); sources cited *infra* notes 55–56, 69–71, 81–82, 189, 204.

⁴⁶ See Tobias, *supra* note 18, at 2240; Julie Hirschfeld Davis et al., *Trump Lawyer Is Ushered Out with a Tweet*, N.Y. TIMES, Aug. 30, 2018, at A1; Peter Nicholas & Brent Kendall, *White House Lawyer Reshapes U.S. Courts*, WALL ST. J. (July 12, 2018), <https://www.wsj.com/articles/white-house-lawyer-reshapes-u-s-courts-1531430240> [<https://perma.cc/59L4-GM5X>]; Philip Rucker et al., ‘*He’s Not Weak, Is He?*’ *Inside Trump’s Quest to Alter the Judiciary*, WASH. POST (Dec. 19, 2017), https://www.washingtonpost.com/politics/hes-not-weak-is-he-inside-trumps-quest-to-alter-the-judiciary/2017/12/19/b653e568-e4de-11e7-833f-155031558ff4_story.html?noredirect=on&utm_term=.41856b0f301d [<https://perma.cc/8W2J-JS2X>]; Michael Schmidt & Maggie Haberman, *Lawyer for President Steps Down*, N.Y. TIMES, Oct. 18, 2018, at A13.

⁴⁷ Scott Horsley, *White House Lawyer Quits After Helping Trump Put His Mark on the Federal Bench*, NPR (Oct. 17, 2018, 8:45 PM), <https://www.npr.org/2018/10/17/656945741/white-house-lawyer-quits-after-helping-trump-put-his-mark-on-the-federal-bench> [<https://perma.cc/59NP-6RCJ>].

⁴⁸ See Andy Kroll, *Inside Trump’s Judicial Takeover*, ROLLING STONE (Aug. 19, 2018), <https://www.rollingstone.com/politics/politics-features/trumps-judicial-takeover-711200> [<https://perma.cc/E2Q4-WHWU>]; Jeremy Peters, *Trump’s New Judicial Litmus Test: Shrinking ‘the Administrative State,’* N.Y. TIMES (March 26, 2018), <https://nyti.ms/2DXp5n5>; Charlie Savage, *Trump Is Rapidly Reshaping the Judiciary. Here’s How.*, N.Y. TIMES (Nov. 12, 2017), <https://nyti.ms/2hsmDK2>; Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 17, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court> [<https://perma.cc/GGN8-ES4Z>]; sources cited *infra* note 99.

⁴⁹ 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> [<https://perma.cc/LV68-UQ3H>]; Toobin, *supra* note 48. For Leo’s impact, see Jess Bravin, *Meet the Conservative Activist Who Plays Critical Role in Supreme Court Picks*, WALL ST. J. (July 1, 2018), <https://www.wsj.com/articles/meet-the-conservative-activist-who-plays-critical-role-in-supreme-court-picks-1530479576> [<https://perma.cc/Y7H4-RATX>]; Charlie Savage, *Anthony Kennedy’s Exit May Echo for Generations*, N.Y. TIMES (June 27, 2018), <https://nyti.ms/2Kt8sDS>.

George W. Bush may have derived assistance from the aforementioned institutions.⁵⁰ Trump emphasizes the circuits because they are the courts of last resort for virtually all cases that articulate substantially greater policy than district courts and issue rulings which cover multiple states.⁵¹ Practically every appellate court nominee whom the administration marshals is extremely conservative, young, and competent.

Nonetheless, this White House has rejected, ignored and downplayed venerable customs. Essential is the failure to actively consult many home state politicians, an efficacious convention which administrations normally initiate that was a crucial reason for the blue slip process. Michigan Democratic Senators Debbie Stabenow and Gary Peters as well as Minnesota Democratic Senators Amy Klobuchar and Al Franken protested that the White House Counsel engaged in little affirmative consultation regarding appellate openings which existed in their states, while McGahn proclaimed that consultation was absent from the Constitution.⁵² Wisconsin Democratic Senator Tammy Baldwin accused Trump of pursuing Seventh Circuit nominee Michael Brennan who lacked the required votes from a bipartisan merit selection panel, which had successfully evaluated, interviewed, and forwarded exceptional judicial candidates over three decades.⁵³ Another instructive example of the White House consultation regime was afforded by Senator John Kennedy (R-LA); he

⁵⁰ Jason DeParle, *Debating the Subtle Sway of the Federalist Society*, N.Y. TIMES (Aug. 1, 2005), <https://nyti.ms/2xn6sex>; Neil A. Lewis, *Conservative Lawyers Voice Abundant Joy*, N.Y. TIMES (Nov. 13, 2004), <https://nyti.ms/2FNqctZ>. *But cf.* Kroll, *supra* note 48 (noting McGahn's denial that the Trump White House outsourced selection to the Federalist Society because it "insourced" selection to him).

⁵¹ Tobias, *supra* note 18, 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> [<https://perma.cc/QW4R-CETW>]; Nicholas & Kendall, *supra* note 46; Sean Sullivan & Mike DeBonis, *With Little Fanfare, Trump and McConnell Reshape the Nation's Circuit Courts*, WASH. POST (Aug. 14, 2018), https://www.washingtonpost.com/powerpost/with-little-fanfare-trump-and-mcconnell-reshape-the-nations-circuit-courts/2018/08/14/10610028-9fcd-11e8-93e3-24d1703d2a7a_story.html?noredirect=on&utm_term=.b0aba1aeba8e [<https://perma.cc/V8YP-DCAQ>].

⁵² Thomas Kaplan, *Trump Is Putting Indelible Conservative Stamp on Judiciary*, N.Y. TIMES (Aug. 1, 2018), <https://nyti.ms/2Owb7z3>; Zoe Tillman, *Here's How Trump Is Trying to Remake His Least Favorite Court*, BUZZFEEDNEWS (Mar. 15, 2018), <https://www.buzzfeednews.com/article/zoetillman/heres-who-the-white-house-pitched-for-the-federal-appeals> [<https://perma.cc/U62V-Q495>]; Zengerle, *supra* note 43. *But see* Robert Barnes & Ed O'Keefe, *Senate Republicans Likely to Change Custom That Allows Democrats to Block Judicial Choices*, WASH. POST (May 25, 2017), https://www.washingtonpost.com/politics/courts_law/senate-republicans-consider-changing-custom-that-allows-democrats-to-block-judicial-choices/2017/05/25/d49ea61a-40b1-11e7-9869-bac8b446820a_story.html?utm_term=.0022172059cc [<https://perma.cc/WV5M-AKJS>].

⁵³ *Hearing on Nominations Before the S. Judiciary Comm.*, 115th Cong. (Jan. 24, 2018); 164 CONG. REC. S2,607 (daily ed. May 10, 2018) (confirming Judge Brennan); Carl Hulse, *Republicans Escalate Bitter Fight Over Judicial Nominations*, N.Y. TIMES (May 17, 2018), <https://nyti.ms/2k29Ams>; Kaplan, *supra* note 52.

argued in a Louisiana Fifth Circuit aspirant's hearing that McGahn effectively informed Kennedy that Kyle Duncan would be the nominee.⁵⁴

Most pertinent here are the conflicting approaches exercised when acting to fill two Ninth Circuit slots. McGahn proposed, and Trump named, Ryan Bounds without granting Oregon Democratic Senators Ron Wyden and Jeff Merkley nominal consultation and the opportunity to implement a dependable bipartisan selection commission—this provoked the senators' aggressive retention of their blue slips.⁵⁵ That initiative profoundly contrasted to the executive's assiduous consultation with Hawaii Democratic Senators Mazie Hirono and Brian Schatz in advance of nominating Mark Bennett, which prompted the legislators to powerfully support the choice and effusively praise that cooperation in Bennett's hearing, leading the GOP to swiftly confirm him.⁵⁶

A related departure from relevant, efficacious precedent has been Trump's systematic exclusion of the American Bar Association (ABA) from participation in selection. All Presidents who followed Dwight Eisenhower, save George W. Bush, had carefully invoked bar examinations and ratings in naming candidates, while Obama dutifully refrained from mustering designees whom the bar ranked not qualified.⁵⁷ However, Trump marshaled six nominees who drew this poor rating; Steven Grasz and Jonathan Kobes captured Eighth Circuit appointments, and Holly Teeter and Charles Goodwin won district court appointments.⁵⁸

⁵⁴ *Hearing on Nominations Before the S. Judiciary Comm.*, 115th Cong. (Nov. 29, 2017); Nicholas & Kendall, *supra* note 46; Todd Ruger, *Senate Republicans Steamroll Judicial Process*, ROLL CALL (Jan. 18, 2018), <https://www.rollcall.com/news/policy/the-senates-consent-machine> [<https://perma.cc/9Q76-FM5K>]; Sam Stein, *GOP Pushes Back as Trump's Lawyer Tries to Stack the Bench*, DAILY BEAST (Dec. 18, 2017), <https://www.thedailybeast.com/trump-nominees-humiliation-puts-spotlight-on-white-house-counsel-don-mcgahn> [<https://perma.cc/H789-ABP6>].

⁵⁵ Press Release, White House, Office of the Press Sec'y, President Donald J. Trump Announces Seventh Wave of Judicial Candidates (Sept. 7, 2017) [hereinafter Seventh Wave]; Letter from Donald McGahn, White House Counsel, to Sens. Ron Wyden & Jeff Merkley, Sept. 6, 2017; Letter from Sens. Ron Wyden & Jeff Merkley to Don McGahn, White House Counsel, Sept. 7, 2017; sources cited *supra* notes 52–54.

⁵⁶ Press Release, White House, Office of the Press Sec'y, President Donald J. Trump Announces Eleventh Wave of Judicial Nominees (Feb. 12, 2018); *Hearing on Nominations Before the S. Judiciary Comm.*, 115th Cong. (Apr. 11, 2018) [hereinafter Apr. 11, 2018 *Hearing*]; see sources cited *infra* note 81 (providing subsequent history). Consultation seemed minimal but was unclear on the Washington and Arizona vacancies. See sources cited *infra* notes 91, 137, 201–03.

⁵⁷ 163 CONG. REC. S8,022, S8,042 (daily ed. Dec. 14, 2017) (statements of Sens. Durbin & Leahy).

⁵⁸ ABA STANDING COMM. ON JUDICIARY, *Ratings of Art. III Judicial Nominees: 115th Cong.*; 163 CONG. REC. S8,024 (daily ed. Dec. 14, 2017) [hereinafter Feinstein Statement] (recording Sen. Feinstein's statement that the last judge with a 'not qualified' rating to win approval was in 1989). The GOP disputed Steven Grasz's rating, arguing that the ABA is a liberal interest group. *Hearing on Nominations Before the S. Judiciary Comm.*, 115th Cong. (Nov. 1, 2017); *Executive Business Meeting Before the S. Judiciary Comm.*, 115th Cong. (Dec. 7, 2017); 163 CONG. REC. S7,288 (daily ed. Nov. 16, 2017) (statement of Sen. Sasse); *id.* at S7,965 (daily ed. Dec. 12, 2017) (confirming Grasz); 164 CONG. REC. S7,405 (daily ed. Dec. 11, 2018) (confirming Kobes); *id.* at S5,590 (daily ed. Aug. 1, 2018) (confirming Teeter); *id.* at S5,981 (daily

The executive has also consistently discarded, ignored, or underestimated myriad effective procedures. One illustration has been the seeming lack of effort to prioritize nominations by initially sending prospects who would reduce the eighty-four judicial emergency vacancies—vacancies which the AO bases on their prolonged length or huge caseloads⁵⁹ and have mushroomed since the GOP won the chamber.⁶⁰ Trump has also nominated fewer choices in numerous jurisdictions that Democrats represent, although they have a plethora of emergencies.⁶¹ California has emergency openings in sixteen lower court seats—four of which are Ninth Circuit positions—but the White House only proposed submissions for half the vacancies in October 2018.⁶²

Another revered policy which Trump stopped or de-emphasized was increasing minority judicial representation, especially in comparison to Democratic presidents.⁶³ For example, he apparently instituted no endeavors that could recruit, identify, and confirm ethnic minority or lesbian, gay, bisexual, transgender, or queer (LGBTQ) possibilities by, for instance, tapping diverse staff who undertake appointments efforts or urging politicians to search for and propose numerous minority candidates.⁶⁴ Among

ed. Aug. 28, 2018) (confirming Goodwin); Adam Liptak, *White House Ends Bar Association's Role in Vetting Judges*, N.Y. TIMES (Apr. 1, 2017), <https://nyti.ms/2nJ1DW6>. McGahn was so opposed to the ABA that he advised nominees to not cooperate with it. *Id.*; see also Savage, *supra* note 48 (arguing ABA's guardrail role is weakening).

⁵⁹ See *Judicial Vacancies*, *supra* note 9 (listing seven of nine circuit vacancies are emergencies; overall circuit vacancies are at four percent); see also Savage, *supra* note 48.

⁶⁰ They skyrocketed from twelve to as many as eighty-eight. *Judicial Vacancies*, *supra* note 9 (listing judicial emergencies from 2015–19). *But see* Press Release, Office of the Press Sec'y, President Donald J. Trump Announces Tenth Wave of Judicial Nominees (Jan. 23, 2018) [hereinafter Tenth Wave]; sources cited *infra* note 65.

⁶¹ See Zengerle, *supra* note 43; *Judicial Vacancies*, *supra* note 9. For more nominees from “blue” states, see Press Release, White House, Office of the Press Sec'y, President Donald J. Trump Announces Eighteenth Wave of Judicial Nominees (Oct. 10, 2018) [hereinafter Press Release, Eighteenth Wave]; Press Release, White House, Office of the Press Sec'y, President Donald J. Trump Announces Sixteenth Wave of Judicial Nominees (July 13, 2018) [hereinafter Press Release, Sixteenth Wave]; Press Release, White House, Office of the Press Sec'y, President Donald J. Trump Announces Fourteenth Wave of Judicial Nominees (May 10, 2018) [hereinafter Press Release, Fourteenth Wave]; Press Release, White House, Office of the Press Sec'y, President Donald J. Trump Announces Ninth Wave of Judicial Nominees (Dec. 20, 2017).

⁶² Press Release, Eighteenth Wave, *supra* note 61. Data verify the priorities. See *Judicial Vacancies*, *supra* note 9 (listing nominations from 2018); see also *id.* (listing judicial confirmations in two GOP-senator states, approving fifty-eight judges and nominating seventy-nine; and in two Democratic-senator states, approving sixteen and nominating thirty-nine).

