

2018

## Curing the Federal Court Vacancy Crisis

Carl Tobias

*University of Richmond - School of Law*, [ctobias@richmond.edu](mailto:ctobias@richmond.edu)

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### Recommended Citation

Carl Tobias, *Curing the Federal Court Vacancy Crisis*, 53 Wake Forest L. Rev. 883 (2018).

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# CURING THE FEDERAL COURT VACANCY CRISIS

Carl Tobias\*

*The federal judiciary has experienced a vacancy crisis, which has intensified over President Donald Trump's tenure when judicial openings significantly increased from the 105 vacancies at his inauguration. Despite these concerns, analysts hail court selection as Trump's paramount success. This Article canvasses the rise and expansion of the crisis and scrutinizes the practices which Trump and the 115th Senate instituted, as Republican concentration on quickly appointing many conservative appeals court judges resulted in departures from longstanding precedents and undermined the presidential discharge of constitutional responsibilities to nominate and confirm impressive jurists as well as senatorial duties to advise and consent. Finally, this Article surveys the implications of these procedures and proffers suggestions for the future. During the near term, the President should meticulously consult home state political figures and concomitantly revitalize deployment of ABA evaluations and ratings. The Senate, in turn, must analogously revitalize constructive devices, principally blue slips and complete, rigorous nominee hearings, committee discussions, and chamber debates. Over the longer term, the Republican and Democratic parties might consider effectuating a bipartisan judiciary, namely with the passage of judgeship legislation.*

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\* Williams Chair in Law, University of Richmond. I wish to thank Margaret Sanner for her valuable suggestions, Jane Baber and Emily Benedict for their valuable research and editing, the *Wake Forest Law Review* editors for their exceptional research and editing, Leslee Stone for her excellent processing, as well as Russell Williams and the Hunton Andrews Kurth Summer Research Endowment Fund for their generous, continuing support. Remaining errors are mine alone.

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## I. INTRODUCTION

American citizens view President Donald Trump substantially less favorably than his Republican and Democratic predecessors,<sup>1</sup> although public approval ratings for the White House remain much higher than the 115th Senate.<sup>2</sup> The federal judicial vacancy crisis has also intensified over President Trump's tenure because empty seats correspondingly rose from 105 the month preceding his inauguration to 142 twenty months later.<sup>3</sup> Despite those concerns, prominent analysts hail federal court selection as Trump's paramount success,<sup>4</sup> praising the record-setting confirmations of appellate jurists across his initial two years.<sup>5</sup> Because cascading, protracted vacancies are a conundrum of modern United States governance,<sup>6</sup> the appointments process since Trump's presidency commenced deserves evaluation.

Part II canvasses the rise and expansion of the vacancy crisis, appreciating that the crisis is comprised of persistent and current difficulties, the latter of which requires emphasis. Part III scrutinizes the judicial selection practices that President Trump and the 115th

1. See Jeffrey M. Jones, *Trump's Fifth-Quarter Job Approval Up; Still Historically Low*, GALLUP (Apr. 24, 2018), <https://news.gallup.com/poll/233135/trump-fifth-quarter-job-approval-historically-low.aspx?version=print>.

2. See Eugene Scott, *Trump's Approval Rating May Be Increasing, but the Same Can't Be Said for Congress's*, WASH. POST (Mar. 29, 2018), [https://www.washingtonpost.com/news/the-fix/wp/2018/03/29/trumps-approval-rating-may-be-increasing-but-the-same-cant-be-said-for-congress/?noredirect=on&utm\\_term=.0aa3a21e1ca8](https://www.washingtonpost.com/news/the-fix/wp/2018/03/29/trumps-approval-rating-may-be-increasing-but-the-same-cant-be-said-for-congress/?noredirect=on&utm_term=.0aa3a21e1ca8).

3. *Vacancy Summary for December 2016*, ADMIN. OFF. OF THE U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2016/12/summary> (last updated Dec. 21, 2016) [hereinafter *Vacancy Summary for December 2016*]; *Vacancy Summary for October 2018*, ADMIN. OFF. OF THE U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/10/summary> (last updated Nov. 10, 2018).

4. See Sahil Kapur & Laura Litvan, *McConnell Cements a Legacy for Trump with Reshaped Courts*, BLOOMBERG (Apr. 27, 2018, 4:00 AM), <https://www.bloomberg.com/news/articles/2018-04-27/mcconnell-cements-a-legacy-for-trump-with-reshaped-u-s-courts>.

5. See, e.g., Jordain Carney, *Republicans Confirming Trump's Court Nominees at Record Pace*, HILL (May 5, 2018, 4:52 PM), <https://thehill.com/homenews/senate/385728-republicans-confirming-trumps-court-nominees-at-record-pace>.

6. See discussion *infra* Part II.B.

Senate instituted. An investigation of these practices reveals that Trump felicitously tapped a significant quantity of nominees, but the White House eschewed multiple venerable conventions—including the assiduous consultation of politicians from jurisdictions with unfilled slots as well as the comprehensive American Bar Association (“ABA”) candidate examinations and ratings—on which contemporary predecessors have deftly relied. Part III then assesses the confirmation process, ascertaining that the Judiciary Committee deemphasized several important norms, particularly the “blue slip” tradition—which proscribes hearings unless home-state politicians signal approval of choices—and the careful arrangement of hearings, which earlier panels had steadfastly respected. The Grand Old Party (“GOP”) Senate majority leadership similarly, albeit less frequently, violated numerous customs pertaining to Senate floor debates and votes.

Part IV surveys the implications of these procedures, finding that more judicial openings exist now than at the Trump presidency’s outset. Single-minded Republican concentration on quickly appointing conservative appellate court judges departs from longstanding precedents—notably robust consultation and employment of significant ABA input and blue slips—seemingly undermining both presidential constitutional responsibilities to nominate and confirm impressive jurists, as well as senators’ fulfillment of their constitutional duties to provide advice and consent. Moreover, the sheer number of vacancies and their prolonged character have eroded the judiciary’s constitutional obligation to swiftly, inexpensively, and fairly resolve cases. The Republican emphasis on ideology and counterproductive partisanship has made numerous jurists ideologically and rhetorically resemble the President and members of Congress and has sharply politicized the judiciary, thus somewhat decreasing public regard for the courts.

Part V, accordingly, proffers suggestions for the future. During the near term, the President ought to meticulously consult home-state political figures and concomitantly revitalize the deployment of ABA evaluations and ratings. The Senate in turn must analogously revitalize constructive devices—principally blue slips, as well as rigorous nominee hearings, committee discussions, and chamber debates. Over the longer term, the Republican and Democratic parties might cautiously review endeavors to address the “confirmation wars” through global solutions, which include effectuating a bipartisan judiciary, namely with the passage of legislation that would authorize many new judgeships.

## II. MODERN SELECTION DIFFICULTIES

The history of judicial vacancies deserves little scrutiny here, as this background has been chronicled elsewhere<sup>7</sup> and reviewed more extensively than the current vacancy problem. One essential notion is the persistent federal judicial vacancies dilemma that resulted from enhanced federal court jurisdiction, lawsuits, and judgeships.<sup>8</sup> The other salient facet contributing to judicial vacancies, the modern concern, is political and can be attributed to conflicting White House and Senate party control, which began thirty-eight years ago.<sup>9</sup>

A. *Persistent Vacancies*

Legislators enlarged jurisdiction in the 1960s,<sup>10</sup> federalizing criminal behavior and fashioning new civil causes of action, which increased district court filings and corresponding appeals.<sup>11</sup> Congress in turn responded by expanding judicial posts.<sup>12</sup> In the fifteen years after 1980, confirmation times mounted.<sup>13</sup> For instance, federal

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7. See generally KENNETH W. THOMPSON, MILLER CTR. COMM'N, REPORT OF THE COMMISSION ON THE SELECTION OF FEDERAL JUDGES (1996) [hereinafter SELECTION COMMISSION]; Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319 (1994).

8. This notion needs less analysis; delay is intrinsic, resists felicitous solution, and has been assessed. See Comm. on Fed. Courts, *Remedying the Permanent Vacancy Problem in the Federal Judiciary: The Problem of Judicial Vacancies and Its Causes*, 42 REC. ASS'N B. CITY N.Y. 374, 376, 382, 384 n.3 (1987) (explaining the nonpolitical reasons for persistent judicial vacancies) [hereinafter Comm. on Fed. Cts.]; see also Bermant et al., *supra* note 7, at 322, 339, 344 (explaining that persistent judicial vacancies do not solely result from the political process).

9. See discussion *infra* Part II.B.

10. See Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1270 (1996); SELECTION COMMISSION, *supra* note 7, at 3.

11. See, e.g., Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 34 U.S.C. §§ 12101-12643); Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.).

12. See 28 U.S.C. §§ 44, 133 (2012); ADMIN. OFF. OF THE U.S. COURTS, CHRONOLOGICAL HISTORY OF AUTHORIZED JUDGESHIPS IN U.S. COURTS OF APPEALS, <http://www.uscourts.gov/sites/default/files/appealschronol.pdf> (last visited Sept. 29, 2018) [hereinafter CHRONOLOGICAL HISTORY OF AUTHORIZED JUDGESHIPS IN U.S. COURTS OF APPEALS]; ADMIN. OFF. OF THE U.S. COURTS, CHRONOLOGICAL HISTORY OF AUTHORIZED JUDGESHIPS IN U.S. DISTRICT COURTS, <http://www.uscourts.gov/sites/default/files/Chronological%20History%20of%20Authorized%20Judgeships%20%28pdf%29> (last visited Nov. 12, 2018); see also Federal Judgeship Act of 2013, S. 1385, 113th Cong. (2013) (proposing the most recent comprehensive legislation that would authorize an increase in the number of federal judgeships).

13. JUDICIAL CONF. OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 103 (1995), [http://www.uscourts.gov/sites/default/files/federalcourtslongrangeplan\\_0.pdf](http://www.uscourts.gov/sites/default/files/federalcourtslongrangeplan_0.pdf).

nominations spanned twelve months, while confirmations consumed three months.<sup>14</sup> Conditions acutely worsened later. For example, circuit nominations demanded twenty months for appointments during 1997,<sup>15</sup> the first year in Bill Clinton's last term, and in 2001, the earliest of George W. Bush's first term.<sup>16</sup>

The confirmation process' convoluted steps and participants make some delay intrinsic.<sup>17</sup> Presidents consult home-state political officers, seeking advice respecting prospects.<sup>18</sup> Senators in these jurisdictions depend on merit selection panels that evaluate aspiring judges and submit talented persons.<sup>19</sup> The Federal Bureau of Investigation then undertakes intensive "background checks."<sup>20</sup> The ABA examines and rates candidates.<sup>21</sup> The Department of Justice ("DOJ") may help screen individuals and prepare nominees for Senate review.<sup>22</sup> The Judiciary Committee analyzes presidential nominations, schedules hearings for candidates, discusses them, and casts votes.<sup>23</sup> Those whom the panel approves might receive chamber debates, when necessary, preceding final ballots.<sup>24</sup>

### B. *The Contemporary Dilemma*

Although federal judicial selection has always been infused with politics, Article II of the U.S. Constitution envisions that senators may limit unwise executive choices.<sup>25</sup> However, partisanship has

14. See SELECTION COMMISSION, *supra* note 7, at 3.

15. See Carl W. Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 771–72 (2010).

16. See Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 904–08 (2004); Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL'Y 1035, 1037–38 (2009). Each resembled Obama's initial and last two years.

17. Bermant et al., *supra* note 7, at 320–21; Sheldon Goldman, *Obama and the Federal Judiciary: Great Expectations but Will He Have a Dickens of a Time Living Up to Them?*, 7 FORUM 8, 9–10 (2009).

18. Bermant et al., *supra* note 7, at 321.

19. Carl Tobias, *Filling the Texas Federal Court Vacancies*, 95 TEX. L. REV. 170, 172 (2017). When at least one of the senators is a member of the President's political party, the President typically consults them. When both senators are not, the President normally consults these senators and the highest-ranking elected official of the President's party in the state, either the governor or the senior member of the House of Representatives delegation.

20. Goldman, *supra* note 17, at 10.

21. See SELECTION COMMISSION, *supra* note 7, at 4–5; see also AMERICAN BAR ASSOCIATION, *THE ABA STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS* 1–2 (2002) [hereinafter ABA STANDING COMMITTEE].

22. Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2188 (2011).

23. Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 255 (1999).

24. Tobias, *supra* note 19, at 172.

25. THE FEDERALIST NO. 76, at 513 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A*

driven the judicial confirmation process and was enhanced when Richard Nixon constantly declared that he would impose “law and order” by consciously appointing “strict constructionists,”<sup>26</sup> while partisanship perceptibly expanded after D.C. Circuit Judge Robert Bork’s monumental Supreme Court fight.<sup>27</sup> Politicization skyrocketed, and government was divided.<sup>28</sup> The clear hope was the party that was not in control of the White House would recapture the presidency and have the opportunity to seat jurists, and that prospect promoted delay.<sup>29</sup>

Relatively slow nominations might explain the dearth of confirmations. In early 1997 and 2001, Clinton and Bush nominated rather small numbers of circuit possibilities, and opponents criticized several.<sup>30</sup> Politicians who tendered applicants often stalled the pace.<sup>31</sup> Bush’s minimal consultation limited selection,<sup>32</sup> and negligible GOP review of Clinton judicial candidates may have driven paybacks.<sup>33</sup> The committee shared responsibility because the panel slowly assessed, conducted hearings for, and voted on nominees.<sup>34</sup>

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CONSTITUTIONAL AND HISTORICAL ANALYSIS 50 (2000); SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 4 (1997).

26. GOLDMAN, *supra* note 25, at 198; DAVID M. O’BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 20 (1988).

27. *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 11–12 (1992); JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 18–19 (2007).

28. O’BRIEN, *supra* note 26, at 48.

29. *Id.*

30. Press Release, Office of the Press Sec’y, President Clinton Nominates Twenty Two to the Federal Bench (Jan. 7, 1997), <https://clintonwhitehouse6.archives.gov/1997/01/1997-01-07-names-of-twenty-two-for-federal-bench-resubmitted.html>; Remarks Announcing Nominations for the Federal Judiciary, 37 WEEKLY COMP. OF PRES. DOC. 724 (May 9, 2001).

31. Republican senators demanded to have input, and many lawmakers even recommended names to the White House. *See* 143 CONG. REC. 4253–54 (1997) (statement of Sen. Biden); Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9, 19 (2017), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol74/iss1/2>; Neil Lewis, *Clinton Has Chance to Shape Courts: But Republicans Hope to Thwart His Selections of Federal Judges*, N.Y. TIMES, Feb. 9, 1997, at 30.

32. *See* David L. Greene & Thomas Healy, *Bush Sends Judges List to Senate: The 11 Nominees Are Carefully Selected to Mollify Democrats; Notable for Diversity; U.S. Appeals Court Candidates Include Vocal Conservatives*, SUN (Balt.), May 10, 2001, at 1A; *see also* Elliot E. Slotnick, *Appellate Judicial Selection During the Bush Administration: Business as Usual or a Nuclear Winter?*, 48 ARIZ. L. REV. 225, 234 (2006).

33. Paul A. Gigot, *How Feinstein Is Repaying Bush on Judges*, WALL ST. J., May 9, 2001, at A26; Neil A. Lewis, *Party Leaders Clash Over Pace of Filling Judgeships*, N.Y. TIMES, May 10, 2002, at A33.

34. *Compare* 143 CONG. REC. 4254 (1997) (statement of Sen. Biden) (asserting that Democrats conducted two hearings every month throughout

These phenomena meant that in 1997 and 2001, few candidates secured approval due to resource constraints and ideological differences.<sup>35</sup> Pressing chamber business and unanimous consent, which enabled one member to halt ballots, stymied numerous floor votes.<sup>36</sup>

These factors worsened over more recent administrations. During President Barack Obama's tenure, Republican obstruction reached new depths,<sup>37</sup> a situation best illustrated by the unprecedented refusal to even process Merrick Garland, Obama's Supreme Court nominee.<sup>38</sup> After the GOP won a 2015 Senate majority, it did not evaluate most Obama prospects and confirmed the least number of jurists since Harry Truman was President,<sup>39</sup> leaving 105 vacancies upon Trump's ascension.<sup>40</sup> Given the shoddy treatment of Obama's choices by Republicans, it is not surprising that Democrats might appear relatively uncooperative by, for example, demanding cloture and roll call ballots for virtually all Trump candidates.<sup>41</sup>

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1987–94), with Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 744 (1997) (suggesting that the committee conducted one circuit nominee hearing a month when the Senate was in session).

35. Tobias, *supra* note 34, at 753; Neil Lewis, *Bush and Democrats in Senate Trade Blame for Judge Shortage*, N.Y. TIMES, May 4, 2002, at A9.

36. Jennifer Bendery, *Republicans Still Find Ways to Stall Judicial Nominees Despite Filibuster Reform*, HUFFINGTON POST (Feb. 8, 2014, 9:42 AM), [https://www.huffingtonpost.com/2014/02/08/republicans-judicial-nominees\\_n\\_4748528.html](https://www.huffingtonpost.com/2014/02/08/republicans-judicial-nominees_n_4748528.html).

37. Carl Tobias, *The Republican Senate and Regular Order*, 101 IOWA L. REV. ONLINE 12, 14 (2016).

38. Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089, 1100 (2017); see Robin Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers To Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 58 (2016); Ruth Marcus, *Opinion, Trump's Dangerous Plot to Weaponize the Supreme Court*, WASH. POST (Mar. 30, 2018), [https://www.washingtonpost.com/opinions/trumps-dangerous-plot-to-weaponize-the-supreme-court/2018/03/30/60b53a04-343d-11e8-94fa-32d48460b955\\_story.html](https://www.washingtonpost.com/opinions/trumps-dangerous-plot-to-weaponize-the-supreme-court/2018/03/30/60b53a04-343d-11e8-94fa-32d48460b955_story.html).

39. See 163 CONG. REC. S8021–24 (daily ed. Dec. 14, 2017) (statements of Sens. Leahy, Feinstein, and Warren); see also Tobias, *supra* note 37, at 13 (describing how Republicans repeatedly claimed that they were restoring “regular order,” but the GOP failed to do so).

40. *Vacancy Summary for December 2016*, *supra* note 3.

41. See, e.g., 163 CONG. REC. S4613 (daily ed. July 31, 2017) (confirming the nomination of Kevin Newsom); 163 CONG. REC. S3124 (daily ed. May 24, 2017) (approving a motion for cloture to close debate on the nomination of Amul Thapar); see also sources cited *infra* note 103 (finding that many Trump nominees received party-line committee approval).



## III. TRUMP ADMINISTRATION JUDICIAL SELECTION

A. *Nomination Process*

Throughout the presidential campaign, Trump specifically promised to name and seat ideological conservatives on the bench,<sup>42</sup> and he kept his pledge by mustering and confirming Justices Neil Gorsuch and Brett Kavanaugh as well as many similar circuit and district nominees.<sup>43</sup> This White House broke records for appointing circuit judges Trump's initial year with a dozen confirmations,<sup>44</sup> appointing even greater numbers the second year.<sup>45</sup> Trump has ultimately tendered more nominees than recent predecessors.<sup>46</sup>

Trump deploys some previously well-regarded conventions, even as he omits, ignores, or downplays several effective traditions. For instance, like every contemporary President, Trump assigns lead selection responsibility to the White House Counsel, Donald McGahn, places related duties in the DOJ, emphasizes appellate court rather than trial-level openings, and defers substantially on the latter vacancies to politicians in home states.<sup>47</sup>

When forwarding appellate court nominees, the White House Counsel accentuates youth and conservative perspectives by, for example, applying litmus tests, which clearly include opposition to the administrative state,<sup>48</sup> and relying mainly on the list of

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42. Tobias, *supra* note 38, at 1101, 1104.

43. 164 CONG. REC. S6702 (daily ed. Oct. 5, 2018); Tobias, *supra* note 38, at 1101–02; see Sheryl Gay Stolberg, *Senate Votes 50-48 to Put Kavanaugh on Supreme Court*, N.Y. TIMES, Oct. 7, 2018, at A1.

44. *Confirmation Listing*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/confirmation-listing> (last updated Oct. 19, 2018).

45. *Id.*

46. See Yuvraj Joshi, *Neil Gorsuch's Legacy Is Already Devastating*, SLATE (Apr. 4, 2018, 11:58 AM), <https://slate.com/news-and-politics/2018/04/neil-gorsuchs-legacy-is-already-devastating.html> (sending a “torrent of judicial nominations: 69 in his first year in office, more than double Barak Obama’s 34 at a similar point in his presidency.”).

47. Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2235, 2239 (2013); 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?utm\\_term=.2013e35856c1](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?utm_term=.2013e35856c1); Charlie Savage, *Hand Guiding President Through a Legal Storm*, N.Y. TIMES, Jan. 27, 2018, at A1; Michael Schmidt & Maggie Haberman, *Lawyer for President Steps Down*, N.Y. TIMES, Oct. 18, 2018, at A13. This deference is warranted, because home-state senators have greater familiarity with candidates who would be excellent judges in their jurisdictions, and senators must be accountable to the electorate for the appointment of these judges, while most district nominees are selected for their competence and will make less policy than circuit judges whose rulings govern multiple states. See *infra* note 66 and accompanying text.