⁶³ Carl Tobias, *President Donald Trump and Federal Bench Diversity*, 74 WASH. & LEE L. REV. ONLINE 400 (2018); Michael Nelson & Rachael Hinkle, *Trump Appoints Lots of White Men to Be Federal Judges. Here's Why It Matters.*, WASH. POST (Mar. 13, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/12/trump-appoints-lots-of-white-men-to-be-federal-judges-heres-why-it-matters/?utm_term=.b8e7c560a023 [https://perma.cc/JRE5-JPX7].

⁶⁴ LGBTQ means “out” sexual preference that some nominees and numerous judges may

Trump's ninety-one confirmees, only Amul Thapar, James Ho, John Nalbandian, Neomi Rao, Karen Gren Scholer, Jill Otake, Fernando Rodriguez, Terry Moorer, and David Morales are people of color. Of 174 nominees, twenty-three are people of color: the initial six listed above, plus Patrick Bumatay, Kenneth Lee, Michael Park, Diane Gujarati, Martha Pacold, and Nicholas Ranjan are Asian Americans; Rodriguez, Morales, Raúl Arias-Marxuach, and Rodolfo Ruiz comprise Latinos and Moorer, Rodney Smith, Rossie Alston, Jason Pulliam, Stephanie Dawkins, Milton Younge, and Ada Brown constitute African Americans.⁶⁵

B. Confirmation Process

The confirmation procedures resemble the deleterious elements of the nomination regime in numerous ways, primarily by deleting, amending, or undermining time-honored conventions or by abolishing, changing, recalibrating, or significantly diluting measures which had formerly proved efficacious. The best illustrations have been the selective alterations of: (1) the century-old policy respecting blue slips, which denies aspirant processing when lawmakers retain slips, and (2) committee responsibilities.

In autumn 2017, Grassley, the Judiciary Chair, declared that he would amend the blue slip practice for *circuit* nominees by setting hearings for possibilities who lacked slips which two politicians from home states afford, especially when a chamber member opposes the nominee “for political or ideological reasons.”⁶⁶ This determination alters

not have divulged. LGBTQ people are considered “minorities” here. Tobias, *supra* note 63; Jennifer Bendery, *Trump Finally Has an LGBTQ Judicial Nominee*, HUFF. POST (June 7, 2018), https://www.huffingtonpost.com/entry/trump-lesbian-judicial-nominee-mary-rowland_us_5b19b351e4b09d7a3d708461 [<https://perma.cc/7GGU-MNZJ>].

⁶⁵ For confirmees, see 165 CONG. REC. S1,819 (daily ed. Mar. 13, 2019) (regarding the confirmation of Neomi Rao); 164 CONG. REC. S5,981 (daily ed. Aug. 28, 2018) (regarding the confirmation of Judge Moorer); *id.* at S5,590 (daily ed. Aug. 1, 2018) (regarding the confirmation of Judge Otake); *id.* at S2,981 (daily ed. June 5, 2018) (regarding the confirmation of Judge Rodriguez); *id.* at S2,661 (daily ed. May 15, 2018) (regarding the confirmation of Judge Nalbandian); *id.* at S1,333 (daily ed. Mar. 5, 2018) (regarding the confirmation of Judge Scholer); 163 CONG. REC. S8,033 (daily ed. Dec. 14, 2017) (regarding the confirmation of Judge Ho); *id.* at S3,179 (daily ed. May 25, 2017) (regarding the confirmation of Judge Thapar). For nominees, see Seventh Wave, *supra* note 55; Tenth Wave, *supra* note 60; sources cited *supra* note 61; Press Release, White House, Office of the Press Sec’y, President Donald J. Trump Announces Fifteenth Wave of Judicial Nominees (June 7, 2018); Press Release, White House, Office of the Press Sec’y, President Donald J. Trump Announces Thirteenth Wave of Judicial Nominees (Apr. 26, 2018); Press Release, White House, Office of the Press Sec’y, President Donald J. Trump Announces Twelfth Wave of Judicial Nominees (Apr. 10, 2018).

⁶⁶ 163 CONG. REC. S7,174 (daily ed. Nov. 13, 2017); *id.* at S7,285 (daily ed. Nov. 16, 2017); see also *Hearing on Nomination Before the S. Judiciary Comm.*, 115th Cong. (Nov. 29, 2017); S. JUDICIARY COMM., 115TH CONG., MAJORITY, HISTORY AND CONTEXT OF THE BLUE SLIP COURTESY, Nov. 2, 2017; Carl Hulse, *Judge’s Death Gives Trump a Chance to Remake a Vexing Court*, N.Y. TIMES (Apr. 7, 2018), <https://nyti.ms/2EvwiLK>; sources cited *supra* note 52.

the blue slip concept that Republicans *and* Democrats meticulously followed during Obama's eight years as president, which comprises the most recent analogous precedent.⁶⁷ That situation deteriorated when Grassley permitted a hearing for Trump's Wisconsin Seventh Circuit nominee, particularly because the Chair minimally justified vesting in himself exclusive discretion for ascertaining whether Counsel had "adequately consulted" about selection.⁶⁸

However, peculiarly relevant to the Ninth Circuit was Grassley's treatment of the disagreement between the chief executive and the Oregon legislators regarding this jurisdiction's vacancy.⁶⁹ To his credit, Grassley apparently had cautiously addressed the controversial dispute rather amicably by not forcing the issue with blue slips' rejection.⁷⁰ Instead, he putatively communicated with the Oregon lawmakers and seemingly believed that Counsel had failed to adequately consult the politicians. Grassley delayed arranging a hearing for months while the legislators suggested numerous candidates whom their merit selection panel had assessed, yet the Chair ultimately relented when he abruptly convened a May 9, 2018 hearing.⁷¹

Grassley has expressly acknowledged that blue slips are clearly meant to guarantee that presidents consult home state politicians, thereby safeguarding officials' prerogatives in the selection process and the elemental interests of the electorate whom they dutifully represent.⁷² Nevertheless, GOP senators had perniciously capitalized

⁶⁷ Grassley honored this convention as Chair in Obama's last two years, and Patrick Leahy (D-VT) also did so in the first six years. *See* sources cited *supra* note 16 (statements of Sens. Grassley and Leahy); Kaplan, *supra* note 52; Zengerle, *supra* note 43, at 48–49.

⁶⁸ Michael Brennan lacked the requisite bipartisan selection commission ballots and the White House negligibly consulted Tammy Baldwin (D). *See* Todd Ruger, *Grassley Moves on Judicial Nominee Over Baldwin's Objections*, ROLL CALL (Jan. 24, 2018), <https://www.rollcall.com/news/politics/grassley-moves-judicial-nominee-baldwins-objection>; sources cited *supra* note 16; *see also Executive Business Meeting Before the S. Judiciary Comm.*, 115th Cong. (July 19, 2018) (allowing a committee discussion and vote despite Senator Casey's blue slip retention and honoring Senator Toomey's for Obama Third Circuit nominee); sources cited *supra* note 53 and *infra* note 80.

⁶⁹ *See* Maxine Bernstein, *Oregon's U.S. Senators Say Federal Prosecutor Ryan Bounds Unsuitable for 9th Circuit Vacancy*, OREGONIAN (Feb. 12, 2018); Jimmy Hoover & Michael Macagnone, *9th Circ. Pick Forces Grassley to Choose: Trump or Tradition?*, LAW360 (Mar. 29, 2018), <https://www.law360.com/articles/1025855> [<https://perma.cc/9RQU-TRX6>]; Zengerle, *supra* note 43, at 49; sources cited *supra* note 55 and *infra* notes 82, 190–91.

⁷⁰ *Hearing on Nominations Before the S. Judiciary Comm.*, 115th Cong. (May 9, 2018) [hereinafter *May 9, 2018 Hearing*]; Thomas Kaplan, *Trump Is Putting Indelible Conservative Stamp on Judiciary*, N.Y. TIMES (Aug. 1, 2018), <https://nyti.ms/2Owb7z3>.

⁷¹ At the hearing Grassley stated that the White House adequately connected the Oregon senators whom Grassley stated clearly failed to meet with Bounds. *See* *May 9, 2018, Hearing*, *supra* note 70; Bernstein, *supra* note 69 (analyzing the four picks, including Bounds whom the panel recommended and the senators' reasons to continue opposing Bounds); sources cited *infra* notes 82, 190–91. For Grassley's similar, albeit less collegial, interactions with the New Jersey, Ohio, and Washington senators who retained blue slips, *see* Kaplan, *supra* note 52.

⁷² *See* sources cited *supra* note 66 and accompanying text.

on slips to block accomplished, moderate nominees during Obama's time, many for political or ideological reasons, the specific premises which the Chair effectively derides as illegitimate.⁷³

Grassley concomitantly amended a number of customs and multiple strictures related to confirmation hearings. Notably, there have already been twelve hearings in which a pair of circuit court nominees and several district court nominees testified absent the permission of the minority party.⁷⁴ This radically contrasted with Democrats' reliance on only three similar hearings throughout Obama's presidency, to which the GOP had explicitly acceded.⁷⁵ Sessions for circuit court nominees appeared hurried and lacked appropriate care for persons who could hold lifetime appointments on courts of last resort in their geographic areas.⁷⁶ Most nominees seemed to pointedly stall by deliberately repeating manifold queries, and they conspicuously deflected, or evasively replied to, plentiful questions.⁷⁷ These phenomena allowed numerous hearings on nominees to devolve into apparently meaningless exercises in which lawmakers exchanged comparatively negligible substantive material.

The discussions conducted before nominee committee votes analogously lacked important context and content. Members rarely engaged the nominees with questions implicating qualifications essential to public servants who possess life tenure when deciding issues such as those respecting constitutional liberty, equality, and property. One consequential departure from regular order was Grassley's determination to schedule panel hearings, and even committee ballots, *ahead of* ABA ratings' compilation, notwithstanding steady importuning from Dianne Feinstein (D-CA), the Ranking Member, to hold votes *after* completion.⁷⁸ Grassley vociferously argued that this

⁷³ Many Republican senators offered no reasons for retaining slips. *See* sources cited *supra* notes 19, 26–27, 39–40, 68 and accompanying text.

⁷⁴ Carl Tobias, *Curing the Federal Vacancy Crisis*, 53 WAKE FOREST L. REV. 883, 889 (2018).

⁷⁵ *See, e.g., Hearing on Nominations Before the S. Judiciary Comm.*, 115th Cong. (Oct. 17, 2018); *Hearing on Nominations Before the S. Judiciary Comm.*, 115th Cong. (Aug. 1, 2018) (hearing for one circuit court and six district court nominees); *see* Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2174–76 (2011) (Obama example). Grassley even scheduled the August 1 hearing while Supreme Court Justice Brett Kavanaugh's nomination was pending, and he arranged for another hearing for the Ninth Circuit Arizona and Washington nominees Bridget Shelton Bade and Eric Miller after the Senate had recessed to campaign for the 2018 midterm elections. *Hearing on Nominations Before the S. Judiciary Comm.*, 115th Cong. (Oct. 24, 2018) [hereinafter Oct. 24, 2018 *Hearing*].

⁷⁶ *See* Feinstein Statement, *supra* note 58; Leahy Statement, *supra* note 30; *see* sources cited *supra* note 51 and accompanying text.

⁷⁷ Texas Fifth Circuit nominees who captured appointment are illustrative. James Ho refused to discuss his torture memorandum that the Justice Department would not release, and Don Willett unresponsively answered many questions. *See* 163 CONG. REC. S8,042–43 (daily ed. Dec. 14, 2017) (statement of Sen. Durbin); sources cited *supra* note 76 and accompanying text. *But see* 163 CONG. REC. S8,025 (daily ed. Dec. 14, 2017) (statement of Sen. Cornyn).

⁷⁸ Michael Macagnone, *DC Court Picks Face Senate Panel Ahead of ABA Report*, LAW360

external political group could not dictate committee scheduling.⁷⁹ It, accordingly, was easily foreseeable that controversial nominees would receive party-line approval.⁸⁰

These detrimental phenomena marginally influenced selection for the Ninth Circuit Hawaii vacancy, principally because the administration thoroughly consulted the home state senators when making the Bennett nomination, which led the state politicians to avidly support him—evinced by the prospect’s salutary committee hearing—and the GOP to mount quick canvassing.⁸¹ Nonetheless, after Grassley concluded that he would reverse the previous decision which had strongly honored the Oregon politicians’ blue slips, this move afforded nominee Ryan Bounds chamber analysis, thus peremptorily undercutting the slips’ purpose. However, when Tim Scott (R-SC) registered serious concerns over his derogatory remarks about diversity, inclusion, people of color, and the LGBTQ community, the administration withdrew Bounds.⁸²

Once the committee had reported nominees and they came to the floor, analogous dimensions stymied efficacious review: Democrats insisted on cloture and roll call ballots for many designees; Republicans engaged in lockstep voting; and the nuclear option’s 2013 detonation permitted submissions to capture appointment with a majority ballot.⁸³ Peculiarly troubling, was the compression of six 2018 appellate nominees’ final consideration into one week;⁸⁴ this left the minority with few resources

(June 28, 2017), <https://www.law360.com/articles/939442/dc-court-picks-face-senate-panel-ahead-of-aba-report> [<https://perma.cc/54NQ-8NH3>].

⁷⁹ *Hearing on Nominations Before the S. Judiciary Comm.*, 115th Cong. (June 14, 2018) (statement of Sen. Grassley); Michael Macagnone, *DC Court Picks Face Senate Panel Ahead Of ABA Report*, LAW360 (June 28, 2017), <https://www.law360.com/articles/939442/dc-court-picks-face-senate-panel-ahead-of-aba-report> [<https://perma.cc/D2NE-VZH7>]. *But see* sources cited *supra* note 57 (praising ABA input’s value); sources cited *supra* notes 48–50 (external political group).

⁸⁰ For Judge Grasz’s approval and confirmation, see sources cited *supra* note 58. For Judge Brennan, see 164 CONG. REC. S2,607 (daily ed. May 10, 2018); Zengerle, *supra* note 43.

⁸¹ *Executive Business Meeting Before the S. Judiciary Comm.*, 115th Cong. (May 10, 2018) [hereinafter *Executive Business Meeting*, May 10, 2018]; 164 CONG. REC. S4,858 (daily ed. July 10, 2018); see sources cited *supra* note 56; David Lat, *President Trump’s Eleventh Wave of Judicial Nominees*, ABOVE THE LAW (Feb. 23, 2018 1:34 PM), <https://abovethelaw.com/2018/02/president-trumps-eleventh-wave-of-judicial-nominees> [<https://perma.cc/W5J7-M2JN>].

⁸² The panel did not have any discussion of Bounds before voting. *Executive Business Meeting Before the S. Judiciary Comm.*, 115th Cong. (June 7, 2018) [hereinafter *Executive Business Meeting*, June 7, 2018]; 164 CONG. REC. S5,098 (daily ed. July 19, 2018) (withdrawing the nomination); see sources cited *supra* notes 55, 71. For comparatively similar resolution of Trump’s nomination of Thomas Farr for an Eastern District of North Carolina vacancy which is the nation’s longest, see Catie Edmondson, *Senator Tim Scott Sinks Thomas Farr’s Judicial Nomination Amid Racial Controversy*, N.Y. TIMES (Nov. 30, 2018), <https://nyti.ms/2zvWCFw>.

⁸³ See sources cited *supra* note 26. The 2017 election of Doug Jones (D-AL) made the margin 51–49. The 2018 midterm elections made the margin 53–47.

⁸⁴ U.S. SENATE DEMOCRATS, Schedule for Pro Formas and Monday, May 7 (Apr. 26, 2018).

to prepare.⁸⁵ The quality of the Senate debates resembled that of numerous panel discussions,⁸⁶ while much of the thirty hours reserved for debate after cloture explored issues lacking relationships to specific nominees.⁸⁷

The GOP majority, like the administration, has prioritized confirming appellate judges over district judges, canvassing nominees from states with Republican politicians, approving conservative white males, and filling non-emergency openings, but the constructs are mainly derived from the nomination scheme.⁸⁸ Those preferences allowed Trump to shatter circuit appointment records thus far, yet resulted in twenty-three district picks lacking chamber ballots in 2017 and thirty-one lacking them in 2018; few nominees realizing approval in jurisdictions with a pair of Democrats; only two minority nominees receiving 2017 confirmation; and emergencies soaring.⁸⁹ Trump prioritized circuit vacancies and Counsel adopted most of the Federalist Society's proposals.⁹⁰ However, they neglected multiple Ninth Circuit openings among "blue" states—mainly California and Washington—and narrow consultation plainly undermined filling the Oregon vacancy. Moreover, Trump's deteriorated relationships with John McCain (R) and Jeff Flake (R) confounded tendering the Arizona designee.⁹¹

Bush and Obama never confirmed so many. *See Judicial Vacancies, supra* note 9 (listing judicial confirmations from 2001–17); *see* sources cited *supra* note 75 and accompanying text.

⁸⁵ The senators' late October 2017 notice on four circuit court nominees the next week came Thursday evening as they recessed for the week. U.S. SENATE DEMOCRATS, Schedule for Tuesday, Oct. 31 (Oct. 26, 2017).

⁸⁶ *See* sources cited *supra* notes 79, 82 and accompanying text.

⁸⁷ Even when members discussed nominees, few senators heard them. Bounds's debate was about him and the process. *See, e.g.*, 164 CONG. REC. S5,010–18 (daily ed. July 17, 2018); *id.* at S5,079 (daily ed. July 19, 2018). GOP senators have found the thirty-hour post-cloture rule so troubling that they urged truncating it and detonated the nuclear option to reduce post-cloture debate time from thirty to two hours for district vacancies on April 3, 2019. *Hearing on S. Res. 355 Before the S. Rules Comm.*, 115th Cong. (Dec. 19, 2017); *id.* (Apr. 25, 2018) (approving resolution); 165 CONG. REC. S2220 (daily ed. Apr. 3, 2019); Carl Hulse, *A 'Nuclear' Tit for Tat with No End in Sight*, N.Y. TIMES, Apr. 5, 2019, at A14.

⁸⁸ *See* Zengerle, *supra* note 43; sources cited *supra* notes 46–55, 57–65 and accompanying text.

⁸⁹ *See* sources cited *supra* notes 49–56; Exec. Calendar, 115th Cong. (Dec. 23, 2017). For 2018, *see id.*, Dec. 31, 2018 (thirty-one district nominees were awaiting confirmation votes); *Judicial Vacancies, supra* note 9 (listing 120 district court vacancies for 2018); *id.* (listing sixty-six judicial emergencies).

⁹⁰ *See* sources cited *supra* notes 48–52 and accompanying text.

⁹¹ *See* Robert D. McFadden, *John McCain, War Hero, Senator, Presidential Contender, Dies at 81*, N.Y. TIMES (Aug. 25, 2018), <https://nyti.ms/2P9j8tx> (his death may have confounded the nomination process more); David Lat, *Circuit Court Nominees in the Trump Administration: The Latest News and Rumor (Part 2)*, ABOVE THE LAW (July 26, 2017), <https://abovethelaw.com/2017/07/circuit-court-nominees-in-the-trump-administration-the-latest-news-and-rumor-part-2/> [<https://perma.cc/PJF4-EQSR>] [hereinafter Lat, *Circuit Court Nominees*]; sources cited *supra* notes 55–56, 69–71 and *infra* notes 137–41, 155–61, 188, 199–201. *But see* sources cited *infra* notes 186–89.

IV. REASONS FOR AND IMPLICATIONS OF PROBLEMATIC SELECTION

The reasons for the concerns over nominations and confirmations are complex.⁹² Some assessors trace the “confirmation wars” to the controversial 1987 fight over Circuit Judge Bork’s Supreme Court nomination.⁹³ Analysis reveals that the selection process has collapsed. This can be seen with continuous partisanship, systematic pay-backs and striking divisiveness whereby the parties ratchet up the stakes, as manifested in the complete denial of review for Garland, the use of the nuclear option to confirm Gorsuch and Obama choices whom Republicans had perennially blocked and the minority party’s demand for cloture and roll call votes on many nominees.⁹⁴

The effects are crucial. The lack of 2015–16 activity conjoined with Trump’s inability to fill posts mean that there are nine circuit and eighty-four emergency vacancies, with especially high percentages in the Ninth Circuit.⁹⁵ These courts had “few” empty slots at 2014’s conclusion, but only *after* Democrats marshaled the nuclear option which had restricted filibusters the previous year.⁹⁶ However, 2015–16 inaction multiplied emergencies by Trump’s inauguration, four within the Ninth Circuit—partly because three judges exited active status close to then, and four more positions opened subsequently, while only four nominees have captured appointment.⁹⁷

In fairness, Trump confronted the start-up expenses in establishing a government following multiple terms where a Democrat had been President. The chief executive had never served in the public sector or run for public office. Trump appears committed to acutely disrupting politics, a complication that his radical management style and extremely chaotic administration infighting purportedly compound.⁹⁸

⁹² Scholars and senators vigorously debate whether selection has always been complex. *See, e.g.*, Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice: Federal Judicial Selection, 1789–1861*, 100 IOWA L. REV. 551 (2015); Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL’Y 1035 (2009).

⁹³ *See* sources cited *supra* note 17.

⁹⁴ The latest began with claims of stalling at the end of George W. Bush’s Administration. The GOP retaliated with huge delay during Obama’s tenure. Democrats then used the so-called nuclear option, and the GOP responded by slowing all nominees. *See* sources cited *supra* notes 16, 18–41, 83.

⁹⁵ The Ninth Circuit experiences nearly half of the system-wide circuit vacancies and forty-four percent of the emergencies. *See* Joe Palazzolo, *Obama’s Successor Will Likely Fill Dozens of Judicial Vacancies*, WALL ST. J. (Mar. 18, 2016), <https://www.wsj.com/articles/obamas-successor-will-likely-fill-dozens-of-judicial-vacancies-1458340351> [<https://perma.cc/XTQ3-PMA3>]; Wheeler, *supra* note 39; sources cited *supra* note 59.

⁹⁶ *See* Zengerle, *supra* note 43, at 46; sources cited *supra* notes 26–27, 83, 94 and accompanying text.

⁹⁷ The three jurists who assumed senior status were Barry Silverman, Diarmuid O’Scannlain, and Richard Clifton. The four whose positions opened were Kozinski, Richard Tallman, Stephen Reinhardt, and Randy Smith. *See* Hulse, *supra* note 66; *Judicial Vacancies*, *supra* note 9 (listing vacancies from 2017–18).

⁹⁸ DAVID FRUM, TRUMPOCRACY: THE CORRUPTION OF THE AMERICAN REPUBLIC (2018);

Trump has displayed little appreciation for the circuits and court selection, parameters witnessed by (1) scathing attacks upon jurists, especially in the Ninth Circuit, whose rulings frustrate his political endeavors, and (2) targeted initiatives which confirm judges who might sustain presidential efforts, notably banning myriad immigrants and dismantling the contemporary administrative state.⁹⁹ Those concerns were exacerbated because of the necessity to quickly fill the protracted Supreme Court vacancy resulting from Justice Antonin Scalia's death and the 105 circuit and district court vacancies upon Trump's inauguration, both of which McConnell concertedly orchestrated.¹⁰⁰

Stalled appointments have a number of compelling adverse impacts.¹⁰¹ They require that nominees place careers on hold and this stops many capable aspirants from envisioning the bench.¹⁰² Numerous, prolonged vacancies deprive circuits, most tellingly the Ninth, of adequate judicial resources to deliver manifold litigants justice.¹⁰³ These individual consequences also erode citizen regard for the selection

BOB WOODWARD, *FEAR: TRUMP IN THE WHITE HOUSE* (2018). Outlets have covered this daily since 2017. See, e.g., Maggie Haberman & Katie Rogers, 'Drama, Action, Emotional Power': As Exhausted Aides Eye the Exits, *Trump Is Re-energized*, N.Y. TIMES (June 10, 2018), <https://nyti.ms/2MgDccO>; Ashley Parker et al., *Trump's Putin Fallout: Inside the White House's Tumultuous Week of Walk-Backs*, WASH. POST (July 21, 2018), https://www.washingtonpost.com/politics/trumps-putin-fallout-inside-the-white-houses-tumultuous-week-of-walk-backs/2018/07/20/7cfdfc34-8c3d-11e8-8b20-60521f27434e_story.html?utm_term=.c0bf228243df [<https://perma.cc/WG3D-M3NJ>].

⁹⁹ Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); Jennifer Bendery, *Trump Has No Idea Why He Gets to Fill So Many Court Seats*, HUFF. POST (Mar. 29, 2018), https://www.huffingtonpost.com/entry/trump-federal-judges-obama-republicans_us_5abd47c4e4b0a47437a98594 [<https://perma.cc/UB62-54KR>]; Evan Osnos, *Trump vs. the "Deep State,"* NEW YORKER (May 21, 2018), <https://www.newyorker.com/magazine/2018/05/21/trump-vs-the-deep-state> [<https://perma.cc/84HX-Q6G2>]; Zengerle, *supra* note 43, at 35; sources cited *supra* note 48.

¹⁰⁰ See Sahil Kapur & Laura Litvan, *McConnell Cements a Legacy for Trump with Reshaped Courts*, BLOOMBERG NEWS (Apr. 27, 2018), <https://www.bloomberg.com/news/articles/2018-04-27/mcconnell-cements-a-legacy-for-trump-with-reshaped-u-s-courts> [<https://perma.cc/3Q S4-5GQ3>]; Amber Phillips, *This Is the Week Mitch McConnell was Waiting for*, WASH. POST (June 27, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/06/27/this-is-the-week-mitch-mcconnell-was-waiting-for/?utm_term=.e2c2bcf0e596 [<https://perma.cc/4LHC-3GRW>]; Sullivan & DeBonis, *supra* note 51; see also MITCH MCCONNELL, *THE LONG GAME* (2015).

¹⁰¹ Tobias, *supra* note 18, at 2252–53; 161 CONG. REC. S3,223 (daily ed. May 21, 2015) (statement of Sen. Leahy).

¹⁰² Tobias, *supra* note 18, at 2252–53; Andrew Cohen, *In Pennsylvania, the Human Costs of Judicial Confirmation Delays*, ATLANTIC (Sept. 9, 2012), <https://www.theatlantic.com/politics/archive/2012/09/in-pennsylvania-the-human-costs-of-judicial-confirmation-delays/261862/> [<https://perma.cc/SL4G-M2ER>]; Palazzolo, *supra* note 95.

¹⁰³ JOHN ROBERTS, YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2010), <https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx> [<https://perma.cc/J5TZ-UUGH>]; Tobias, *supra* note 18, at 2252–53; Jennifer Bendery, *Federal Judges Are Burned Out*,

process and the branches of government.¹⁰⁴ Few tribunals address circumstances so daunting as the Ninth Circuit, which resolves the most appeals that can devour the greatest time.¹⁰⁵ According ideology explicit, incessant emphasis now makes the tribunals resemble the political branches, which saps public confidence about jurists.¹⁰⁶

In sum, this evaluation illuminates the selection process's degraded state; the chief executive's rampant criticisms of, and grave inattention to, the Ninth Circuit which may worsen; and the critical necessity for expeditious action. The Constitution imposes major nomination and confirmation duties on the President and the Senate.¹⁰⁷ Much precedent which supports circuit appointments, especially near a presidency's midpoint, ought to control.¹⁰⁸ Republicans and Democrats, thus, should collaborate and fill the Ninth Circuit openings. If the parties actively coordinate when scrutinizing fine, moderate nominees who resemble many easily approved during previous years, they could smoothly appoint judges.¹⁰⁹ Finally, the court needs all of its members to rapidly, economically, and fairly conclude the largest docket.¹¹⁰

Overworked and Wondering Where Congress Is, HUFF. POST (Sept. 30, 2015), https://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_us_55d77721e4b0a40aa3aaf14b [<https://perma.cc/RJL2-W2MV>]; Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, WALL ST. J. (Apr. 6, 2015), <https://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746> [<https://perma.cc/6GWT-2RCE>]; Wheeler, *supra* note 19.

¹⁰⁴ Tobias, *supra* note 18, at 2253; Savage, *supra* note 48.

¹⁰⁵ 2017 JUDICIAL BUSINESS OF THE U.S. COURTS, *Courts of Appeals—Median Times for Merits Terminations in 12-Month Period Ending Sept. 30, 2017*, Tbl. B-4, https://www.uscourts.gov/sites/default/files/data_tables/B04Sep15.pdf [<https://perma.cc/HG6P-5W5E>] (last visited Apr. 11, 2019). Senior judges can help, but a number of Ninth Circuit jurists have died or retired in the last decade. Carol J. Williams, *Judges' Deaths Add to 9th Circuit Backlog*, L.A. TIMES (Oct. 15, 2011), <http://articles.latimes.com/2011/oct/15/local/la-me-9th-circuit-vacancies-20111012> [<https://perma.cc/9MBH-ACHC>]; see sources cited *infra* notes 157, 159.

¹⁰⁶ Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161 (2019); Orrin Hatch, *Protect the Senate's Important 'Advice and Consent' Role*, THE HILL (Apr. 11, 2014), <https://thehill.com/opinion/op-ed/203226-protect-the-senates-important-advice-and-consent-role> [<https://perma.cc/9KSJ-VL6L>]; Carl Hulse, *High Tensions and Fractured Customs Before a Supreme Court Fight*, N.Y. TIMES, Sept. 2, 2018, at A15; Benjamin Wittes, *The Confirmation Wars Are Over*, ATLANTIC (Aug. 14, 2018), <https://www.theatlantic.com/ideas/archive/2018/08/the-polarization-contagion/567422> [<https://perma.cc/N2MC-EYQN>].