48. Jeremy W. Peters, *Trump’s New Judicial Litmus Test: Shrinking ‘the Administrative State’*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018>

twenty-one potential Supreme Court picks whom the Federalist Society and Heritage Foundation compiled in 2016.<sup>49</sup> The above practices continue because the Federalist Society's Executive Vice President, Leonard Leo, advises Trump on selections.<sup>50</sup>

No White House in U.S. history ceded this much responsibility to a nongovernmental entity, although President Bush may have derived some help from the Federalist Society.<sup>51</sup> Trump's actions stress the circuit courts<sup>52</sup> because they are courts of last resort for ninety-nine percent of federal cases, they articulate significantly more policy than district courts, and they issue rulings which cover several jurisdictions.<sup>53</sup> Nearly all of his circuit judges are especially conservative, quite youthful, and very capable.<sup>54</sup>

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/03/26/us/politics/trump-judges-courts-administrative-state.html; see *infra* note 130 and accompanying text.

49. See Charlie Savage, *Courts Reshaped at Fastest Pace in Five Decades*, N.Y. TIMES, Nov. 12, 2017, at A1; Jeffrey Toobin, *Full Court Press*, NEW YORKER, Apr. 17, 2017, at 24; Press Release, Office of the Press Sec'y, President Donald J. Trump's Supreme Court List, (Nov. 17, 2017) <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-supreme-court-list/>. For additional information on the Federalist Society, see generally AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015) (detailing the work of the Federalist Society).

50. Zoe Tillman, *After Eight Years on the Sidelines, This Conservative Group Is Reshaping the Courts Under Trump*, BUZZFEED NEWS (Nov. 20, 2017, 8:06 AM), <https://www.buzzfeednews.com/article/zoetillman/after-eight-years-on-the-sidelines-this-conservative-group>; see Peters, *supra* note 48 (evaluating Leonard Leo's impact); Toobin, *supra* note 49.

51. See Jason DeParle, *Debating the Subtle Sway of the Federalist Society*, N.Y. TIMES (Aug. 1, 2005), <https://www.nytimes.com/2005/08/01/politics/politicsspecial1/debating-the-subtle-sway-of-the-federalist.html>; Neil A. Lewis, *Conservative Lawyers Voice Abundant Joy*, N.Y. TIMES (Nov. 13, 2004), <https://www.nytimes.com/2004/11/13/politics/conservative-lawyers-voice-abundant-joy.html>. But see 2017 *National Lawyers Convention: White House Counsel McGahn*, C-SPAN (Nov. 17, 2017), <https://www.c-span.org/video/?437462-8/2017-national-lawyers-convention-white-house-counsel-mcgahn> [hereinafter 2017 *National Lawyers Convention*] (denying that the Trump White House outsourced judicial selection to the Federalist Society).

52. Joan Biskupic, *Trump Fast-Tracks Appeals Judges, but Lags on Lower Courts*, CNN (May 25, 2018, 6:16 AM), <https://www.cnn.com/2018/05/25/politics/appeals-district-court-trump/index.html>.

53. 163 CONG. REC. S8023–24 (daily ed. Dec. 14, 2017) (statement of Sen. Feinstein); Tobias, *supra* note 47, at 2240–41. See generally GOLDMAN, *supra* note 25 (analyzing the strategies of presidential lower court appointments, especially for the appeals courts, from Roosevelt through Reagan).

54. See *Standing Committee on the Federal Judiciary: Ratings of Article III and Article IV Judicial Nominees, 115th Congress*, AM. BAR ASS'N (Oct. 16, 2018), <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Web%20rating%20Chart%20Trump%20115.authcheckdam.pdf> [hereinafter ABA RATINGS] (showing the ABA's "well qualified" ratings for most of Trump's circuit court judges); see also Thomas Kaplan, *Trump Is Putting Indelible Conservative*

However, this administration contravenes, ignores, or deemphasizes vaunted traditions. Perhaps most essential is the failure to assertively consult home-state officials,<sup>55</sup> an efficacious custom that White Houses normally follow. That was a primary reason for blue slips, while during Obama's presidency the Senate Judiciary Committee Chairs only permitted hearings when both home-state politicians returned slips.<sup>56</sup> Michigan, Minnesota, New Jersey, Ohio, Oregon, Pennsylvania, and Washington Democratic senators found that White House Counsel engaged in little or no active consultation respecting appellate openings that existed for their jurisdictions,<sup>57</sup> and McGahn proclaimed that consultation was absent from the Constitution.<sup>58</sup> Indeed, Senator Tammy Baldwin (D-WI) accused President Trump of marshaling a Seventh Circuit nominee, Michael Brennan, who actually lacked the requisite votes from a bipartisan selection commission, which had successfully examined, interviewed, and proposed judicial candidates for three decades,<sup>59</sup> Senator Bob Casey (D-PA) had concomitantly proffered

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*Stamp on Judiciary*, N.Y. TIMES (July 31, 2018), <https://www.nytimes.com/2018/07/31/us/politics/trump-judges.html>.

55. See Kaplan, *supra* note 54.

56. 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=.27d6dd280a05](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=.27d6dd280a05).

57. See Jennifer Brooks & Stephen Montemayor, *David Stras Gets Long-Delayed Senate Hearing for Federal Judgeship*, STAR TRIB. (Jan. 6, 2018, 2:44 PM), <http://www.startribune.com/minnesota-justice-david-stras-set-for-senate-confirmation-hearing-wednesday/460755193/>; Melissa Burke, *Larsen's Hearing for Federal Bench Set for Next Week*, DET. NEWS (Aug. 31, 2017, 9:56 AM), <https://www.detroitnews.com/story/news/politics/2017/08/31/larsen-federal-judicial-hearing-set/105143430/>; Kaplan, *supra* note 54; Zoe Tillman, *Here's How Trump Is Trying to Remake His Least Favorite Court*, BUZZFEED NEWS (Mar. 16, 2018, 9:06 AM), <https://www.buzzfeednews.com/article/zoetillman/heres-who-the-white-house-pitched-for-the-federal-appeals>. *But see* Barnes & O'Keefe, *supra* note 56 (describing how Leonard Leo claims that the Trump Administration is engaging in a "vigorous consulting process" with senators).

58. See *2017 National Lawyers Convention*, *supra* note 51.

59. See *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Jan. 24, 2018), <https://www.judiciary.senate.gov/meetings/01/24/2018/nominations>; Tobias, *supra* note 47, at 2256; Craig Gilbert, *Milwaukee Lawyer Michael Brennan Confirmed for U.S. Court of Appeals, Ending Long Vacancy Amid Bitter Partisan Dispute*, MILWAUKEE J. SENTINEL (May 10, 2018, 4:25 PM), <https://www.jsonline.com/story/news/politics/2018/05/10/senate-confirms-michael-brennan-u-s-court-appeals/598340002/>; Todd Ruger, *Grassley Moves on Judicial Nominee over Baldwin's Objection*, ROLL CALL (Jan. 24, 2018, 5:04 AM), <https://www.rollcall.com/news/politics/grassley-moves-judicial-nominee-baldwins-objection>; Bruce Vielmetti, *Trump Court Pick Michael Brennan Faces Senate Judiciary Committee*, MILWAUKEE J. SENTINEL (Jan. 24, 2018, 2:48 PM), <https://www.jsonline.com/story/news/politics/2018/01/24/trump-court-pick-michael-brennan-faces-senate-judiciary-committee/1061965001/>.

numerous well-qualified, mainstream candidates for White House scrutiny who received little consideration because Casey suggested that the executive had preselected another person who became the nominee.<sup>60</sup> Another trenchant example of the White House consultation approach was furnished by Senator John Kennedy (R-LA) who argued in a Louisiana Fifth Circuit nominee's hearing that the White House Counsel had effectively instructed him whom the nominee was.<sup>61</sup>

A related major departure from relevant precedent was Trump's exclusion of the ABA from involvement with selection.<sup>62</sup> All presidents who followed Dwight Eisenhower, save George W. Bush, comprehensively invoked ABA evaluations and ratings when nominating choices, while Obama dutifully refrained from mustering designees whom the ABA ranked not qualified.<sup>63</sup> However, Trump marshaled six nominees who drew this rating, and the chamber approved one for a circuit position and two others for district slots.<sup>64</sup>

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60. See *Executive Business Meeting*, SENATE JUDICIARY COMMITTEE (July 19, 2018), <https://www.judiciary.senate.gov/meetings/07/19/2018/executive-business-meeting> (allowing a committee vote despite Senator Casey's slip retention and honoring Senator Toomey's for Obama Third Circuit nominee); Jonathan Tamari, *Pat Toomey Used Senate Tradition to Block an Obama Pa. Judicial Pick. GOP Leaders Won't Give Bob Casey the Same Deference*, PHILA. INQUIRER (July 17, 2018), <http://www2.philly.com/philly/news/politics/pat-toomey-used-senate-tradition-to-block-an-obama-judicial-pick-from-pa-gop-leaders-wont-give-bob-casey-the-same-deference-20180717.html>.

61. See *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Nov. 29, 2017) <https://www.judiciary.senate.gov/meetings/11/29/2017/nominations>; Todd Ruger, *Senate Republicans Steamroll Judicial Process*, ROLL CALL (Jan. 18, 2018, 11:33 AM), <https://www.rollcall.com/news/policy/the-senates-consent-machine>; Sam Stein, *GOP Pushes Back as Trump's Lawyer Tries to Stack the Bench*, DAILY BEAST (Dec. 18, 2017, 4:23 PM), <https://www.thedailybeast.com/trump-nominees-humiliation-puts-spotlight-on-white-house-counsel-don-mcgahn>; see also Kaplan, *supra* note 54 (discussing the White House Counsel's similar treatment of the New Jersey, Ohio, Oregon and Washington senators); *infra* notes 84-87 and accompanying text (discussing similar treatment of these senators—senators from Minnesota and Oregon and Senators Baldwin and Casey—by Senator Chuck Grassley, the Judiciary Committee Chair, when he refused to honor their blue slips).

62. See Savage, *supra* note 49.

63. 163 CONG. REC. S8021-24 (daily ed. Dec. 14, 2017) (statements by Sens. Feinstein and Leahy); 163 CONG. REC. S8042 (daily ed. Dec. 14, 2017) (statement of Sen. Durbin); Adam Liptak, *White House Ends Bar Association's Role in Vetting Judges*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/us/politics/white-house-american-bar-association-judges.html>.

64. 163 CONG. REC. S8024 (daily ed. Dec. 14, 2017) (statement of Sen. Feinstein) (observing that the last judge with this rating was approved in 1989); ABA RATINGS, *supra* note 54. GOP senators disputed Steven Grasz's ABA rating, arguing that the ABA is a liberal interest group. See *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Nov. 1, 2017), <https://www.judiciary.senate.gov/meetings/11/01/2017/nominations> (statement of Sen. Chuck Grassley); *Results of Executive Business Meeting*, SENATE JUDICIARY COMMITTEE (Dec. 7, 2017), [https://www.judiciary.senate.gov/imo/media/doc/Results%20of%20Executive%](https://www.judiciary.senate.gov/imo/media/doc/Results%20of%20Executive%20)

McGahn reportedly was so disenchanted with the ABA that he advised nominees to eschew cooperation when the bar association undertook its investigations.<sup>65</sup>

The Executive relies upon more conventional procedures when suggesting district nominees. For instance, this White House, like recent predecessors, depends greatly on recommendations from home-state officers, and the administration bases most nominations principally on competence vis-à-vis ability to manage substantial caseloads.<sup>66</sup> Plentiful submissions are excellent candidates and hold distinguished ABA rankings.<sup>67</sup> However, three district nominees withdrew and two more were rated not qualified,<sup>68</sup> partially because they failed to muster complete information or their hearing preparation lacked sufficient care.<sup>69</sup> Despite these issues, Trump withdrew very few nominees and admonished Senator Kennedy and his Republican colleagues, advising them to discharge their advice and consent responsibilities by voting against his nominees whom they considered unqualified.<sup>70</sup>

The White House also ignores or underemphasizes multiple efficacious practices. One is the seeming dearth of effort to prioritize nominations by suggesting picks who reduce the 132 district court

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20Business%20Meeting%202012-07-17.pdf; 163 CONG. REC. S7288 (daily ed. Nov. 16, 2017) (statement of Sen. Sasse); 163 CONG. REC. S7964–65 (daily ed. Dec. 12, 2017) (confirming Eighth Circuit Judge Grasz); 164 CONG. REC. S5590 (daily ed. Aug. 1, 2018) (confirming District of Kansas Judge Holly Teeter); 164 CONG. REC. S5981 (daily ed. Aug. 22, 2018) (confirming Western District of Oklahoma Judge Charles Goodwin); *infra* note 170 and accompanying text.

65. See Liptak, *supra* note 63; cf. Savage, *supra* note 49 (finding that ABA's independent guardrail role is weakening).

66. See Tobias, *supra* note 31, at 19, 25–26. *But see* Seung Min Kim, *Trump's Judge Picks: 'Not Qualified,' Prolific Bloggers*, POLITICO (Oct. 17, 2017, 5:05 AM), <https://www.politico.com/story/2017/10/17/trump-judges-nominees-court-picks-243834>.

67. Western District of Texas Judge Walter Counts and Northern District of Texas Judge Karen Gren Scholer are examples. See ABA STANDING COMMITTEE, *supra* note 21.

68. See Rucker et al., *supra* note 47; Jennifer Bendery, *Trump Judicial Nominee Drops Out After Embarrassing Hearing*, HUFFINGTON POST (Dec. 18, 2017, 1:35 PM), [https://www.huffingtonpost.com/entry/donald-trump-judicial-nominee-matthew-petersen\\_us\\_5a37ec14e4b0ff955ad51e82](https://www.huffingtonpost.com/entry/donald-trump-judicial-nominee-matthew-petersen_us_5a37ec14e4b0ff955ad51e82).

69. See Elliot Minberg, *4 Steps to Restore Thorough Senate Vetting of Judicial Nominees*, HILL (Dec. 26, 2017, 1:30 PM), <http://thehill.com/opinion/judiciary/366490-4-steps-to-restore-thorough-bipartisan-senate-vetting-of-judicial-nominees>; see also Bendery, *supra* note 68; Rucker et al., *supra* note 47.

70. See Bendery, *supra* note 68; see also Press Release, Office of the Press Sec'y, President Donald J. Trump Announces Renomination of 21 Judicial Nominees (Jan. 5, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-renomination-21-judicial-nominees/>. *But see* Zoe Tillman, *Trump Had a Good Year Confirming Judges, But He's a Long Way from Reshaping the Courts*, BUZZFEED NEWS (Dec. 27, 2017, 12:47 PM), <https://www.buzzfeednews.com/article/zoetillman/trump-had-a-good-year-getting-judges-confirmed-but-hes> (describing Leo's defense of McGahn's vetting).

and the sixty-three “judicial emergency” vacancies;<sup>71</sup> the U.S. Courts Administrative Office bases the latter on their protracted length or huge caseloads.<sup>72</sup> Illustrative is that emergencies have multiplied since the GOP won the Senate.<sup>73</sup> Trump moreover taps considerably fewer nominees in jurisdictions represented by Democrats,<sup>74</sup> even though many are inundated with a plethora of emergencies.<sup>75</sup> In fact, California and New York together experience vacancies in twenty-one circuit and district court slots, more than half of which are emergencies.<sup>76</sup> However, Trump failed to recommend a single candidate for the New York vacancies until May 10, 2018, and Trump failed to nominate anyone for the California openings until October 10, 2018.<sup>77</sup>

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71. Judicial vacancy and emergency numbers are based on October 19, 2018 numbers. See *Current Judicial Vacancies*, ADMIN. OFF. OF THE U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> (last updated Oct. 19, 2018) [hereinafter *Judicial Vacancies*]; *Current Judicial Emergencies*, ADMIN. OFF. OF THE U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies> (last updated Oct. 19, 2018) [hereinafter *Judicial Emergencies*].

72. *Emergency Definition*, ADMIN. OFF. OF THE U.S. COURTS, JUDICIAL, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition> (last visited Oct. 1, 2018); *Judicial Emergencies*, *supra* note 71; Savage, *supra* note 49.

73. They skyrocketed from twelve to sixty-three. Compare *Judicial Emergencies for January 2015*, ADMIN. OFF. OF THE U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2015/01/emergencies/html> (last updated Jan. 1, 2015), with *Judicial Emergencies*, *supra* note 71. But see Press Release, Office of the Press Sec’y, President Donald J. Trump Announces Nomination of Indiana Attorney James Sweeney to Fill Judicial Emergency (Nov. 1, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-nomination-indiana-attorney-james-sweeney-fill-judicial-emergency/>; Press Release, Office of the Press Sec’y, President Donald J. Trump Announces Tenth Wave of Judicial Nominees (Jan. 23, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-tenth-wave-judicial-nominees>.

74. See *Judicial Emergencies*, *supra* note 71; Press Release, Office of the Press Sec’y, President Donald J. Trump Announces Ninth Wave of Judicial Nominees and Tenth Wave of United States Attorney Nominees (Dec. 20, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-ninth-wave-judicial-nominees-tenth-wave-united-states-attorney-nominees/>.

75. See *Judicial Emergencies*, *supra* note 71. But see Office of the Press Sec’y, *supra* note 74 (nominating more from “blue” states).

76. See *Judicial Vacancies*, *supra* note 71; *Judicial Emergencies*, *supra* note 71.

77. Data verify the priority accorded “red” states. See Press Release, Office of the Press Sec’y, President Donald J. Trump Announces Eighteenth Wave of Judicial Nominees, Eighteenth Wave of United States Attorney Nominees, and Thirteenth Wave of United States Marshal Nominees (Oct. 10, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-eighteenth-wave-judicial-nominees-eighteenth-wave-united-states-attorney-nominees-thirteenth-wave-united-states-marshal-nominees/>; Press Release, Office of the Press Sec’y, President Donald J. Trump Announces

A third venerable approach which Trump jettisoned or downplayed was improving minority judicial representation. He has seemingly implemented no endeavors to recruit, identify, or confirm ethnic minorities or lesbian, gay, bisexual, transgender and queer (“LGBTQ”) candidates, such as assigning diverse employees to selection initiatives or encouraging politicians to recommend numerous minority candidates.<sup>78</sup> Among the White House’s sixty confirmed nominees as of October 2018, only Amul Thapar, James Ho, John Nalbandian, Karen Gren Scholer, Fernando Rodriguez, Jill Otake, and Terry Moorer are persons of color.<sup>79</sup> Moreover, of the 139

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Thirteenth Wave of Judicial Nominees and Seventh Wave of United States Marshal Nominees (Apr. 26, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-thirteenth-wave-judicial-nominees-seventh-wave-united-states-marshal-nominees/> (sending a New York Second Circuit nominee); Press Release, Office of the Press Sec’y, President Donald J. Trump Announces Fourteenth Wave of Judicial Nominees, Thirteenth Wave of United States Attorney Nominees, and Eighth Wave of United States Marshal Nominees (May 10, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-fourteenth-wave-judicial-nominees-thirteenth-wave-united-states-attorney-nominees-eighth-wave-united-states-marshal-nominees/> (sending seven New York district nominees); see also *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Aug. 1, 2018), <https://www.judiciary.senate.gov/meetings/08/01/2018/nominations> (hearing for New York circuit and district nominees) [hereinafter *Aug. 1, 2018 Hearing*]; *Confirmation Listing*, ADMIN. OFF. OF THE U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/confirmation-listing> (last updated Sep. 6, 2018) (confirming thirty-six judges and tapping sixty-four nominees in states with two GOP senators; confirming nine judges and tapping twenty-six nominees in states with five Democratic senators); see also *Judicial Emergencies*, *supra* note 71.

78. For the purposes of this Article, LGBTQ means openly disclosed sexual preference. LGBTQ individuals are considered “minorities” throughout this piece. See *Stacking the Courts: The Fight Against Trump’s Extremist Judicial Nominees*, LAMBDA LEGAL, <https://www.lambdalegal.org/judicial-nominees> (last updated Oct. 16, 2018); Eleanor Clift, *What Trump’s Judicial Nominees Have in Common: They Really Don’t Want LGBTQ People to Have Rights*, DAILY BEAST (Mar. 12, 2018, 5:26 AM), <https://www.thedailybeast.com/what-trumps-judicial-nominees-have-in-common-they-really-dont-want-lgbtq-people-to-have-rights>; see also *Aug. 1, 2018 Hearing*, *supra* note 77.