¹⁰⁷ U.S. CONST. art. II § 2, cl. 2.

¹⁰⁸ Approval is easier at a presidency's outset, but the responsibilities always apply. See sources cited *supra* notes 39–41.

¹⁰⁹ For elevation of federal district, and state Supreme Court, jurists, see sources cited *infra* notes 122–24.

¹¹⁰ Kimberly Strawbridge Robinson & Christina Brady, *Heavy Caseload to Blame for Ninth Circuit's Bad Rap*, BLOOMBERG LAW (May 3, 2018), <https://news.bloomberglaw.com/us-law-week/heavy-caseload-to-blame-for-ninth-circuits-bad-rap?context=article-related> [<https://perma.cc/J3VN-D9BB>]; see sources cited *supra* notes 4, 26–27, 79, 105.

V. SUGGESTIONS FOR FILLING THE VACANCIES

A. *General Ideas*

1. The Nomination Process

Trump's first priority was, and remains, the creation of a well-functioning government. Insofar as time existed for work involving selection, early initiative was dedicated to the High Court; filling these two vacancies consumed abundant resources that would have been devoted to circuit openings.¹¹¹ Trump lacks experience as compared with recent presidents: Obama diligently labored on judicial and executive appointments in the Senate, while Bush tapped a plethora of state jurists when he was Texas Governor.¹¹² Trump's negligible familiarity with judges, courts, and the process can help explain his unorthodox systems and mistaken remarks that implicate circuits. The executive is relatively nascent with multiple difficult endeavors to address, but a number of conclusions may be reaped from activities conducted already.¹¹³

Certain Trump actions inspire nominal confidence. His derogatory, misguided public statements on jurists, tribunals, and court opinions have been problematic. For example, when Judge James Robart temporarily restrained the travel ban which Trump implemented, the President denigrated the respected jurist as a "so-called judge."¹¹⁴

¹¹¹ Press Release, White House, Office of the Press Sec'y, President Donald J. Trump Nominates Judge Neil Gorsuch to Supreme Court (Jan. 31, 2017); Press Release, Keeping His Promise, *supra* note 4 (Kavanaugh); Tobias, *supra* note 43, at 1090–92, 1100–01; Adam Liptak, *Gorsuch Clinched Spot After a Lengthy Process*, N.Y. TIMES, Feb. 7, 2017, at A15. *But see* Paul Bedard, *On Record-Breaking Pace of Approving Judges, Grassley Urged to Go Faster*, WASH. EXAMINER (Aug. 10, 2018), <https://www.washingtonexaminer.com/washington-secrets/on-record-breaking-pace-of-approving-judges-grassley-urged-to-go-faster> [<https://perma.cc/X3MG-VA3U>].

¹¹² *See, e.g.*, Carl Tobias, *Filling the Texas Federal Court Vacancies*, 95 TEX. L. REV. 170, 174 (2017); Gregory Korte, *With the Tables Turned, Obama Now 'Regrets' His 2006 Alito Filibuster*, USA TODAY (Feb. 17, 2016), <https://www.usatoday.com/story/news/politics/2016/02/17/obama-now-regrets-his-2006-alito-filibuster-white-house-says/80514152> [<https://perma.cc/T9CK-FRN9>].

¹¹³ The executive approved many court of appeals judges, but the jurists may be too new and too little hard data exist to posit very definitive conclusions. Matt Pearce, *Federal Judges Appointed by Trump are Starting to Leave Their Mark*, L.A. TIMES (Aug. 21, 2018), <https://www.latimes.com/nation/la-na-trump-judges-20180821-story.html> [<https://perma.cc/L77Z-LHZ2>]. *But see* PEOPLE FOR THE AMERICAN WAY, *Confirmed Judges, Confirmed Fears*, Oct. 2018; John O. McGinnis, *The Coming Influence of the Trump Judges*, L. & LIBERTY (Dec. 14, 2018), <https://www.lawliberty.org/2018/12/14/the-coming-influence-of-the-trump-judges> [<https://perma.cc/7NBD-576P>].

¹¹⁴ 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?noredirect=on&utm_term=.4b21210c0748 [<https://perma.cc/7NBD-576P>].

Previous and subsequent to this order's Ninth Circuit affirmance, the chief executive provocatively asserted that the court, the jurists, and their decisions were "so political."¹¹⁵ Trump later mischaracterized the Ninth Circuit as chaotic, alleging that he reacted quickly to a flawed determination by the tribunal which the Justices reverse the most.¹¹⁶ These dismissive rejoinders could dramatically rekindle incendiary battles about dividing the Ninth Circuit.¹¹⁷

The activities show that Trump faces more complications appointing numerous judges than other Presidents, yet he can rectify this desperate situation. Because establishing the government as well as confirming Gorsuch and Kavanaugh required much time, and Trump did not seem to make the Ninth Circuit a priority, he must now emphasize the tribunal's vacancies. For instance, the AO grounds emergencies in conservative work and case load estimates, and openings' length, which reveal that a number deserve priority.¹¹⁸ The White House Counsel should also engage in meticulous consultation with home state politicians and keep in mind that renominating and confirming able, consensus Obama nominees who almost captured approval, especially Judge Lucy Koh, as Trump has done with many of his nominees, will

perma.cc/FUW6-PY7F]; Julie Hirschfeld Davis, *Court Pick Says Trump's Critique of Judiciary Is 'Demoralizing'*, N.Y. TIMES, Feb. 9, 2017, at A1. *But see* Hawaii v. Trump, 138 S. Ct. 2393, 2403 (2018); Jonathan Turley, *Trump's Abuse of Judges Is Perfectly Presidential*, USA TODAY (Feb. 23, 2017), <https://www.usatoday.com/story/opinion/2017/02/23/so-called-judge-robart-trump-twitter-judges-jonathan-turley-column/97824926/> [<https://perma.cc/5AVB-MZGY>].

¹¹⁵ Michael D. Shear & Katie Benner, *Trump Assaults Legal System, Eroding Trust*, N.Y. TIMES, Aug. 26, 2018, at A1; Matt Zapotosky & Robert Barnes, *Trump Suggests Only Politics Could Lead Court to Rule Against His Immigration Order*, WASH. POST (Feb. 8, 2017), https://www.washingtonpost.com/world/national-security/in-their-courtrooms-theyre-protected-by-people-like-me-dhs-secretary-weighs-in-on-legal-dispute-over-trump-ban/2017/02/07/5e37fc4e-ed4e-11e6-9662-6eedf1627882_story.html?utm_term=.c517becd81c7 [<https://perma.cc/M7GN-Q6XK>]; *see* Sai Prakash & John Yoo, *Trump's 'So-Called' Judgment*, WALL ST. J. (Feb. 13, 2017), <https://www.wsj.com/articles/trumps-so-called-judgment-1486941557> [<https://perma.cc/TV4T-XPYE>].

¹¹⁶ Calvin Woodward & Mark Sherman, *AP Fact Check: Trump's Misinformation on Appeals Courts*, APNEWS (Nov. 22, 2018), <https://www.apnews.com/5407eb459668436abb13be9922d77de2> [<https://perma.cc/5UCH-AM8G>].

¹¹⁷ *Transcript of President Trump's Press Conference*, N.Y. TIMES (Feb. 16, 2017), <https://nyti.ms/2lcbosY>; *see* Emily Cadei, *Dianne Feinstein, Kamala Harris Try To Cut a Deal with Trump*, SACRAMENTO BEE (May 22, 2018), <https://www.sacbee.com/latest-news/article/211603954.html> [<https://perma.cc/KDE4-CR3P>]; Bob Egelko, *Trump Attack May Reopen Debate on Splitting Ninth Circuit*, S.F. GATE (Feb. 18, 2017), <https://www.sfgate.com/nation/article/Trump-attack-may-reopen-debate-on-splitting-Ninth-10943304.php> [<https://perma.cc/K8S7-CYVQ>]. Even were the Chair's data accurate, they mean little, because the Supreme Court hears so few appeals. Adam Feldman, *Evaluating Speculation that The Ninth Circuit is the Lower Court SCOTUS Overturns the Most*, EMPIRICAL SCOTUS (Feb. 27, 2017), <https://empiricalscotus.com/2017/02/27/evaluating-speculation-ninth-circuit> [<https://perma.cc/S9WP-QYLV>].

¹¹⁸ *Judicial Vacancies*, *supra* note 9 (defining 'judicial emergency'); sources cited *supra* notes 95, 105, 110.

preserve scarce resources that would necessarily be dedicated to the process's commencement, cultivate Democrat support, and rapidly fill vacancies.¹¹⁹

The Federalist Society helped compile the list from which Trump pledged to select Justices and continues advising the White House on circuit openings.¹²⁰ Most Presidents solicit ideas and choices from public servants who discharged previous selection responsibilities and customary outlets, namely manifold practitioners, the ABA, and state bars.¹²¹ The chief executive can, and needs to, pursue more, efficacious input from less conventional sources, notably ethnic minority, female and LGBTQ politicians, individuals, and communities.

Trump should also contemplate, and keep applying, numerous mechanisms that proved salutary for earlier Presidents. One would be to nominate sitting judges, particularly federal district jurists like Thapar, his initial confirmer, and state Supreme Court members, encompassing Joan Larsen, another prominent Trump circuit appointee.¹²² This notion is constructive, because the Senate has already confirmed federal judges, who possess valuable expertise and complete, impressive, easily accessible records.¹²³ That scrutiny decidedly fosters primary components of Senate assessment, mainly ABA canvasses, candidate ratings, and FBI background checks. Plentiful state High Court Justices' efforts also distinctly resemble those of federal circuit jurists.¹²⁴ Another promising source would be distinguished lawyers involved with federal cases.¹²⁵

¹¹⁹ See, e.g., Carl Tobias, *Confirm Judge Koh for the Ninth Circuit*, 73 WASH. & LEE L. REV. ONLINE 449, 452–53, 459 (2016); see sources cited *supra* note 64 and *infra* notes 130–42, 165 (showing that California senators powerfully support Koh), *infra* notes 172, 202 (providing Obama nominees).

¹²⁰ See sources cited *supra* notes 48–50 (showing that society helped Trump nominate and confirm the second Justice); see also Kyle Peterson, *Trump's Supreme Court Whisperer*, WALL ST. J. (Feb. 3, 2017), <https://www.wsj.com/articles/trumps-supreme-court-whisperer-1486165573> [<https://perma.cc/2TRH-NTSL>]; Jeffrey Toobin, *The Supreme Court After Scalia*, NEW YORKER (Oct. 3, 2016), <https://www.newyorker.com/magazine/2016/10/03/in-the-balance> [<https://perma.cc/FJ5D-WYG8>].

¹²¹ I rely substantially here and below on Goldman et al., *supra* note 18, at 19–20; Tobias, *supra* note 18, at 2239–40.

¹²² Tobias, *supra* note 18, at 2243–46; Elisha Savchak et al., *Taking It to the Next Level: Elevation of District Court Judges to the U.S. Courts of Appeals*, 50 AM. J. POL. SCI. 478, 479 (2006); *supra* note 65 (Thapar); 163 CONG. REC. S6,944 (daily ed. Nov. 1, 2017) (Larsen).

¹²³ For examples of district judges whom Obama elevated, see 156 CONG. REC. S10,986 (daily ed. Dec. 22, 2010) (Mary Murguia); 158 CONG. REC. S1,677 (daily ed. May, 14, 2012) (Jacqueline Nguyen).

¹²⁴ For examples of Justices whom Obama elevated, see 157 CONG. REC. S8,625 (daily ed. Dec. 15, 2011) (Morgan Christen); 158 CONG. REC. S4,108 (daily ed. June 12, 2012) (Andrew Hurwitz).

¹²⁵ For examples of counsel whom Obama appointed, see 158 CONG. REC. S3,388 (daily ed. May 21, 2012) (Paul Watford); 160 CONG. REC. S2,426 (daily ed. Apr. 28, 2014) (Michelle Friedland); sources cited *infra* note 180. Other sources may be state lower court judges and counsel, but federal experience seems more applicable.

Both parties have afforded White House Counsel ample responsibility for circuit nominations.¹²⁶ Trump accorded selection priority for multiple courts and devoted copious resources to expedite nominations and confirmations by speeding FBI investigations and cajoling members, but he assigned the Ninth Circuit de minimis preference and excluded from a central role the ABA, which rated six submissions as ‘not qualified.’¹²⁷ The administration, therefore, must ensure that the Ninth Circuit enjoys priority, ABA information duly receives serious examination, and consideration and greater care attends vetting.

The President should meticulously consult politicians from home states, pursuing suggestions of numerous prominent, mainstream designees when vacancies arise. Cultivation helps for states with open posts, which have two senators from the party lacking the White House—as is true of California, Oregon, and Washington—because a sole politician can stall, or perhaps stop, processing through blue slip retention.¹²⁸ The protracted Oregon standoff and nomination withdrawal cogently manifested the peril of declining to assiduously consult, while the easy Hawaii appointment showed its value.¹²⁹ The President needs to energetically cultivate home state politicians and the senators must be receptive to these special overtures, cooperate in good faith, and efficiently pick a few superb centrists for White House analysis by delineating individual preferences and convincing reasons for them.

The administration should carefully evaluate this information, pose lingering questions, directly reconcile stubborn disputes which remain, and tender a choice on whom Trump and the politicians concur. The executive should inform the legislators about the potential nominee, so that the politicians might explain why they deem someone objectionable. Proffering several candidates and prompt, transparent communications will grant Trump and the senators critical flexibility and limit possible surprise. If the lawmakers keep rejecting any choice whom the President does propose, they should amicably resolve persistent differences, because continued opposition and slip retention could provoke delay, expense, and the necessity to restart consideration, which may occur and consume deficient resources.¹³⁰

¹²⁶ DOJ helps confirm nominees. Goldman et al., *supra* note 18, at 14–16; Tobias, *supra* note 18, at 2239.

¹²⁷ See sources cited *supra* notes 57–58, 62 and accompanying text.

¹²⁸ Seung Min Kim, *Trump Is Transforming the Judiciary, But He Has Yet to Take Aim at the Court That Annoys Him the Most*, WASH. POST (May 6, 2018), https://www.washingtonpost.com/politics/trump-is-transforming-the-judiciary-but-he-has-yet-to-take-aim-at-the-court-that-annoys-him-most/2018/05/06/53886d30-4f9d-11e8-b966-bfb0da2dad62_story.html?utm_term=.ee9803589140 [<https://perma.cc/A8QX-YR5H>]; see sources cited *supra* note 51 (Presidents and senators deem appellate courts critical). *But see* sources cited *supra* notes 66–73 (numerous times that White House and Grassley slips eroded).

¹²⁹ See sources cited *supra* notes 55–56, 69–71, 81–82; sources cited *infra* notes 186–87, 190–200.

¹³⁰ These concepts show why proposing and ranking multiple picks is usually preferable to submitting one.

2. The Confirmation Process

Once Trump nominates, Democrats and Republicans must coordinate to ensure expeditious, thorough, and equitable confirmation strategies. Both parties ought to astutely conclude scrutiny in part through facilitation of ABA and FBI canvasses, and the nominees should collaborate with those entities and persons by, for instance, completely and dutifully submitting responses to the Judiciary Committee questionnaire.¹³¹

Politicians might also keep blue slips when they find a nominee unacceptable *after* exhaustively pursuing initiatives meant to have the executive change the nomination's trajectory, as with Oregon and California. The crux should be merit: great intelligence, ethics, independence, diligence and temperament. The nominee must hold, but politicians need to ensure that the selection clearly retains: (1) mainstream views, defined as not overly conservative or liberal ideologically, (2) abundant respect for High Court precedent and most federal, state or local conduct, and (3) no predispositions on the crucial matters to be determined.

After the senators cautiously provide slips for a nominee with those attributes, the committee must expeditiously arrange a hearing. When the nominee is very competent, moderate, and not controversial, and the ABA, FBI and committee examinations have been probing, substantial, and fair, thereby yielding unproblematic conclusions, few members attend the hearing which normally proceeds well.¹³² If controversy arises, the session must promote robust, comprehensive, and equitable inquiries. Legislators have seven days to pose written queries that are usually candid, searching and fair, while the nominee often promptly and completely supplies answers.

The panel then convenes a meeting in which senators thoroughly and equitably discuss questions related to the nominee and vote. If the committee approves the choice, but the minority will not allow floor consideration, the designee's proponents should aggressively press for cloture that well-regarded, mainstream nominees typically win.¹³³ Next, the Majority Leader swiftly arranges a confirmation debate and ballot. McConnell ought to urge comprehensive, rigorous discussion that respects the nominee, the process, and colleagues. Following this debate, senators must rapidly vote.

At the outset, Democrats confronted and attempted to treat a conundrum: whether to retaliate for denying Judge Garland review, Judge Koh any chamber ballot, and for no or truncated processing for six additional estimable, consensus appellate nominees whom Obama proffered his last year.¹³⁴ Democrats seemed to resist this

¹³¹ Some nominees lacked responses or omitted data. *See supra* note 127 (Jeff Mateer and Brett Talley); Apr. 11, 2018 *Meeting, supra* note 56 (Wendy Vitter); May 9, 2018 *Hearing, supra* note 70 (Bounds).

¹³² Restrepo's hearing was typical. Some posed mundane queries that he easily fielded. *See* Tobias, *supra* note 35, at 45–46 nn.59, 62.

¹³³ *See, e.g.,* Tobias, *supra* note 18, at 2244–46; sources cited *supra* note 27.

¹³⁴ No appellate nominee secured a 2016 floor vote and four were not given a hearing. *See* sources cited *supra* notes 28–41 and *infra* notes 165–75.

temptation initially, hoping that the President would select dynamic, moderate nominees, because replicating GOP obstruction could further the process's downward slide. Ample cooperation with the executive and Republican politicians can apparently foster confirmations, which smoothly filling the Hawaii open slot demonstrated and the ongoing controversy regarding the California nominees illuminates. However, little GOP consultation and collaboration and the concerted endeavors to appoint young, highly conservative judges, which the Oregon vacancy stalemate and conclusion illustrated, frustrated appellate confirmation.

Democrats ought to comprehensively and equitably query nominees in hearings, present cogent written questions, and completely explore many qualifications across committee and floor discussions. If minority party lawmakers harbor serious concerns about capability, ethics, or temperament, or ascertain that nominees retain perspectives outside the mainstream, Democrats should ventilate criticisms, be amenable to persuasive Republican contentions, thoroughly address the claims, and vote no when clearly dissatisfied.

B. Specific Vacancies

The jurists who left active service had been confirmed to Arizona, California, Hawaii, Idaho, Oregon, and Washington judgeships. Modern chief executives honor the tradition of nominating prospects from the states in which empty posts surface.¹³⁵ Presidents respect that custom because senators jealously guard their prerogatives to maintain this singular remnant of courtesy and patronage.¹³⁶

1. Arizona

Trump should pervasively consult the two Arizona Senators, Democrat Kyrsten Sinema and Republican Martha McSally, who recently replaced one-term Senator Jeff Flake (R) and iconic Senator John McCain (R), and who ought to coordinate with one another and the White House in filling the vacancy. The President needs to be solicitous of the members, because they are new and the Counsel has apparently not consulted them, while either lawmaker could retain her blue slip.¹³⁷

¹³⁵ For two rare exceptions, see Tobias, *supra* note 75, at 2174 (filling a South Carolina seat with a North Carolina nominee); sources cited *supra* note 16 (describing dispute over Judge Trott's seat). *But see Executive Business Meeting on Nominations Before the S. Judiciary Comm.*, 116th Cong. (Apr. 4, 2019) [hereinafter *Executive Business Meeting*, Apr. 4, 2019] (statement of Sen. Feinstein) (Trump nominated Bress to the California Ninth Circuit vacancy over the objection of California's senators premised partly on Daniel Bress's tenuous links to California); *cf. Executive Business Meeting*, May 10, 2018, *supra* note 81; *Executive Business Meeting*, June 7, 2018, *supra* note 82 (blue slip erosion erodes this custom).

¹³⁶ All circuit states must have one active jurist, so Bennett, a Hawaiian, replaced Clifton. *See* 28 U.S.C. § 44(c) (2012).

¹³⁷ McCain and Flake had lodged more criticisms at Trump's conduct, while exercising

Quickly after Trump's victory, McCain and Flake created a merit selection group, which pursued, surveyed, and interviewed putative candidates, generating names from whom the senators developed recommendations for the administration.¹³⁸ The purported frontrunner, however, lost this status, partially due to a controversial legal representation.¹³⁹ Because the White House might have not been enamored with the other submissions proffered, the executive did not make a nomination until 2018.¹⁴⁰ Magistrate Judge Bridget Shelton Bade enjoyed a smooth hearing during the chamber recess; but, the panel never accorded her a discussion and vote because Flake stopped all committee ballots until McConnell provided a floor vote on the "Mueller Protection" legislation. This never happened, and her nomination expired on January 2, 2019.¹⁴¹ Thus, it remains unclear whether Trump will renominate Judge Bade and, if so, whether both new senators will return their blue slips and, if they do, whether the chamber will approve the nominee.

This uncertainty means that the politicians may now wish to employ a few sources of prospects, while critical in-state precedent supports the possibility of elevation, as Obama confirmed Arizona District Court Judge Mary Murguia and Supreme Court Justice Andrew Hurwitz to the Ninth Circuit.¹⁴² Particularly relevant are the six impressive, diverse, consensus trial level jurists whom Senators McCain and Flake nominated and who captured 2014 appointment.¹⁴³ The court members have

greater independence, than numerous GOP lawmakers, but McCain's passing and the decision of Flake to eschew seeking reelection complicated the nomination process. Carl Hulse, *Trump's Next Battle: Keeping These Republican Senators Happy*, N.Y. TIMES (Nov. 27, 2016), <https://nyti.ms/2g3N9N0>; Paul Kane, *In Flake's War on Trump Tariffs, Judicial Picks Are Caught In Crossfire*, WASH. POST (June 27, 2018), https://www.washingtonpost.com/power-post/in-flakes-war-on-trumps-tariffs-presidents-judicial-picks-caught-in-the-crossfire/2018/06/27/99714bd0-797a-11e8-93cc-6d3becdd7a3_story.html?utm_term=.880e126da5df [<https://perma.cc/2X6Y-7LW7>]; Jonathan Martin, *At His Ranch, McCain Shares Memories and Regrets with Friends*, N.Y. TIMES (May 5, 2018), <https://nyti.ms/2FMilJV>.

¹³⁸ Press Release, Sen. John McCain, Apply for Federal Judicial Nomination (2017).

¹³⁹ David Lat, *The Latest and Greatest in President Trump's Judicial Nominations (Part 2)*, ABOVE THE LAW (Jan. 26, 2018), <https://abovethelaw.com/2018/01/the-latest-and-greatest-in-president-trumps-judicial-nominations-part-2/> [<https://perma.cc/G5AY-CR4K>] [hereinafter Lat, *Latest and Greatest*].

¹⁴⁰ Lat, *Circuit Court Nominees*, *supra* note 91; Sen. John McCain, Apply for Federal Judicial Nomination (2017). For the frontrunner, contenders and updates, see Lat, *Latest and Greatest*, *supra* note 139.

¹⁴¹ Press Release, White House, Office of the Press Sec'y, President Donald J. Trump Announces Seventeenth Wave of Judicial Nominees (Aug. 27, 2018); Oct. 24, 2018 *Hearing*, *supra* note 75; 164 CONG. REC. S28 (Jan. 2, 2019) (returning expired nomination); Burgess Everett, *Senate Judiciary Cancels Nominee Hearings Over Flake's Mueller Stand*, POLITICO (Nov. 28, 2018), <https://www.politico.com/story/2018/11/28/senate-judiciary-nominee-flake-mueller-1025918> [<https://perma.cc/C7Z2-KDSB>]. The GOP vow to confirm all candidates nominated in 2018 preceded Justice Kennedy's vacancy that assumed priority. Kim, *supra* note 128.

¹⁴² See sources cited *supra* notes 109, 122–24 and accompanying text.

¹⁴³ Press Release, White House, Office of the Press Sec'y, President Obama Nominates Eight

served adequate periods to compile long, accessible federal judicial records, which supplement their considerable expertise. For instance, virtually all possessed certain judicial experience when nominated. Accordingly, instructive evidence regarding competence, intelligence, ethics, diligence, and temperament could be readily available.

More specifically, Diane Humetewa carefully practiced some fourteen years with the U.S. Attorney Office litigating knotty questions central to Indian Law and federal procedure that culminated with her astute confirmation to be U.S. Attorney, capably serving Bush principally at McCain's request.¹⁴⁴ Humetewa concomitantly was the first Native American woman to become a federal court jurist; thus, her elevation would improve diversity and both new members should seriously consider promoting her.¹⁴⁵ Of the 2014 confirmees, Steven Logan had been a respected Magistrate Judge previous to nomination, while Alan Soto was a conscientious practitioner before he joined the state bench.¹⁴⁶

The district jurists whom President George W. Bush tendered upon the recommendation of Senators McCain and Jon Kyl (R) have amassed comprehensive, easily discovered records across a number of years. David Campbell rigorously practiced in a distinguished firm and led the federal civil rules advisory committee.¹⁴⁷ Murray Snow had been a prominent Arizona Court of Appeals Judge for six years; he deftly treated powerful challenges to Sheriff Joe Arpaio's controversial actions.¹⁴⁸ Cindy Jorgenson was a highly regarded federal prosecutor for over ten years after being a state trial court jurist across five¹⁴⁹ and Neil Wake litigated cases

to Serve on United States District Courts (Sept. 19, 2013); Carl Tobias, *Filling the District of Arizona Vacancies*, 56 ARIZ. L. REV. SYLLABUS 4 (2014); sources cited *infra* notes 145–46.

¹⁴⁴ See John McCain & Jeff Flake, *Federal Judge Diane Humetewa*, 40 HUMAN RTS. MAG. 4 (June 30, 2017), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol-40-no-1-tribal-sovereignty/federal-judge-diane-humetewa; sources cited *supra* note 143.

¹⁴⁵ McCain and Flake avidly supported Humetewa's district court approval with strong arguments premised on her valuable experience, and the new senators might choose to support Humetewa partly out of deference to them. See sources cited *supra* notes 91, 143–44.

¹⁴⁶ Dan Nowicki, *Santa Cruz Judge Nominated to U.S. District Court*, ARIZONA REPUBLIC, Dec. 20, 2013, at B3; Alia Beard Rau, *Second Ruling in 2 Days Against Arizona's Abortion Laws*, ARIZONA REPUBLIC (Oct. 16, 2015), <https://www.azcentral.com/story/news/arizona/politics/2015/10/16/judge-freezes-arizona-abortion-reversal-law/74079464> [<https://perma.cc/KN92-A6F2>]; see sources cited *supra* note 143.

¹⁴⁷ *Campbell, David G., Biographical Directory of Judges*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/campbell-david-g> [<https://perma.cc/6NTC-LFXV>] [hereinafter *Directory*] (providing Judge Campbell's employment history); Zoe Tillman, *Informed by What I Am: Judges Talk Obligation to Faith, Duty and the Law*, 256 N.Y. L.J., Sept. 30, 2016, at 5.

¹⁴⁸ *Directory, supra* note 147; Michael Kiefer, *Murray Snow: The Man Judging Sheriff Joe*, ARIZONA REPUBLIC (June 5, 2015), <https://www.azcentral.com/story/news/local/phoenix/2015/06/05/judge-murray-snow-sheriff-joe-arpaio/28554351> [<https://perma.cc/PV34-F8MR>].

¹⁴⁹ *Directory, supra* note 147; see Dillon Fishman, *Hon. Cindy K. Jorgenson, U.S. District Judge, District of Arizona*, 63 FED. LAW. 21 (Jan./Feb. 2014), http://www.fedbar.org/PDFs/Past-Judicial-Profiles/Ninth-Circuit_1/Jorgenson-Hon-Cindy.aspx.

for three decades, while each productively administered the court as chief judge.¹⁵⁰ Related valuable sources are many federal circuit and district court lawyers and the Justices. For instance, preeminent Ninth Circuit Judge Mary Schroeder practiced for a significant time with Lewis & Roca preceding confirmation;¹⁵¹ Justices Scott Bales and John Pelander have been dedicated Arizona Supreme Court members for years.¹⁵²

When the two politicians agree, they should propose some prioritized selections with thorough explication for the rankings. The President ought to fully contemplate these suggestions while picking a nominee who satisfies him and the politicians.¹⁵³ Once they concur, all must dutifully coordinate and labor with the senators' colleagues to ensure the nominee an efficient, complete, and fair confirmation process. Little more specific to Arizona can be provided until the administration decides whether to renominate Judge Bade and, if so, whether the Senate confirms her, but the general concepts above could apply.¹⁵⁴

2. California

Trump can, and should, assertively consult Democratic Senators Feinstein and Kamala Harris, and perhaps the state's leading Republican, who ought to cooperate by advancing for White House perusal several capable, mainstream aspirants who could duly fill all three circuit openings. Feinstein has afforded important Judiciary panel service, functioning collaboratively with GOP politicians, especially Grassley, and is now the Ranking Member.¹⁵⁵ For example, she helped Bush's disputed appellate

¹⁵⁰ *Directory, supra* note 147; Chris McDaniel & Chris Geidner, *Arizona Enlists Major Law Firm to Import Execution Drugs from India*, BUZZFEED NEWS (Jan. 28, 2016), <https://www.buzzfeednews.com/article/chrismdaniel/arizona-enlists-major-law-firm-to-import-execution-drugs-fro> [<https://perma.cc/B3KZ-4HKK>]. Both and Campbell are senior judges; Trump's penchant for younger picks makes all three unlikely.