79. 163 CONG. REC. S3179 (daily ed. May 25, 2017) (confirming Thapar); 163 CONG. REC. S8033 (daily ed. Dec. 14, 2017) (confirming Ho); 164 CONG. REC. S1333 (daily ed. Mar. 5, 2018) (confirming Scholer); 164 CONG. REC. S2,661 (daily ed. May 15, 2018) (confirming Nalbandian); 164 CONG. REC. S5,590 (daily ed. Aug. 1, 2018) (confirming Otake); 164 CONG. REC. S2981 (daily ed. June 5, 2018) (confirming Rodriguez); 164 CONG. REC. S5981 (daily ed. Aug. 28, 2018) (confirming Moorer); *Judicial Confirmations for September 2018*, ADMIN. OFF. OF THE U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/09/confirmations> (last visited Oct. 10, 2018); see Press Release, Office of the Press Sec’y, President Donald J. Trump Announces Intent to Nominate Judge Amul Thapar for the U.S. Court of Appeals for the Sixth Circuit (Mar. 21, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judge-amul-r-thapar-u-s-court-appeals-sixth-circuit/>; Press Release, Office of the Press Sec’y, President Donald Trump Announces Seventh Wave of Judicial Candidates (Sept.

nominees, merely fifteen choices are people of color, and Mary Rowland is the only nominee who is a member of the LGBTQ community.<sup>80</sup>

### B. Confirmation Process

The confirmation process distinctly resembles the detrimental elements of the nomination regime in several ways, principally by omitting, altering, or undermining longstanding customs or by abrogating, changing, or significantly diluting mechanisms which have proved effective. The best illustrations of these concepts are selective amendments to (1) the century-old policy for blue slips—which permitted hearings once senators presented slips—and (2) committee hearing procedures.<sup>81</sup>

In autumn 2017, Chuck Grassley (R-IA), the Chair of the Judiciary Committee (the “Chair”), proclaimed that he would abruptly change the blue slip practice for appeals court nominees by scheduling hearings on prospects who lacked slips provided by two home-state members, especially when a legislator opposed the nominee for “political or ideological” reasons.<sup>82</sup> This decision modified the blue slip notion that Democrats *and* Republicans, including Grassley as the 2015-16 Chair, closely followed throughout all eight years in Obama’s tenure.<sup>83</sup>

7, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-seventh-wave-judicial-candidates/>; Press Release, Office of the Press Sec’y, President Donald Trump Announces Eighth Wave of Judicial Candidates (Sept. 28, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-eighth-wave-judicial-candidates/>.

80. Thapar, Ho, Nalbandian, Scholer, Otake, Gujarati, Pacold, and Ranjan are Asian Americans; Rodriguez, Raúl Arias-Marxuach and Ruiz are Latinos; Moorer, Smith, Alston, and Younge are African Americans. See Press Release, Office of the Press Sec’y, President Donald J. Trump Announces Twelfth Wave of Judicial Nominees, Twelfth Wave of United States Attorney’s and Sixth Wave of United States Marshals (Apr. 10, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-twelfth-wave-judicial-nominees-twelfth-wave-united-states-attorneys-sixth-wave-united-states-marshals/>. For additional information on the “waves” of nominees, see sources cited *supra* notes 73, 75, 77, and 79.

81. See *infra* Part IV.

82. 163 CONG. REC. S7174 (daily ed. Nov. 13, 2017); 163 CONG. REC. S7285 (daily ed. Nov. 16, 2017); see *Nomination Hearing*, SENATE JUDICIARY COMMITTEE, (Nov. 29, 2017), <https://www.judiciary.senate.gov/meetings/11/29/2017/nominations>; *Memorandum to News Media*, SENATE JUDICIARY COMMITTEE MAJORITY (Nov. 2, 2017), <https://www.toomey.senate.gov/files/documents/Blue%20Slip.pdf> (describing the history of the blue slip controversy); Carl Hulse, *Judge’s Death Gives Trump a Chance to Remake a Vexing Court*, N.Y. TIMES, Apr. 8, 2018, at A13.

83. Grassley followed this as Chair in Obama’s last two years, and Patrick Leahy (D-VT) did the first six. See *Executive Business Meeting*, SENATE JUDICIARY COMMITTEE (Feb. 15, 2018), <https://www.judiciary.senate.gov/meetings/02/15/2018/executive-business-meeting> (statements of Sens. Grassley and Leahy).



That situation was exacerbated by permitting a January hearing for Wisconsin Seventh Circuit nominee Michael Brennan whom Trump proffered, although McGahn negligibly consulted Democratic Senator Tammy Baldwin, and the individual sent lacked the required evaluation committee affirmative votes.<sup>84</sup> The situation was particularly troubling because Grassley minimally justified vesting in the Chair (himself) absolute discretion for concluding whether the Trump Administration had conducted adequate consultation about the nominee.<sup>85</sup> Grassley continued that practice by scheduling a May hearing for an Oregon Ninth Circuit nominee, even though the White House minimally consulted with the Oregon senators, and the nominee purportedly withheld relevant information from a bipartisan selection commission which vetted candidates.<sup>86</sup> The Chair correspondingly set a June hearing for a Pennsylvania Third Circuit nominee, although Senator Casey strongly opposed the choice and recommended several highly qualified candidates to the White House Counsel who rejected them after nominal consideration and little consultation with Casey.<sup>87</sup>

Grassley explicitly recognized that blue slips were meant to guarantee that presidents consult home-state politicians, while

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84. *See Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Jan. 24, 2018), <https://www.judiciary.senate.gov/meetings/01/24/2018/nominations>.

85. *Executive Business Meeting*, SENATE JUDICIARY COMMITTEE (Feb. 15, 2018), <https://www.judiciary.senate.gov/meetings/02/15/2018/executive-business-meeting>; *see infra* text accompanying note 135.

86. *See* Maxine Bernstein, *Oregon's U.S. Senators Say Federal Prosecutor Ryan Bounds Unsuitable for 9th Circuit Vacancy*, OREGONIAN (Feb. 12, 2018), [https://www.oregonlive.com/portland/index.ssf/2018/02/oregons\\_us\\_senators\\_say\\_federa.html](https://www.oregonlive.com/portland/index.ssf/2018/02/oregons_us_senators_say_federa.html) (analyzing the four picks, including Bounds, whom the panel recommended and senators' reasons for continuing to oppose Bounds); Jimmy Hoover & Michael Macagnone, *9th Circ. Pick Forces Grassley to Choose: Trump or Tradition?*, LAW360 (Mar. 29, 2018, 3:43 PM), <https://www.law360.com/articles/1025855>; *see also Nomination Hearing*, SENATE JUDICIARY COMMITTEE (May 9, 2018), <https://www.judiciary.senate.gov/meetings/05/09/2018/nominations>; *Executive Business Meeting*, SENATE JUDICIARY COMMITTEE (June 7, 2018), <https://www.judiciary.senate.gov/meetings/06/07/2018/executive-business-meeting> (11-10 party-line panel approval); 164 CONG. REC. S5098 (daily ed. July 19, 2018) (withdrawing the nomination).

87. *See Nomination Hearing*, SENATE JUDICIARY COMMITTEE (June 6, 2018), <https://www.judiciary.senate.gov/meetings/06/06/2018/nominations>; Tracie Mauriello, *Why Bob Casey Thinks the Confirmation Hearing for Pittsburgh Attorney David Porter Is Breaking Protocol*, POST-GAZETTE (June 4, 2018, 11:29 PM), <http://www.post-gazette.com/news/politics-nation/2018/06/04/David-Porter-third-circuit-court-appeals-confirmation-hearing-Senate-judiciary-committee-bob-casey-chuck-grassley-blue-slip/stories/201806040156> (allowing hearing, despite Senator Casey's blue slip retention and honoring Senator Toomey's for Obama nominee). Grassley similarly treated Ohio, Washington, and New Jersey senators by not honoring the senators' retention of blue slips and by scheduling hearings on appellate court nominees from their states. *See Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Oct. 10, 2018), <https://www.judiciary.senate.gov/meetings/10/10/2018/nominations> (hearing for Ohio Sixth Circuit nominees Eric Murphy and Chad Readler).

strongly protecting senators' prerogatives in the selection process and the essential interests of voters whom they directly represent.<sup>88</sup> Moreover, GOP lawmakers had vigorously capitalized on blue slips to obstruct well-qualified, mainstream nominees during the Obama Administration, many for political or ideological reasons, the very bases which the Chair expressly decried as illegitimate.<sup>89</sup>

Grassley concomitantly altered numerous conventions and multiple strictures regarding hearings. Peculiarly compelling was his scheduling of five hearings last year at which two circuit, and often four district, court nominees testified without minority party approval.<sup>90</sup> This contrasted remarkably with Democrats' setting a paltry three similar hearings across the eight Obama years for a pair of circuit nominees, and then in special circumstances and with Republican permission.<sup>91</sup> Most notorious was Grassley's scheduling a major hearing for two controversial appellate candidates, four district nominees, and the ABA representative, who cogently explained the much-disputed not qualified rating accorded a Trump circuit nominee.<sup>92</sup> The session which the panel mounted was so packed that the district nominees who appeared only had time for introducing themselves.<sup>93</sup>

Many hearings, especially which implicated appellate court nominees, seemed rushed with a lack of due care appropriate for persons who can enjoy life-tenured appointments on "Supreme

88. 163 CONG. REC. S7,174 (daily ed. Nov. 13, 2017).

89. See *supra* note 82 and accompanying text. Many GOP senators even offered no reasons. See sources cited *supra* notes 37, 56, 83–84.

90. 163 CONG. REC. S8021–24 (daily ed. Dec. 14, 2017) (statement of Sens. Feinstein, Leahy, and Warren)

91. *Id.* (statement of Sen. Leahy). For example, North Carolina Fourth Circuit nominees Albert Diaz and James Wynn were tapped the same day and were considered together in the confirmation process. Tobias, *supra* note 22, at 2174–76.

92. See *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Nov. 15, 2017), <https://www.judiciary.senate.gov/meetings/06/06/2018/nominations> [hereinafter *Nov. 15, 2017 Hearing*]; *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Sept. 6, 2017), <https://www.judiciary.senate.gov/meetings/08/08/2017/nominations> (similarly packed); *Aug. 1, 2018 Hearing*, *supra* note 77 (hearing for one New York Second Circuit nominee and six New York district nominees).

93. Members asked no questions. 163 CONG. REC. S8021–24 (daily ed. Dec. 14, 2017) (statement of Sen. Feinstein) (providing hearings for five circuit nominees in November, a month which included a one-week recess); sources cited *supra* note 92. Grassley continued this practice in 2018 by scheduling four similar hearings, one of which was unprecedented because the Chair scheduled it on October 24 after the Senate had recessed to campaign in the midterm elections. See *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Mar. 21, 2018), <https://www.judiciary.senate.gov/meetings/03/21/2018/nominations> (hearing for Seventh Circuit nominees Amy St. Eve and Michael Scudder); *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (June 20, 2018), <https://www.judiciary.senate.gov/meetings/06/20/2018/nominations> (hearing for Fourth Circuit nominees Julius Richardson and Marvin Quattlebaum).