¹⁵¹ *Directory, supra* note 147; Jason Hoppin, *Schroeder Will Lead 9th Circuit. But When?*, RECORDER, Aug. 15, 2000.

¹⁵² Howard Fischer, *Newest AZ Supreme Court Justice Likens Role to Umpire's Task*, TUCSON.COM (Aug. 16, 2009), https://tucson.com/news/national/newest-az-supreme-court-justice-likens-role-to-umpire-s/article_912f0ac6-ef77-5827-8070-82f794de2d36.html [<https://perma.cc/FY7Y-HBEQ>]; *see sources cited supra* note 142.

¹⁵³ If a senator resists after candid discussions, both must patiently negotiate and suggest cogent resolution. *See sources cited supra* note 130.

¹⁵⁴ *See supra* Section V.A.2. Crucial are prompt and rigorous panel and chamber analysis and discussions of qualifications. President Trump did renominate Judge Bade on January 22, 2019. Press Release, White House Office of the Press Sec'y, President Donald Trump Announces His Intent to Nominate Judicial Nominees (Jan. 22, 2019). The Senate confirmed Bade on March 26. *See* 165 CONG. REC. 51,964 (daily ed. Mar. 26, 2019).

¹⁵⁵ 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 [<https://perma.cc/DXS7-AG3V>]; *see Cadei, supra* note

nominees, pertinently Brett Kavanaugh and Leslie Southwick, in having panel or floor ballots, which should endear her to Republican colleagues, however, Feinstein's opposition to Kavanaugh's Supreme Court appointment did provoke much GOP criticism.¹⁵⁶

Upon President Trump's inauguration and during most of 2017, California encountered one vacancy, although the 2017 departure by Judges Kozinski and the 2018 passing of Reinhardt left California with three vacancies and ostensibly changed the dynamics.¹⁵⁷ In this administration's nascent period, Feinstein seemed to have profitable meetings with Mike Pence and the White House Counsel regarding court selection and the California and Ninth Circuit openings.¹⁵⁸ She also glowingly lauded earlier reliance on a commission which assisted her by vetting talented choices, particularly John Owens.¹⁵⁹

In August 2017, a dependable political source contended that the administration had examined twenty-five prospects for the single Ninth Circuit vacancy and supplied "possible nominees" to the legislators, while in 2018, multiple reliable sources claimed that Feinstein's panel had interviewed some White House picks and a number whom her group first scrutinized.¹⁶⁰ Notwithstanding much press coverage on

117; Bob Egelko, *Feinstein, Harris Will Have Some Pull on Federal Judge Picks*, S.F. CHRON. (Dec. 30, 2016), <https://www.sfchronicle.com/news/article/Feinstein-Harris-will-have-some-pull-on-federal-10828126.php> [<https://perma.cc/5FLR-AUVB>]; Sarah D. Wire, *Is Trump Finally Ready to Turn His Sights Toward Remaking the 9th Circuit Court?*, L.A. TIMES (Aug. 16, 2018), <https://www.latimes.com/politics/la-na-pol-ninth-circuit-vacancies-20180815-story.html> [<https://perma.cc/BEE4-CPHQ>].

¹⁵⁶ Emily Cadei, *'Shut Down the Senate!' Supreme Court Confirmation Roils Feinstein Race*, SACRAMENTO BEE (Aug. 14, 2018), <https://www.sacbee.com/news/politics-government/capitol-alert/article216596255.html> [<https://perma.cc/MF3N-C75A>]; Bob Egelko, *Feinstein Draws Fire Over Vote for Judge*, S.F. CHRON. (Aug. 4, 2007), <https://www.sfgate.com/politics/article/Feinsteindraws-fire-over-vote-for-judge-2549435.php> [<https://perma.cc/6CT8-FGCQ>]; Lat, *Latest and Greatest*, *supra* note 139; Sheryl Gay Stolberg, *Avoiding Clash, Senate Sends Judicial Nominee to Floor*, N.Y. TIMES (May 26, 2006), <https://nyti.ms/2UeEFHt>; *see sources cited supra* note 43.

¹⁵⁷ Maura Dolan, *9th Circuit Judge Alex Kozinski Steps Down After Accusations of Sexual Misconduct*, L.A. TIMES (Dec. 18, 2017), <https://www.latimes.com/politics/la-pol-ca-judge-alex-kozinski-20171218-story.html> [<https://perma.cc/J85J-A3LC>]; Noah Feldman, *The Battle for the 9th Circuit Court Falls Silent*, SEATTLE TIMES (Apr. 2, 2018), <https://www.seattletimes.com/opinion/the-battle-for-the-9th-circuit-court-falls-silent> [<https://perma.cc/Y7QK-887Q>]; Hulse, *supra* note 66; Leah Litman et al., Opinion, *A Comeback But No Reckoning*, N.Y. TIMES (Aug. 2, 2018), <https://nyti.ms/2OEKecu>; Wire, *supra* note 155.

¹⁵⁸ Kim, *supra* note 128; Tillman, *supra* note 52; Zoe Tillman, *Why Trump Will Have to Work with the Senate, Including Democrats, to Get His Judges Confirmed*, BUZZFEED NEWS (Mar. 31, 2017), <https://www.buzzfeednews.com/article/zoetillman/why-trump-will-have-to-work-with-democrats-to-get-his> [<https://perma.cc/7E8F-PE4E>].

¹⁵⁹ Press Release, Feinstein on Passing of Judge Reinhardt, Ninth Circuit Vacancies (Mar. 30, 2018); *see* Tobias, *supra* note 18, at 2256; sources cited *infra* note 180.

¹⁶⁰ Cadei, *supra* note 117; Kim, *supra* note 128; 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> [<https://perma.cc/JE8Z-J3T3>] [hereinafter Lat, *Federal*

the two newer openings and speculation explaining how Trump could dramatically remake the tribunal, the President failed to send any nominee until October 2018 when he tapped Patrick Bumatay, Daniel Collins, and Kenneth Lee, three conservative males, despite the California senators' opposition and concerted attempts to consummate a deal by proposing Collins, "James Rogan from the White House's list," and Judge Koh from the Feinstein/Harris "list of recommended candidates."¹⁶¹

Insufficient time apparently remained in the 115th Congress for the Judiciary panel to arrange hearings for any of the nominees, partly because Senators Feinstein and Harris retained blue slips on the three, whose nominations expired in early January 2019. Therefore, it remains uncertain whether Trump plans to renominate any of the nominees, particularly because the California senators have continued their opposition and have kept pursuing a deal that would include Collins, Koh, and Rogan.

This lack of clarity, the machinations, and District Judge Koh's impressive qualifications show why the senators have persisted in suggesting that Trump renominate Koh, who achieved February 2016 nomination on the cautious recommendation of Feinstein and Barbara Boxer (D).¹⁶² The jurist was a distinguished, centrist aspirant, who captured a powerful bipartisan September 2016 panel vote.¹⁶³ This solution, therefore, would preserve considerable scarce time by avoidance of having to reopen the nomination process. Speedily filling the vacancies is distinctly pressing for many litigants, Ninth Circuit members, and California active circuit judge representation.¹⁶⁴

Judicial Nominations]; Tillman, *supra* note 52; *see* Lat, *Circuit Court Nominees*, *supra* note 91; Lat, *Latest and Greatest*, *supra* note 139; Wire, *supra* note 155.

¹⁶¹ As late as November 19, the senators' offer included a "third candidate to be further agreed upon," but they substituted Collins apparently to increase the offer's appeal for Trump. Letter from Sens. Feinstein and Harris to Pat Cipollone, White House Counsel (Nov. 19, 2018). *See* Press Release, Eighteenth Wave, *supra* note 51 (nominating Bumatay, Collins, and Lee). A deal is possible but may consume time, and Trump lacks incentive to cooperate with the senators. 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> [<https://perma.cc/7FHS-4UJ3>]; Cadei, *supra* note 117; Lat, *Latest and Greatest*, *supra* note 139; Tillman, *supra* note 52; *see* sources cited *supra* notes 49, 157. On January 30, 2019, President Trump renominated Collins and Lee to the Ninth Circuit, renominated Bumatay to the Southern District of California and nominated Daniel Bress to the Ninth Circuit. Press Release, White House Office of the Press Sec'y, President Donald Trump Announces His Intent to Nominate Judicial Nominees (Jan. 30, 2019). A *Wall Street Journal* editorial, which triggered a conservative media blitz that sharply criticized the White House for considering a "judge deal" with the California senators, may have prompted the White House's January 30 actions, which renominated Collins and Lee and nominated Bress. Editorial, *A Bad Judges Deal*, WALL ST. J. (Jan. 29, 2019), <https://www.wsj.com/articles/a-bad-judges-deal-11548807717> [<https://perma.cc/ZZ22-R9FE>].

¹⁶² Howard Mintz, *San Jose Judge Koh Nominated to Federal Appeals Court*, MERCURY NEWS (Feb. 25, 2016, 7:24 AM), <https://www.mercurynews.com/2016/02/25/san-jose-judge-lucy-koh-nominated-to-federal-appeals-court> [<https://perma.cc/TL5B-T8H2>].

¹⁶³ *Executive Business Meeting on S. 2763, S. 3155, S. 3270 and Nominations Before S. Judiciary Comm.* (Sept. 15, 2016), <https://www.judiciary.senate.gov/download/09/15/2016/09-15-16-grassley-statement> [<https://perma.cc/5BV7-W6DR>].

¹⁶⁴ This may seem to conflict with the idea that senators should send multiple picks, as

Trump should diligently analyze renominating Koh.¹⁶⁵ Over almost nine years in the Northern District, the jurist has earned a vaunted reputation for accurately deciding complex issues, especially regarding intellectual property, expertise the tribunal definitely requires.¹⁶⁶ She is a district judge, which facilitates the process, and Koh's ABA and FBI evaluations merely necessitated updating, while she had been confirmed once and proffered a comprehensive, accessible record.¹⁶⁷ The committee fully assessed Koh by abundantly coordinating with the ABA, FBI and DOJ.¹⁶⁸

The Chair did only arrange a hearing that July, but Grassley ought to have reciprocated for Democrats' collegial assistance in confirming ten appellate jurists over George W. Bush's last two years.¹⁶⁹ Koh testified in the session, which proceeded effectively,¹⁷⁰ and won a 13–7 vote with four GOP members, including the Chair, favoring the prospect.¹⁷¹ After July 6, the GOP provided no chamber ballot for any of twenty-three capable, mainstream aspirants with committee approval, so nominations of them plus twenty-eight other skilled, moderate individuals, who lacked panel reports, expired in early January 2017.¹⁷²

Koh deserved a rapid floor debate and ballot. McConnell should have instituted the regular order he persistently champions and honored directly relevant 2007–08 precedent that implicates nominees.¹⁷³ Because the Majority Leader, nonetheless, eschewed scheduling Koh's debate and vote, her proponents should have insistently pursued

that enhances flexibility. However, when they concur on one, Trump might defer, as they have worked on the opening, know more strong picks who best represent California and may slow processing by retaining blue slips while two other slots are open.

¹⁶⁵ The senators favor Koh. Cadei, *supra* note 117; Tillman, *supra* note 52. I rely below on Tobias, *supra* note 119.

¹⁶⁶ Brian X. Chen, *Meet Lucy H. Koh, a Silicon Valley Judge*, N.Y. TIMES: BITS (Mar. 30, 2014, 9:36 PM), <https://bits.blogs.nytimes.com/2014/03/30/meet-lucy-h-koh-a-silicon-valley-judge/>; Bob Egelko, *Lucy Koh Nominated for US Court of Appeals in SF*, S.F. CHRON. (Feb. 25, 2016), <http://www.sfgate.com/bayarea/article/Obama-nominates-local-judge-to-federal-appeals-6855113.php>.

¹⁶⁷ Tobias, *supra* note 18, at 2258; *see* Tobias, *supra* note 119, at 450–52.

¹⁶⁸ Koh had received vetting, so analysis was brief. Tobias, *supra* note 119, at 460–61. *But see* sources cited *supra* note 79.

¹⁶⁹ No 2016 nominee had a floor vote. *Judicial Vacancies*, *supra* note 9 (listing confirmations from 2007–08 and 2016).

¹⁷⁰ *Hearing on Nominations Before the S. Judiciary Comm.*, 114th Cong. (July 13, 2016) (statements of Sens. Feinstein & Boxer). Both emphasized her powerful record, GOP support and Ninth Circuit critical need.

¹⁷¹ *Executive Business Meeting Before the S. Judiciary Comm.*, 114th Cong. (Sept. 15, 2016); *see* Tobias, *supra* note 119, at 462.

¹⁷² 162 CONG. REC. S7,183–84 (daily ed. Jan 3, 2017); Carl Tobias, *Fix Nation's Judicial Staffing Crisis*, DET. FREE PRESS (Jan. 7, 2017), <https://www.freep.com/story/opinion/contributors/2017/01/07/judicial-staffing-crisis/96249410> [<https://perma.cc/LL59-853Z>].

¹⁷³ Tobias, *supra* note 119, at 454, 455 n.29 (providing McConnell's pleas for the Senate to restore regular order and to approve Bush nominees in 2008). Much time remained for Koh's vote, yet McConnell did not set it.

cloture.¹⁷⁴ Able, moderate jurists customarily realize final ballots; thus, lawmakers who appreciate conventions ought to have expeditiously agreed on cloture.¹⁷⁵ After the nominee came to the floor, McConnell should have actively convened a dignified and respectful debate which robustly canvassed numerous probing questions, and the Senate must have permitted a fast vote. In short, the prominent judge enjoyed no final consideration due to reasons of GOP obstruction distinctly apart from her candidacy's merits. Now she must win only this and a committee vote, although the panel may want to reschedule another hearing should a number of members—especially new ones—deem that advisable.