Courts” in their regions.<sup>94</sup> With most designees, numerous lawmakers had one five-minute round when they posed queries.<sup>95</sup> Some nominees did appear to pointedly stall by repeating many questions, while they deflected, evasively responded to queries, or dissembled.<sup>96</sup> Illustrative of this was testimony of both Texas Fifth Circuit prospects.<sup>97</sup> Another example was candidates’ unwillingness to say whether, once appointed, they would recuse themselves in cases which addressed concepts—notably abortion, discrimination, or civil rights—that candidates had litigated while serving as counsel or about which the picks had explicitly stated clearly-held perspectives.<sup>98</sup> Indeed, a third of Trump appointees did compile anti-LGBTQ records.<sup>99</sup> These phenomena enabled hearings to devolve into seemingly meaningless exercises or farces in which nominal substantive material was exchanged.

The resulting discussions that preceded Judiciary Committee approval of nominees similarly lacked important content and context. Members rarely engaged on substantive issues, even on matters which distinctly involved qualifications essential to public officials who hold unlimited tenure when resolving life and death questions.<sup>100</sup> One radical departure from regular order was Grassley’s deleterious choice to not await completion of ABA evaluations and ratings *before* panel votes, despite continuous requests from Senator Dianne Feinstein (D-CA), the Ranking Member, to have votes *after* the ABA designee reports duly issued.<sup>101</sup> Grassley vociferously responded that

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94. See 163 CONG. REC. S8021–24 (daily ed. Dec. 14, 2017) (statements of Sen. Feinstein and Sen. Leahy); Minckberg, *supra* note 69 (rushing submission and review of nominee questionnaire answers); *supra* text accompanying note 53.

95. See, e.g., *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (June 14, 2017), <https://www.judiciary.senate.gov/meetings/06/14/2017/nominations> [hereinafter *June 14, 2017 Hearing*].

96. See *id.*

97. He refused to discuss his memorandum on torture that the DOJ would not release, and Don Willett unresponsively answered many questions. *Nov. 15, 2017 Hearing*, *supra* note 92; see 163 CONG. REC. S8021–24 (daily ed. Dec. 14, 2017) (statements of Sens. Feinstein, Leahy, and Warren). *But see* 163 CONG. REC. S8025 (daily ed. Dec. 14, 2017) (statement of Sen. Cornyn).

98. See 28 U.S.C. § 455 (2012) (recusal law); *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Mar. 7, 2018), <https://www.judiciary.senate.gov/meetings/03/07/2018/nominations>; Josh Gerstein, *Trump-Appointed Judge Won't Recuse From Dossier Case*, POLITICO (Feb. 16, 2018, 10:14 PM), <https://www.politico.com/story/2018/02/16/trump-dossier-judge-recuse-416844>; Joshi, *supra* note 46 (describing judges’ possible conflicts); *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Nov. 29, 2017), <https://www.judiciary.senate.gov/meetings/11/29/2017/nominations>; *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (June 14, 2017), <https://www.judiciary.senate.gov/meetings/06/14/2017/nominations>.

99. Sources cited *supra* note 78.

100. See, e.g., *June 14, 2017 Hearing*, *supra* note 95.

101. Two of six district nominees lacked ABA ratings before the hearing and four district nominees’ ratings were posted the day of the hearing. See *Aug. 1, 2018 Hearing*, *supra* note 77; *Executive Business Meeting*, SENATE JUDICIARY

he could not allow this extra-governmental political group to dictate the Judiciary Committee schedule.<sup>102</sup> It, accordingly, was unsurprising that many controversial nominees received party-line ballots.<sup>103</sup>

After the Judiciary Committee marshaled approval of nominees who came to the floor, somewhat problematic, albeit less troubling, conduct by the Democrats complicated meaningful review of the attorneys nominated. Democrats insisted on cloture and roll call votes for myriad nominees, even well-qualified, mainstream individuals who felicitously won appointment.<sup>104</sup> The GOP controlled the Senate fifty—two to forty-eight,<sup>105</sup> and the 2013 ignition of the “nuclear option” meant that nominees won confirmation through majority vote.<sup>106</sup> Especially problematic was the stacking of four appellate court nominees’ debates and chamber votes over less than one week in 2017 after tendering last-minute notice and stacking six across one week in 2018 after proffering minimal notice.<sup>107</sup> The

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COMMITTEE (Nov. 2, 2017), <https://www.judiciary.senate.gov/meetings/11/02/2017/executive-business-meeting>.

102. Michael Macagnone, *DC Court Picks Face Panel Ahead of ABA Report*, LAW360 (June 28, 2017, 4:35 PM), <https://www.law360.com/articles/939442/dc-court-picks-face-senate-panel-ahead-of-aba-report>; see *Aug. 1, 2018 Hearing*, *supra* note 77 (lacking ABA ratings before the hearing, and four district nominees’ ratings were posted the day of the hearing for two of the six district nominees); see also Minberg, *supra* note 69 (urging hearings after ABA reports); Tobias, *supra* note 37, at 13–14 (describing regular order). *But see* 163 CONG. REC. S8021–24 (daily ed. Dec. 14, 2017) (statements of Sen. Feinstein and Leahy) (touting ABA input’s value). For more on the influence of external political groups in judicial nominations and confirmations, see *supra* text accompanying notes 49–51 (assessing the role of the Federalist Society).

103. See, e.g., *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Nov. 1, 2017), <https://www.judiciary.senate.gov/meetings/11/01/2017/nominations> (approving Eighth Circuit nominee Grasz); *Executive Business Meeting*, SENATE JUDICIARY COMMITTEE (Feb. 15, 2018), <https://www.judiciary.senate.gov/meetings/02/15/2018/executive-business-meeting> (approving Seventh Circuit nominee Michael Brennan).

104. David B. Rivkin, Jr. & John Shu, *The Senate’s Unprecedented Obstruction*, WALL ST. J. (Aug. 2, 2018, 6:48 PM), <https://www.wsj.com/articles/the-senates-unprecedented-obstruction-1533250131?mod=searchresults&page=1&pos=1>.

105. See Alexander Burns & Jonathan Martin, *Once a Long Shot, Democrat Doug Jones Wins Alabama Senate Race*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/2017/12/12/us/politics/alabama-senate-race-winner.html>.

106. 159 CONG. REC. S8418 (daily ed. Nov. 21, 2013) (describing the nuclear option); Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L.J. 121, 122 (2015).

107. Feinstein said that 2017 notice came on Thursday evening as senators were recessing for the week. *Executive Business Meeting*, SENATE JUDICIARY COMMITTEE (Nov. 2, 2017), <https://www.judiciary.senate.gov/meetings/11/02/2017/executive-business-meeting>; *Schedule for Oct. 31, 2017*, U.S. SENATE DEMOCRATS (Oct. 26, 2017, 7:40 PM), <https://www.democrats.senate.gov/2017/10/30/schedule-for-tuesday-october-31-2017>. For 2018, see *Schedule for May 7,*

immense quantity of candidates, their mammoth records, and the eleventh-hour notice clearly left Democrats, as the minority party, without sufficient resources to prepare.<sup>108</sup> In fact, during Bush's eight years, the Senate never confirmed that many appellate court prospects over a single week,<sup>109</sup> across the corresponding period in Obama's tenure, this happened once because of a rare situation and with express GOP permission.<sup>110</sup>

The quality of Senate final debates prior to nominee confirmation votes actually resembled that of Judiciary Committee candidate discussions; some were relatively less illuminating than the panel exchanges.<sup>111</sup> The minority insisted on cloture ballots for nearly all candidates,<sup>112</sup> while much of the thirty hours allocated to debate following cloture addressed issues which were not related to specific choices and, even when particular senators discussed the picks, minuscule numbers of members heard the remarks.<sup>113</sup> Indeed, GOP legislators seemingly deemed the post cloture rule, which limits post-cloture debate respecting district nominees to thirty hours, so unhelpful that they proposed shortening the proviso.<sup>114</sup>

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2018, U.S. SENATE DEMOCRATS (Apr. 26, 2018, 5:38 PM), <https://www.democrats.senate.gov/2018/04/26/schedule-for-pro-formas-and-monday-may-7-2018> [hereinafter *Schedule for May 7, 2018*].

108. Feinstein asserted these ideas. Compare Ruger, *supra* note 61, with *Executive Business Meeting*, SENATE JUDICIARY COMMITTEE (Nov. 2, 2017), <https://www.judiciary.senate.gov/meetings/11/02/2017/executive-business-meeting>. In 2018, the GOP stacked six circuit nominees in one week. *Schedule for May 7, 2018*, *supra* note 107.

109. The most judges Bush confirmed in one week was three in late June 2004 and four in early June 2005. See CHRONOLOGICAL HISTORY OF AUTHORIZED JUDGESHIPS IN U.S. COURTS OF APPEALS, *supra* note 12.

110. Obama appointed five judges in one late December 2010 week, as the Senate recessed at the Congress' end; they had languished a lengthy time awaiting final votes. *Judicial Confirmations for January 2011*, ADMIN. OFF. OF THE U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2011/01/confirmations/html> (last visited Oct. 10, 2018). The most judges Obama appointed any other week was two. For more information, see CHRONOLOGICAL HISTORY OF AUTHORIZED JUDGESHIPS IN U.S. COURTS OF APPEALS, *supra* note 12.

111. See *supra* notes 100–103 and accompanying text.

112. See *supra* note 104 and accompanying text.

113. *Id.*

114. See *Improving Procedures for the Consideration of Nominations in the Senate: Hearing on S. Res. 355*, SENATE RULES COMMITTEE (Dec. 19, 2017), <https://www.rules.senate.gov/hearings/hearing-to-review-s-res-355>; *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Apr. 27, 2018), <https://www.judiciary.senate.gov/meetings/04/27/2018/nominations> (approving the resolution); 163 CONG. REC. S7990 (daily ed. Dec. 13, 2017) (statement of Sen. Blunt); Alexander Bolton, *Trump Presses GOP to Change Senate Rules*, HILL (Mar. 18, 2018, 6:03 PM), <https://thehill.com/homenews/senate/378882-trump-presses-gop-to-change-senate-rules>; Jordain Carney, *McConnell Not Yet Ready To Change Rules for Trump Nominees*, HILL (May 15, 2018, 4:16 PM), <https://thehill.com/homenews/senate/387817-mcconnell-not-yet-ready-to-change-rules-for-trump-nominees>; Hulse, *supra* note 82.

The Republican chamber majority, similarly to the Trump Administration, prioritized circuit over district approvals, confirming nominees from states which Republican officers represent, appointing conservative white males and filling nonemergency federal court vacancies,<sup>115</sup> although those parameters derived in significant measure from the nominating regime. These priorities directly enabled Trump to set the record for the most circuit judges approved in a president's first year,<sup>116</sup> but the concepts left twenty-three district nominees without floor votes and substantial unoccupied district court positions at 2017's conclusion.<sup>117</sup> These priorities also meant that paltry numbers of candidates realized appointments in jurisdictions that Democrats represent; only two minority nominees won confirmation, and emergencies drastically soared.<sup>118</sup> The priorities concomitantly allowed Trump to shatter the record for most appellate jurists appointed in a president's second year, but these priorities will restrict the number of district nominees confirmed and increase district court vacancies at 2018's close. Moreover, these priorities indicate that small numbers of nominees will receive confirmations in states Democrats represent, comparatively few minority nominees will secure confirmation, and emergencies will remain extremely high.<sup>119</sup>

### C. *Explanations for Nomination and Confirmation Problems*

The reasons why many concerns plagued the nomination and confirmation systems are difficult to precisely identify, mainly because the Executive Branch and the Senate furnish rather limited information about nominations and confirmations.<sup>120</sup> However, some explanations may be gleaned from the descriptive rendition detailed already.

Perhaps the leading reason for complications involving nominees was that the Trump Administration overemphasized circuit appointments of many conservatives to the near exclusion of multiple other important actions, notably district nominations and confirmations. Trump emphatically and clearly admonished McGahn to stress circuit vacancies, while the Trump Administration powerfully invoked Federalist Society recommendations, even if the White House did not fully outsource recruitment to this external political group.<sup>121</sup>

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115. See *supra* notes 44–53 and accompanying text.

116. See *supra* notes 44–46 and accompanying text.

117. See *supra* notes 52–53 and accompanying text.

118. *Executive Calendar*, U.S. SENATE (Dec. 23, 2017), [https://www.senate.gov/legislative/LIS/executive\\_calendar/2017/12\\_23\\_2017.pdf](https://www.senate.gov/legislative/LIS/executive_calendar/2017/12_23_2017.pdf); *supra* notes 71–80 and accompanying text.

119. See *Carney*, *supra* note 5; see also *Judicial Vacancies*, *supra* note 71.

120. See Tobias, *supra* note 38, at 1107 (explaining that participants' privacy needs may justify limited information).

121. See, e.g., *supra* notes 47–54 and accompanying text.

The Trump Administration concomitantly appeared to deemphasize (1) empty trial court posts and leave much responsibility for the nominations to home-state politicians, (2) copious openings in jurisdictions with Democratic senators, (3) minority representation, and (4) emergency vacancies in numbers of circuits and districts.<sup>122</sup> The focus on circuit and conservative candidates can partly explain the insignificant attention these aspects received. This inattention was unwarranted, because district jurists comprise the federal bench “workhorses” and finally resolve most cases.<sup>123</sup> Moreover, Senators’ party affiliation should clearly not dictate the allocation of court judicial resources, and correspondingly, justice’s quality. Minority jurists also provide numerous distinct benefits, and the emergency vacancy classification applies in the worst-case scenarios.<sup>124</sup> The appellate court emphasis may also reveal why certain district nominees plainly lacked the requisite qualifications:<sup>125</sup> the DOJ and the White House Counsel deployed insufficiently rigorous screening procedures and devoted comparatively minimal resources to scrutiny of prospects, while they disregarded ABA ratings before and even subsequent to nominations.<sup>126</sup>

In fairness, Trump had never served in the public sector or run for office.<sup>127</sup> He campaigned on a platform to “drain the swamp” and radically disrupt the political status quo, crucial elements that the President’s unorthodox management style and chaotic White House infighting putatively worsened.<sup>128</sup> Trump had little appreciation for courts and the selection process, phenomena evidenced by (1)

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122. See *id.*

123. ALICIA BANNON, BRENNAN CTR. FOR JUST., FEDERAL JUDICIAL VACANCIES: THE TRIAL COURTS 1–5 (2013), <http://www.brennancenter.org/sites/default/files/publications/Judicial%20Vacancies%20Report%20Final.pdf> (describing the work load of district courts).

124. See sources cited *supra* notes 71–73, 75–76, *infra* notes 147–50.

125. See sources cited *supra* notes 68–69.

126. *Id.*; see sources cited *supra* notes 63–65 (indicating circuit nominee was found not qualified through an ABA rating); sources cited *supra* notes 101–102. For DOJ and White House Counsel deficiencies, see, for example, *supra* notes 47–48 and accompanying text.

127. See, e.g., Zachary Crockett, *Donald Trump Is the Only US President Ever with No Political or Military Experience*, VOX (Jan. 23, 2017, 10:07 AM), <https://www.vox.com/policy-and-politics/2016/11/11/13587532/donald-trump-no-experience>.

128. See generally DAVID FRUM, TRUMPOCRACY (2018); BOB WOODWARD, FEAR: TRUMP IN THE WHITE HOUSE (2018) (discussing the chaotic and disruptive nature of President Trumps’ campaign and management style); MICHAEL WOOLF, FIRE AND FURY (2018). For more on the campaign, see Mark Landler & Julie Hirschfeld Davis, *President Unbound, Aides Bewildered, Capital Reeling*, N.Y. TIMES, Mar. 24, 2018, at A1; Ashley Parker et al., *Trump Chooses Impulse Over Strategy as Crises Mount*, WASH. POST (Apr. 12, 2018), [https://www.washingtonpost.com/politics/trump-chooses-impulse-over-strategy-as-crises-mount/2018/04/11/884e33c2-3d9d-11e8-974f-aacd97698cef\\_story.html?utm\\_term=.8a0edc6cf425](https://www.washingtonpost.com/politics/trump-chooses-impulse-over-strategy-as-crises-mount/2018/04/11/884e33c2-3d9d-11e8-974f-aacd97698cef_story.html?utm_term=.8a0edc6cf425) (representing the fact that newspapers have covered President Trump’s disruptive style since 2017).

scathing criticisms of judges who issued opinions which thwarted his political efforts,<sup>129</sup> and (2) concerted attempts to confirm numerous jurists who might reliably sustain presidential initiatives, such as banning extensive numbers of immigrants from the country and comprehensively dismantling the modern administrative state.<sup>130</sup> Those parameters were exacerbated by the compelling necessity to speedily fill the prolonged Supreme Court opening which resulted from Justice Antonin Scalia's passing and the 105 unoccupied lower court seats upon Trump's inauguration, each of which Mitch McConnell (KY), the Republican Majority Leader, aggressively orchestrated.<sup>131</sup>

Considerable analogous concerns—in particular the apparently crucial need to foster the swift appointment of many conservative appellate court judges—explain the numerous difficulties in the confirmation process, yet Republicans had been the Senate majority party for two years.<sup>132</sup> At the committee level, the deviation from traditional blue slip procedure exemplifies these problems. In Grassley's seeming haste to quickly process the maximum number of conservative appellate court jurists,<sup>133</sup> the Chair undermined the blue slip mechanism which had long functioned extremely well. Grassley created an exception for circuit nominees by arrogating to the Chair significant discretion for ascertaining judicial candidate qualifications on a case-specific basis, without objective criteria, including whether the White House had adequately consulted politicians in home states.<sup>134</sup> This reasoning lacks persuasive support, as both parties concur that appellate court openings remain

129. *In His Own Words: The President's Attacks on the Courts*, BRENNAN CTR. FOR JUST. (June 5, 2017), <https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts>.

130. See generally Gillian 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*, HUFFINGTON POST (Mar. 29, 2018, 8:56 PM), [https://www.huffingtonpost.com/entry/trump-federal-judges-obama-republicans\\_us\\_5abd47c4e4b0a47437a98594](https://www.huffingtonpost.com/entry/trump-federal-judges-obama-republicans_us_5abd47c4e4b0a47437a98594); see 163 CONG. REC. S8021–24 (daily ed. Dec. 14, 2017) (statements of Sens. Leahy, Feinstein, and Warren); Peters, *supra* note 48; Rucker et al., *supra* note 47; Tillman, *supra* note 50.

131. See Tessa Berenson, 'We'd Like to See America Right of Center:' Mitch McConnell Explains His Judge Strategy, TIME (Feb. 8, 2018), <http://time.com/5138247/mitch-mcconnell-judicial-strategy/>; Amber Phillips, *Why Mitch McConnell Is Bragging About Holding Up Merrick Garland From the Supreme Court, Two Years Later*, WASH. POST (Apr. 5, 2018) <https://www.washingtonpost.com/news/the-fix/wp/2018/04/05/why-mitch-mcconnell-is-bragging-about-holding-up-merrick-garland-from-the-supreme-court-two-years-later/>; see also MITCH MCCONNELL, *THE LONG GAME* (2015); Hulse, *supra* note 82; Rucker et al., *supra* note 47; see generally Tobias, *supra* note 37.

132. *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> (last visited Oct. 4, 2018).

133. See *supra* Part III.B.

134. See *supra* notes 82–89 and accompanying text.



more critical because circuit judges are fewer, their opinions cover several jurisdictions and consistently enunciate greater policy, and lawmakers continually insist on assigning nearly every appellate vacancy to the identical state where openings arise.<sup>135</sup>

Related, but probably somewhat less concerning, was the extremely hurried arrangement of committee hearings, discussions, and votes, which could similarly have been motivated by the perceived necessity to rapidly approve myriad conservative appeals court jurists.<sup>136</sup> Analogous ideas can apply to the Chair's eschewing dependence on ABA nominee ratings ahead of committee votes and the Majority Leader's conscious determination to stack floor ballots on appellate court picks.<sup>137</sup> Nonetheless, GOP members' abject failure in 2017 to cast neither one negative panel vote against any prospect nor more than one no floor ballot<sup>138</sup> suggests that the propositions surveyed in this paragraph enjoy less crucial importance than Grassley's blue slip modification and rushed chamber treatment generally.

#### IV. IMPLICATIONS

The nomination and confirmation processes' descriptive examination above reveals that the constructs which the Trump White House and the 115th Senate use have multiple detrimental ramifications. One trenchant yardstick is the current thirteen appellate court and 115 district court unfilled positions, sixty-eight constituting emergencies.<sup>139</sup> Many of these unfilled positions arose from jurisdictions that Democrats primarily represent,<sup>140</sup> and a stunning paucity of nominees comprise minority individuals.<sup>141</sup> The numbers are worse than the 105 vacant slots, forty-two consisting of

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135. *Executive Business Meeting*, SENATE JUDICIARY COMMITTEE (Feb. 15, 2018), <https://www.judiciary.senate.gov/meetings/02/15/2018/executive-business-meeting> (statements of Sens. Crapo, Feinstein and Leahy); see Tobias, *supra* note 22, at 2171–74 (discussing seat assignments); *infra* note 191 and accompanying text.