In short, the White House should accept the most recent package deal offered by Senators Feinstein and Harris. The principal reason is that the proposal is eminently fair. The recommendation accords President Trump smooth confirmation of one nominee whom the chief executive tendered, a second who appeared on the White House list and is a highly respected California Superior Court judge, and a third who was on the senators' recommended list and is a well-regarded, experienced federal district court jurist. Another reason is that agreement would promote rapid, smooth confirmation and fill half of the Ninth Circuit vacancies. Moreover, cooperation regarding these openings could facilitate collaboration on other vacancies and perhaps confine or ameliorate the confirmation wars that have plagued the Ninth Circuit and the nation.

Because the administration may eschew the deal as presently constituted and needs multiple nominees, the California senators might attempt to reach consensus on several additional picks. One source is the nearly twenty-five trial level Obama appointees—most of these prospects have been federal court jurists over six years. An example is Northern District Judge Edward Chen; he imparts much ethnic, and intensive, rare experiential diversity because of previous work as a highly competent ACLU attorney.¹⁷⁶ A related idea would be Southern District Judge Gonzalo Curiel, who earned respect for deftly resolving the Trump University litigation and for numerous very capable federal prosecutorial initiatives, and could supplement ethnic diversity.¹⁷⁷ George W. Bush approved twenty-one jurists, who have provided well-regarded trial court service in the last decade-plus timeframe. For example, James Selna was a respected O'Melveny partner over twenty years before confirmation,

¹⁷⁴ Tobias, *supra* note 119, at 454 n.20, 463 n.73; *see* 162 CONG. REC. S5,312 (daily ed. Sept. 7, 2016) (denying unanimous consent).

¹⁷⁵ *See* Tobias, *supra* note 119, at 457 nn.36–41.

¹⁷⁶ Edward Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 1109, 1109–10, 1116 (2003); *Directory*, *supra* note 147; Kenneth Lee, *One Year and Waiting—The Nomination of Edward M. Chen*, HUFF. POST (May 25, 2011), https://www.huffingtonpost.com/kenneth-k-lee/one-year-and-waiting-the-b_703971.html [<https://perma.cc/L8WU-72AM>].

¹⁷⁷ *Cohen v. Trump*, 200 F. Supp. 3d 1063, 1065 (S.D. Cal. 2016); *Directory*, *supra* note 147. Approval may treat Trump's excoriation of him. Alan Rappeport, *That Judge Attacked by Donald Trump? He's Faced a Lot Worse*, N.Y. TIMES (June 3, 2016), <https://nyti.ms/22CFcD>.

while he thoroughly addressed the Toyota “sticky pedals” suits.¹⁷⁸ Philip Gutierrez would contribute immense experience gleaned from plentiful time on both the federal and Los Angeles Superior Court benches and can increase ethnic diversity.¹⁷⁹

Lawyers who appear before federal courts would be pertinent sources. For instance, Obama nominees and confirmees Paul Watford and Michelle Friedland were superb civil litigators for a number of years with the highly regarded Munger, Tolles & Olson firm, while John Owens had correspondingly been a partner there and served competently over numerous years for the U.S. Attorney Office.¹⁸⁰

A related valuable possibility would be the California Supreme Court. For example, Justices Goodwin Liu and Mariano-Florentino Cuéllar were pathbreaking faculty with UC–Berkeley and Stanford before joining the court.¹⁸¹ Nevertheless, the GOP minority had previously stopped Liu’s approval for the Ninth Circuit because it argued that he was outside the mainstream.¹⁸²

When the legislators concur, they need to offer many potential nominees for all three vacant slots with full explanations of prioritization for Trump, who in turn should propose mutually satisfactory putative nominees.¹⁸³ The myriad extremely qualified choices in the state and three open positions yield considerable flexibility vis-à-vis ethnic, gender, sexual orientation, ideological, and experiential diversity. If the participants are unable to consummate an agreement, they might entertain compromise with “trades,” as the California senators have apparently proposed.¹⁸⁴

¹⁷⁸ *Directory, supra* note 147; Stuart Pfeifer, *Judge Taps Lawyer in Toyota Cases*, L.A. TIMES, May 15, 2010.

¹⁷⁹ *Directory, supra* note 147; Kenneth Ofgang, *Judge Philip Gutierrez Confirmed to U.S. District Court*, METRO. NEWS-ENTERPRISE (Feb. 1, 2007), <http://www.metnews.com/articles/2007/guti020107.htm> [<https://perma.cc/DS2D-Q2M8>]; *see* Cadei, *supra* note 117 (senators proposed Bush district confirmer Andrew Guilford).

¹⁸⁰ *Directory, supra* note 147; Scott Graham, *Nine Circuit Nominees Face Uncertain Prospects*, RECORDER, Aug. 30, 2013; 160 CONG. REC. S1,881 (daily ed. Mar. 31, 2014) (Owens confirmation); sources cited *supra* note 159. For Trump’s choices who are lawyers, see Lat, *Circuit Court Nominees, supra* note 91; Lat, *Federal Judicial Nominations, supra* note 160; Tillman, *supra* note 52. For the senators’ choices, see Cadei, *supra* note 117.

¹⁸¹ Bob Egelko, *Goodwin Liu Confirmed to Calif. Supreme Court*, S.F. GATE (Aug. 31, 2011), <https://www.sfgate.com/bayarea/article/Goodwin-Liu-confirmed-to-Calif-Supreme-Court-2311696.php> [<https://perma.cc/UV8X-56E9>]; David Siders, *Jerry Brown Names Law School Professor to California Supreme Court*, SACRAMENTO BEE (July 22, 2014), <https://www.sacbee.com/news/politics-government/capitol-alert/article2604510.html> [<https://perma.cc/6JRZ-9283>]; *see* Maura Dolan, *As Gov. Jerry Brown Ponders a California Supreme Court Vacancy, One of His Earlier Appointees Defies Expectations*, L.A. TIMES (June 1, 2018), <https://www.latimes.com/local/lanow/la-me-ln-kruger-court-20180531-story.html> [<https://perma.cc/WUV9-MD4C>].

¹⁸² Tobias, *supra* note 18, at 2242; Egelko, *supra* note 181.

¹⁸³ For why and how they should do this, see sources cited *supra* note 130.

¹⁸⁴ Tobias, *supra* note 18, at 2260 n.126; *see* sources cited *supra* note 161. For example, the California senators have essentially proposed that Trump suggest two nominees and the

When the White House and the lawmakers concur, they ought to apply prompt, complete, and fair confirmation systems. Nothing more about California necessitates investigation before the President decides whether to rename the three October nominees and, if he does, whether the Senate confirms them, although the constructs above should prevail.¹⁸⁵

3. Hawaii

Once Judge Clifton altered his status, the White House pervasively consulted Senators Hirono and Schatz, and a leading Republican state politician, who seemed to cooperate with one another while expeditiously providing capable, moderate designees for Trump's review.¹⁸⁶ Hirono and Schatz concomitantly agreed to deploy plenty of sources to suggest potential nominees. The nuanced procedures yielded Mark Bennett, the nominee who felicitously won confirmation.¹⁸⁷

4. Idaho

Judge Randy Smith proclaimed his intent to depart active service months before this eventuality occurred.¹⁸⁸ Trump proffered Randy Nelson, who is a very qualified, conservative attorney during May 2018. The Senate promptly confirmed the nominee in October.¹⁸⁹

senators proffer one. "Horsetrading" may only be warranted if the situation is desperate and participants exhaust other solutions.

¹⁸⁵ See *supra* Sections V.A.2, B.1. For what is critical, see sources cited *supra* note 154. On January 30, Trump renominated Collins and Lee and nominated Bress to the Ninth Circuit. See sources cited *supra* note 144. On March 13, Graham allowed a hearing for Collins and Lee over the opposition of the California senators, who retained blue slips and that session proved to be very contentious because of the nominees' perspectives on numerous issues and Lee's purported failure to provide writings. *Hearing on Nominations Before the S. Judiciary Comm.*, 116th Cong. (Mar. 13, 2019). The Judiciary Committee engaged in contentious discussion of Collins and Lee who received approval on 12–10 party-line votes. Senator Feinstein strongly argued that the White House failed to engage in adequate consultation with the California senators regarding Bress, who she claimed lacked sufficient links to California. Senator Ted Cruz (R-TX) and Senator Mike Lee (R-UT) defended Bress's qualifications and California ties. The Senate will probably conduct debate and chamber votes on Collins and Lee in May and will likely confirm each on close or party-line ballots. Graham promised to meet with White House Counsel regarding Feinstein's concern about Bress's connections to California. *Executive Business Meeting*, Apr. 4, 2019, *supra* note 135.

¹⁸⁶ I rely in this paragraph on Wire, *supra* note 155; sources cited *supra* notes 56, 81.

¹⁸⁷ Wire, *supra* note 155. For the process and prospects before Bennett was named, see Tobias, *supra* note 2, at 719; Lat, *Circuit Court Nominees*, *supra* note 91.

¹⁸⁸ See Lat, *Latest and Greatest*, *supra* note 139; Press Release, Office of Sen. Crapo, Risch Welcome White House Nomination of Ryan Nelson to Serve on Ninth Circuit Court of Appeals (May 10, 2018) (showing that Trump consulted).

¹⁸⁹ Press Release, Fourteenth Wave, *supra* note 61. The Judiciary Committee granted him

5. Oregon

The administration should have consulted Senators Wyden and Merkley and plainly did contact upper-echelon state GOP officers, like Oregon Representative Greg Walden, who necessarily ought to have acted collaboratively by forwarding preeminent, mainstream aspirants for Trump's scrutiny. The politicians needed to invoke multiple sources, but the White House negligibly consulted. Controversy directly arose because the executive refused to wait on the bipartisan merit selection commission process that the senators had activated.¹⁹⁰ The politicians insisted on keeping their blue slips which Grassley had dutifully respected. Once the panel work ended, the senators proposed Ryan Bounds and three more selections for Trump; however, the politicians opposed the nominee, claiming that he had "failed to disclose [Bounds's] writings."¹⁹¹ When Grassley decided against honoring the slips, the preferable resolution of this standoff would have been extensive consultation on the four suggested prospects to discern whether one could have proven acceptable. Yet, the GOP chose to move Bounds, an action which cratered.¹⁹²

The senators and Trump now might contemplate the three additional candidates recommended; however, if the President remains opposed, the senators and he may want to diligently explore related prospects. One possibility is the strong, centrist Obama trial level appointees; several have competently served over a number of

an early hearing, while the Senate rather promptly confirmed Nelson. *See Hearing on Nominations Before the S. Judiciary Comm.*, 115th Cong. (July 11, 2018); Wire, *supra* note 155; 164 CONG. REC. S6,799 (daily ed. Oct. 11, 2018) (Nelson confirmation).

¹⁹⁰ See sources cited *supra* notes 55, 69–71. *But cf.* Lat, *Latest and Greatest*, *supra* note 139 (observing that the panel had not been used for Ninth Circuit).

¹⁹¹ The writings putatively reveal "alarming views about sexual assault, [workers' rights], people of color, and the LGBTQ community." Letter from Sens. Ron Wyden & Jeff Merkley to Don McGahn, White House Counsel, Feb. 12, 2018; see Maxine Bernstein, *Senators Grill Oregon Federal Prosecutor During Judicial Confirmation Hearing*, OREGONIAN (May 9, 2018), https://www.oregonlive.com/portland/2018/05/democratic_senators_grill_oreg.html [<https://perma.cc/78BH-W3KU>] (assessing Bounds hearing and idea that Oregon panel majority would not have favored Bounds, had they known about his "deeply troubling writings"); 164 CONG. REC. S6,883 (Oct. 11, 2018). *But see* David Lat, *Give Amnesty for College Writings*, WALL ST. J. (Apr. 15, 2018), <https://www.wsj.com/articles/give-amnesty-for-college-writings-1523819122> [<https://perma.cc/E3EF-EEN2>].

¹⁹² See sources cited *supra* note 82. Some observers have suggested that efforts are being undertaken to revitalize Bounds's candidacy and to have Trump renominate him. However, that possibility seems unlikely, because the effort would probably offend Senator Scott, the lone Republican African American member of the Senate, and Senators Wyden and Merkley would strongly oppose Bounds again. Michael Macagnone, *Bounds Rebound? Controversial 9th Circ. Pick May Return*, LAW360 (Nov. 30, 2018), <https://www.law360.com/articles/1106826/bounds-rebound-controversial-9th-circ-pick-may-return> [<https://perma.cc/L7PD-3ALQ>]; see Sen. Tim Scott, *Only the Best Candidates for Federal Courts*, Letter to Editor, WALL ST. J. (Dec. 6, 2018), <https://www.wsj.com/articles/only-the-best-candidates-for-federal-courts-1544127307> [<https://perma.cc/SLD4-NANG>].

years. Marco Hernandez can provide necessary ethnic, and impressive experiential, diversity resulting from legal services practice combined with Oregon judicial activity;¹⁹³ Michael Simon litigated for Perkins Coie over numerous years following analogous DOJ work for five years.¹⁹⁴ Michael McShane—who could improve sexual orientation, and crucial experiential, diversity from rigorous public defender initiatives and being a state jurist—fairly resolved the nascent Oregon marriage equality case.¹⁹⁵

Another potential source is the lone nominee whom Bush confirmed, Michael Mosman, who has productively served a number of years—half as chief judge—enjoyed appointment to the prestigious Foreign Intelligence Surveillance Court; and was earlier the very capable U.S. Attorney.¹⁹⁶ A third would be dynamic counsel who participate in federal actions.¹⁹⁷ The Supreme Court also can yield a promising aspirant. Martha Walters has systematically compiled an easily available record; she is the Chief Justice and was the first woman to be President of the National Commissioners on Uniform State Laws.¹⁹⁸

At this point, the senators could proffer a few submissions with explanations for prioritization and cooperate to suggest people who satisfy Trump and the politicians.¹⁹⁹ When they concur, all must labor with the senators' colleagues to implement

¹⁹³ He was a Bush district court nominee whom the Senate never processed. *Directory, supra* note 147; see Bernstein, *supra* note 69 (senators proposed him to Trump, who did not nominate); Charles Pope, *Senate Unanimously Approves Marco Hernandez to Be Federal Judge*, OREGONIAN (Feb. 7, 2011), https://www.oregonlive.com/politics/2011/02/senate_unanimously_approves_ma.html [<https://perma.cc/59WQ-SFMR>].

¹⁹⁴ *Directory, supra* note 147; see Charles Pope, *U.S. Senate Confirms Portland Attorney Michael Simon as Oregon Federal Judge*, OREGONIAN (June 21, 2011), https://www.oregonlive.com/politics/2011/06/senate_confirms_michael_simon.html [<https://perma.cc/MZ7C-9DHB>].

¹⁹⁵ He has served fewer years. *Directory, supra* note 147. *But see* Geiger v. Kitzhaber, 994 F. Supp. 2d 1128 (D. Or. 2014); Jeff Mapes, *Judge McShane Writes Unusually Personal Decision in Oregon Gay Marriage Case*, OREGONIAN (May 19, 2014), https://www.oregonlive.com/mapes/2014/05/judge_michael_mcshane_writes_u.html.

¹⁹⁶ *Directory, supra* note 147. *But see* Bryan Denson, *Portland Federal Judge Appointed to Secretive Surveillance Court*, OREGONIAN (June 7, 2013), https://www.oregonlive.com/portland/2013/06/portland_federal_judge_appoint.html; Charlie Savage, *Roberts's Picks Reshaping Secret Surveillance Court*, N.Y. TIMES (July 25, 2013), <https://nyti.ms/14ckW5d>.

¹⁹⁷ Obama nominated Simon from this bar. See sources cited *supra* note 194 and accompanying text.

¹⁹⁸ Amanda Bronstad, *Oregon Justice Elected ULC President*, NAT'L L.J. (Dec. 13, 2007), <https://www.law.com/nationallawjournal/almID/900005498268/?sreturn=20190111172917> [<https://perma.cc/6X4B-ZAL4>]; Lydia Gerike, *Martha Walters Sworn in as First Woman Chief Justice of Oregon Supreme Court*, OREGONIAN (July 2, 2018), https://www.oregonlive.com/politics/2018/07/martha_lee_walters_sworn_in_as.html [<https://perma.cc/69TY-E33N>]. Complete disclosure: Walters is a personal friend. Trump's penchant for younger picks may stop her, Mosman, and Bush district appointees whom I treated, none of whom Trump nominated. Rucker et al., *supra* note 46; sources cited *supra* note 150.

¹⁹⁹ For why and how they should do this, see sources cited *supra* note 130, 192 (suggesting that it would be efficient to start with the three candidates whom the selection panel recommended).

efficient, thorough, and fair confirmation procedures. Nothing specific for Oregon merits prescription until the senators furnish picks. Should Trump deem none acceptable, he might consider tapping another, when numerous propositions surveyed previously can apply.²⁰⁰

6. Washington

Judge Richard Tallman clearly announced that he would change status plenty of months before doing so.²⁰¹ Nevertheless, little public information existed regarding selection. Washington Democratic Senators Patty Murray and Maria Cantwell attempted to collaborate on district nominees with the White House Counsel by urging that Trump once again name three respected, moderate Obama submissions, but negligible progress materialized on the vacant district seats or the circuit position until July when the White House forwarded a trio of nominations.²⁰² One reliable source presciently delineated several major appellate prospects, who “fit the Trump nominee template: young, conservative (reflected in their Federalist Society ties), and well credentialed,” and the President tapped Eric Miller, a highly qualified, conservative lawyer who had practiced with the U.S. Solicitor General’s Office and Perkins Coie.²⁰³ On July 13, when Trump nominated Miller, Cantwell’s staff stated that she “did not and does not consent,” and Murray’s aides said that she needed to “review Miller’s record and qualifications before supporting” him.²⁰⁴

Although both Washington senators ultimately refused to deliver blue slips and strongly opposed Miller’s nomination, Grassley decided to schedule a hearing for Miller and Bade on October 24 after the Senate had recessed to campaign in the midterm elections.²⁰⁵ The exchange of letters between Senators Grassley and Murray

²⁰⁰ See *supra* Sections V.A.2, B.1–2; see also sources cited *supra* notes 192–98. For what is critical, see sources cited *supra* note 154.

²⁰¹ *Judicial Vacancies*, *supra* note 9 (listing confirmations from 2017–18); Lat, *Latest and Greatest*, *supra* note 139; see sources cited *supra* note 188.

²⁰² Sens. Murray & Cantwell Reaffirm Bipartisan Choices for Western District Vacancies, Apr. 14, 2017. The first three came from a bipartisan selection panel like other senators use. See sources cited *supra* notes 159, 191. Trump nominated a person whom the panel recommended and renamed one Obama nominee, Kathleen O’Sullivan, Press Release, Sixteenth Wave, *supra* note 61, and many more earlier to other courts. Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9, 25 (2017); see Tobias, *supra* note 63, at 417. He left one district seat open and named a circuit pick whom the panel did not suggest.

²⁰³ He was the “chair of appellate practice”; others were Joel Ard, an Immix Law Group IP litigator, and Matt Cooper, Boeing “vice president and assistant general counsel.” Lat, *Latest and Greatest*, *supra* note 139; see Press Release, Sixteenth Wave, *supra* note 61 (Miller).

²⁰⁴ Agueda Pacheco-Flores, *Three Seattle Attorneys Nominated for Federal Judgeships, Appellate Court*, SEATTLE TIMES (July 13, 2018), <https://www.seattletimes.com/seattle-news/3-seattle-attorneys-nominated-for-federal-judgeships-appellate-court> [<https://perma.cc/B2JQ-WM9J>]; see Kaplan, *supra* note 52.

²⁰⁵ This was rare, if not unprecedented. Oct. 24, 2018 *Hearing*, *supra* note 75. No

that immediately preceded his determination tellingly reveals the poverty of the Chair's approach to blue slips.²⁰⁶ However, the committee never granted Miller a discussion and ballot, and his nomination expired on January 2, 2019.²⁰⁷ Therefore, whether Trump will renominate Miller and, if so, whether the Senate will confirm him lacks clarity.

This uncertainty suggests that the politicians may want to activate their efficacious bipartisan panel which could search for, consider, interview, and denominate potential choices whom the senators recommend to the White House.²⁰⁸ Possible sources are four district judges whom President Bush confirmed and who have served effectively for more than ten years. Prior to nomination, Ricardo Martinez had been a knowledgeable state jurist and a dynamic U.S. Magistrate Judge; he is now Chief Judge.²⁰⁹ Ronald Leighton worked for over a quarter of a century with a prominent firm.²¹⁰ Benjamin Settle practiced over several decades before ascending to the court.²¹¹ Richard Jones was a prosecutor, state court jurist and DOJ lawyer preceding

Democrats attended and merely two Republicans appeared, while the hearing consumed fewer than twenty minutes and little of substance was elicited. Jordain Carney, *Controversial Trump Judicial Nominee Advances After Two Senators Attend Hearing*, THE HILL (Oct. 24, 2018), <https://thehill.com/homenews/senate/412976-controversial-trump-judicial-nominee-advances-after-two-senators-attend> [<https://perma.cc/HUN8-4LJ7>]. Many Native American individuals, groups, and tribes as well as numerous civil rights organizations strongly opposed Miller, principally because of his private representation of people and interests opposed to Native American rights and interests and partly because of his representation of the U.S. government in ways that opposed Native American rights and interests. Vanita Gupta, LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, *Oppose the Confirmation of Eric Miller to the U.S. Court of Appeals for the Ninth Circuit* (Oct. 23, 2018), <https://civilrights.org/resource/oppose-the-confirmation-of-eric-miller-to-the-u-s-court-of-appeals-for-the-ninth-circuit> [<https://perma.cc/85K3-ZTE7>]; NAT'L CONGRESS OF AMERICAN INDIANS, *Nat'l Congress of American Indians and Native American Rights Fund Oppose the Nomination of Eric Miller for the U.S. Court of Appeals for the Ninth Circuit* (Oct. 16, 2018), <http://www.ncai.org/news/articles/2018/10/16/national-congress-of-american-indians-and-native-american-rights-fund-oppose-the-nomination-of-eric-miller-to-the-u-s-court-of-appeals-for-the-ninth-circuit> [<https://perma.cc/8776-YA7P>].

²⁰⁶ Letter from Sen. Grassley to Sens. Patty Murray & Maria Cantwell, Oct. 18, 2018; Letter from Sen. Murray to Sen. Grassley (Oct. 22, 2018).

²⁰⁷ See sources cited *supra* note 141.

²⁰⁸ This commission worked well and resembles California and Oregon ones. See sources cited *supra* notes 159, 191.

²⁰⁹ *Directory, supra* note 147. See Nicole Narea, *Asylum Seekers Granted Quick Win in Filing-Deadline Suit*, LAW360 (Mar. 30, 2018, 5:16 PM), <https://www.law360.com/articles/1027963/asylum-seekers-granted-quick-win-in-filing-deadline-suit> [<https://perma.cc/4NPN-YXRK>].

²¹⁰ *Directory, supra* note 147; see Mike Carter, *Leighton an Active Republican, Judicial Nominee of Both Bushes*, SEATTLE TIMES (Sept. 25, 2010), <https://www.seattletimes.com/seattle-news/leighton-an-active-republican-judicial-nominee-of-both-bushes> [<https://perma.cc/T2H6-7AAH>].

²¹¹ *Directory, supra* note 147; see Gene Johnson, *Judge Tosses Challenge to Expanded Gun-Background Checks*, SEATTLE TIMES (May 7, 2015), <https://www.seattletimes.com/seattle-news/politics/judge-tosses-challenge-to-expanded-gun-background-checks> [<https://perma.cc/9LBD-CV5T>].

federal confirmation.²¹² All could bring significant experience—Martinez and Jones can improve ethnic diversity. Moreover, the four prospects have reached sixty-five and the current White House displays a penchant for tapping younger aspirants.²¹³ A related valuable notion may be the Washington Supreme Court. Practically all of the Justices would impart helpful expertise from lengthy court service,²¹⁴ and a few could increase gender and/or ethnic diversity.²¹⁵ The politicians can also recommend the three Obama trial court nominees whom the GOP denied review, although Trump is unlikely to choose any, he did tender one for the district bench.²¹⁶

At this juncture, the senators might wish to proffer several candidates and explicate their priorities while collaborating to suggest one aspirant on whom they and the President concur.²¹⁷ Once all carefully agree, they need to cooperate with the members and invoke a comprehensive and fair confirmation system. Little else particular to Washington necessitates mention until Trump decides whether to renominate Miller, and, if so, whether the chamber confirms him, but the main constructs above could apply.²¹⁸

CONCLUSION

The Ninth Circuit decides the most appeals least quickly in part because the court now faces six emergency openings. If President Trump and the Senate effectuate the recommendations posited, they can simultaneously fill all the vacancies with

²¹² *Directory, supra* note 147; see Kelly Cohen, *Federal Judge Allows Immigrants Rights Group to Continue Legal Work*, WASH. EXAMINER (May 17, 2017), <https://www.washingtonexaminer.com/federal-judge-allows-immigrants-rights-group-to-continue-legal-work> [https://perma.cc/5Y49-RQFZ].

²¹³ *Directory, supra* note 147; see Rucker et al., *supra* note 46; *supra* text accompanying note 203.

²¹⁴ Associate Chief Justice Charles Johnson and Justice Barbara Madsen have served over twenty-five years, and Chief Justice Mary Fairhurst and Justices Susan Owens and Debra Stephens have over seventeen years, on the High Court. JUDICIAL YELLOW BOOK (2018–19). All but Stephens are over sixty, so they may face the same issue as the Bush appointees. See sources cited *supra* note 213.

²¹⁵ Madsen, Fairhurst, Owens, and Stephens and Justices Sheryl McCloud and Mary Yu would afford gender diversity, while Yu and Justice Steven Gonzalez would provide ethnic diversity. JUDICIAL YELLOW BOOK, *supra* note 214.

²¹⁶ Trump has renominated fifteen fine, mainstream Obama district nominees and one is from Washington; most have won confirmation. Tobias, *supra* note 18; see Tobias, *supra* note 63, at 417; sources cited *supra* note 202. Obama confirmed no judges in the Western District of Washington.

²¹⁷ For why and how they should do this, see sources cited *supra* note 130.

²¹⁸ Should the Senate not approve Miller, ideas like ones in this piece ought to apply. See, e.g., *supra* Sections V.B.1–2, 5; see also sources cited *supra* note 189. For what is critical, see sources cited *supra* note 177. Trump did renominate Miller on January 22, 2019. Press Release, *supra* note 154. The Senate confirmed Miller on February 26. See 165 CONG. REC. S1,467 (daily ed. Feb. 26, 2019).

prominent, mainstream jurists who could better deliver justice and remedy the counterproductive downward spiraling process which undercuts it.

EPILOGUE

When this Article entered the publication process, the Ninth Circuit experienced six emergency vacancies in twenty-nine active judgeships. That number declined to four with the February 26 confirmation of Eric Miller to the Washington opening and the March 26 confirmation of Bridget Shelton Bade to the Arizona vacancy, and it may soon decrease to one with the confirmations of Daniel Collins, Kenneth Lee and Daniel Bress for the California openings. The Washington Democratic home state senators retained blue slips for Miller and the California Democratic senators kept their blue slips for all three nominees. However, Chair Graham refused to honor those slips, thus allowing Miller, Collins, Lee and Bress, to secure confirmation and further undercutting a century-old tradition. These recent developments may convert this piece to a cautionary tale.

Numerous reasons made the fast nominations and confirmations of Judges Miller, Collins, Lee and Bress controversial. In the White House's apparent haste to quickly nominate and confirm the maximum possible number of ideologically conservative, young appellate court judges, the administration engaged in virtually no consultation with the Washington senators and minimal consultation with the California senators, even though Feinstein serves as the Judiciary Committee Ranking Member. The White House's limited consultation violated longstanding tradition and principally led the Washington and California senators to withhold their blue slips.

The Republican Judiciary Committee Chair, for his part, refused to honor the Washington lawmakers' blue slips and conducted a hearing for Miller and Bade in late October 2018 when the Senate had recessed to campaign in the midterm elections. Graham also did not respect the California senators' blue slips and very promptly scheduled one hearing for both Collins and Lee, although Democrats lacked sufficient time to prepare for the session and comprehensively question each nominee, while it remains uncertain whether Lee divulged all of his writings, some of which appeared equally troubling as Bounds' writings which doomed his candidacy. In April, Graham seemed prepared to schedule a hearing for Bress, even though both California senators retained their slips and maintained that the White House nominated the candidate, who possesses tenuous links to California, in January without adequately consulting the legislators.

Thus, it remains unclear whether Judges Miller, Collins, Lee and Bress will serve as neutral arbiters, who fairly decide cases on the law and facts before them. It correspondingly appears uncertain whether the President's speedy nomination, and the Senate's quick confirmation, of controversial nominees in violation of White House and Senate rules, customs and norms has been worth the harm to the presidency and the Senate as institutions. However, it does remain clear that Trump and

the GOP Senate majority have contravened presidential and chamber strictures and conventions in ways that will be difficult to repair. Trump and the GOP Senate majority have certainly eviscerated the hallowed customs of assiduous White House consultation, blue slips and rigorous confirmation processes, which are the glue that binds the respective institutions. These phenomena will additionally undermine the institutions of the President as the leader of the free world and the Senate as the world's greatest deliberative body.