136. See *supra* notes 90–100 and accompanying text. Hearings, discussions, and votes do warrant improvement.

137. See sources cited *supra* notes 101, 107–110. The panel needs ABA input before the committee members discuss nominees and vote, and the chamber requires decreased stacking before senators debate and vote.

138. Much Republican, and considerable Democratic, lockstep voting suggest that better procedures may not improve the confirmation process or the vacancy crisis. See 163 CONG. REC. S7351 (daily ed. Nov. 28, 2017) (Sen. Kennedy's sole negative GOP floor vote); *supra* note 103 and accompanying text (no negative GOP panel vote).

139. See *Archive of Judicial Vacancies*, ADMIN. OFF. OF THE U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> (last updated Oct. 2018) (providing archival data on judicial vacancies, judicial emergencies, and confirmation listings).

140. See *supra* notes 74–77 and accompanying text.

141. See *supra* notes 78–80 and accompanying text.

emergencies, upon the Trump Administration's inception, even while present active jurists' motivation to assume senior status or retire is purportedly slowing.<sup>142</sup>

The judicial openings' significant quantity—large percentages of which constitute emergencies—clustered at the trial court level and in states represented by Democrats, conjoined with their protracted nature and minorities' confined representation among nominees, creates troubling consequences. The statistics enhance pressure on sitting district judges to promptly, inexpensively, and equitably resolve civil and criminal suits.<sup>143</sup> Trial level jurists comprise the justice regime's workhorses and finally decide most civil lawsuits and criminal prosecutions, which receive precedence under the Speedy Trial Act.<sup>144</sup> Yet numerous prolonged empty seats undercut minority party home-state politicians who can receive blame for the openings and deprive their constituents of judicial resources.<sup>145</sup>

Certain factors—including the numerous circuit and district vacancies, striking emergencies, and few minority confirmees and nominees—accentuate the critical need to fill more openings with diverse jurists. The Trump Administration's neglect of minority, female, and LGBTQ representation has problematic impacts. The federal courts have been an emblematic locus for justice where individuals of color, particularly African Americans, Latinos, and Native Americans, experience significant overrepresentation in the criminal justice process, and minorities, women, and LGBTQ individuals correspondingly encounter too little judicial representation.<sup>146</sup> This inattention to diversity's expansion

142. See Russell Wheeler, *Trump's 1st State of the Union: Is He Really Reshaping the Federal Judiciary?*, BROOKINGS INST. (Jan. 25, 2018), <https://www.brookings.edu/blog/fixgov/2018/01/25/trumps-1st-state-of-the-union-is-he-really-reshaping-the-federal-judiciary/>; Tillman, *supra* note 70; *supra* note 71 and accompanying text.

143. FED. R. CIV. P. 1; see Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325, 1325 (1995).

144. Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, WALL ST. J. (Apr. 6, 2015, 2:09 PM), <https://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746>.

145. *Id.*; Kevin Diaz, *Senate Approves Federal Judge Growing Backlog Eased Slightly*, HOUS. CHRON. (Apr. 14, 2015), <https://www.houstonchronicle.com/archive/search/>. See John R. Emshwiller & Gary Fields, *As Criminal Laws Proliferate, More Are Ensnared*, WALL ST. J. (July 23, 2011), <https://www.wsj.com/articles/SB10001424052748703749504576172714184601654> (stating that criminal prosecutions now often address matters that should be treated in the civil justice system but that many civil dockets are already backlogged).

146. See Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 599 (2003); see, e.g., *Inmate Ethnicity*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_ethnicity.jsp](https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp) (last updated Oct. 27, 2018); *Inmate Race*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate](https://www.bop.gov/about/statistics/statistics_inmate)

constitutes a lost opportunity for increasing the quality of justice that litigants need.

Greater minority representation offers numerous special advantages. People of color, women, and LGBTQ jurists carefully supply efficacious, nuanced “outsider” perspectives<sup>147</sup> as well as different, constructive insights about crucial questions respecting abortion, criminal law, employment discrimination, and other complex issues which federal judges resolve.<sup>148</sup> They also curtail ethnic, gender, and sexual orientation biases that directly undermine justice.<sup>149</sup> Moreover, jurists who resemble the nation instill public confidence by strongly demonstrating that abundant persons of color, women, and LGBTQ candidates serve productively as judges, and minority judges may be especially sensitive to the circumstances that lead numbers of minorities to appear in federal court.<sup>150</sup>

A few reasons for not addressing diversity, which might have possessed surface plausibility before, seem unconvincing today. For example, the conservative, able people of color, women, and LGBTQ individuals—including Trump confirmees Thapar, Ho, Nalbandian, Scholer, Rodriguez, Otake, and Moorer combined with nominees Alston, Arias-Marxuach, Gujarati, Pacold, Ranjan, Ruiz, Smith, Younge, and Rowland—dynamically refute the condescending notions that appointing considerable minority, female, and LGBTQ nominees

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\_race.jsp (last updated Oct. 27, 2018); *Demography of Article III Judges, 1789-2017*, FED. JUD. CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/race-and-ethnicity> (last visited Sept. 29, 2018); *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045217> (last visited Sept. 29, 2018) (providing statistics for all states, counties, and cities with a population of five thousand or more). These charts in particular show that the number of minority inmates far exceeds the percentage of the population those minorities occupy. Conversely, the number of minorities in federal judicial positions is far below the percentage of the population that minorities occupy.

147. John McCain & Jeff Flake, *Federal Judge Diane Humetewa*, 40 HUM. RTS. 22, 22 (2015); see Beiner, *supra* note 146, at 610–17.

148. See generally Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005) (discussing voting preferences of female judges on Title VII sex discrimination and sexual harassment claims along with how female judges influence male judges on these types of gender-coded cases). But see generally Stephen Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504 (2011) (arguing that there are not significant gender differences in decision-making).

149. See, e.g., NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS AND ETHNIC FAIRNESS, FINAL REPORT 7–14 (1997); FED. CTS. STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990).

150. Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1442 (2008); Jeffrey Toobin, *The Obama Brief*, NEW YORKER, Oct. 27, 2014, at 24 (discussing the judicial legacy of President Obama and focusing in part on how the majority of his appointments “have been women and non-white males”). For more background on this discussion, see generally WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999) (providing an analysis of the legal issues surrounding gender and sexual nonconformity in the United States).

will erode merit because the pool is small or the United States lacks enough conservative attorneys.<sup>151</sup> The persons of color, women, and LGBTQ individuals nominated and confirmed to date show that Trump has copious readily available putative nominees, who do simultaneously provide merit and conservative views. The Trump Administration need only capitalize on this salutary potential.

Presidential fulfillment of constitutional duties to nominate and confirm accomplished judges for the myriad vacancies may be undercut by the White House's abbreviated consultation with home-state politicians, limited transparency and rigor in considering selections, exclusion of ABA investigations and other effective concepts, dependence on truncated or inefficacious measures, and penchant for stressing rapid nominations and confirmations of ample conservative appellate court jurists.<sup>152</sup> The Senate's concomitant proclivity to quickly approve numerous similar jurists—particularly through modifying blue slips; eschewing or constricting additional helpful practices, such as probing nominee questioning in committee hearings; and correspondingly rubberstamping Trump Administration candidates—might analogously undermine senators' discharge of constitutional responsibilities to advise and consent.

Vacancies' enormous number and protracted character may also distinctly impair the federal judiciary's efforts to realize its constitutional duty for swiftly, economically, and fairly resolving cases by imposing excessive pressure on jurists and slowing litigation dispositions.<sup>153</sup> When the circuit and district courts lack the judicial resources which are necessary to deliver justice for lengthy periods, this situation can have abundant corrosive impacts.<sup>154</sup> Constant, express overemphasis on ideology when appointing jurists could make the bench resemble the President and Congress. The judges who secure nomination and confirmation through overtly politicized and staunchly partisan nomination and confirmation processes might concomitantly seem very political and supremely partisan, which may undercut public confidence in the judiciary.<sup>155</sup>

151. See *supra* notes 79–80 and accompanying text. Trump confirmed many other able, conservative women, including Seventh Circuit Judge Amy Coney Barrett and Sixth Circuit Judge Joan Larsen. 163 CONG. REC. S6908 (daily ed. Oct. 31, 2017) (debate on confirmation of Barrett); 163 CONG. REC. S6944 (daily ed. Nov. 1, 2017) (debate on confirmation of Larsen); Press Release, Office of the Press Sec'y, President Donald Trump Announces Judicial Nominees (May 8, 2017), <https://www.whitehouse.gov/presidential-actions/nine-nominations-sent-senate-today-2/>.

152. Matthew Madden, *Anticipated Judicial Vacancies and the Power To Nominate*, 93 VA. L. REV. 1135, 1139, 1145 (2007).

153. Bruce Moyer, *Vacancy Signs at the Federal Courthouse*, 57 FED. LAW. 8, 8 (2010).

154. See *id.*; see also Comm. on Fed. Cts., *supra* note 8, at 374; Tobias, *supra* note 15, at 769, 770, 795.

155. Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. (forthcoming 2019); Sen. Orrin Hatch, *Protect*

The termination or erosion of a few customs, notably administration consultation and blue slips, can mean that the institutions of the presidency, the Senate and perhaps the judiciary could be experiencing decline, as those conventions are the “glue” that solidifies the institutions.<sup>156</sup> Finally, the concerns analyzed can erode citizen respect for, and trust in, the coequal branches, which epitomize American democracy.

In sum, President Trump has earned success in recommending circuit and district court possibilities, while his administration set the record for confirming appeals court nominees, most of whom are very conservative and prominent, since taking office. Nevertheless, the White House eliminated, modified or deemphasized constructive ideas which formerly promoted excellent judicial nominations and confirmations, and the U.S. confronts considerably larger openings than upon Trump’s inauguration. Therefore, the last part reviews strictures which promise to improve selection.

## V. SUGGESTIONS FOR THE FUTURE

The assessment of the confirmation and nomination processes’ modern state demonstrates that plentiful features clearly necessitate remediation and some could deserve amelioration, even while other concepts implemented have performed reasonably well. Thus, this section proffers many short- and longer-term proposals which should help treat the vacancy crisis by enhancing the nomination and confirmation procedures.

### A. *Short-Term Suggestions*

The Trump Administration must capitalize on numerous solutions that have proved useful before. Trump’s White House astutely deploys a few of these solutions. One reliable approach is the elevation to appellate courts of impressive, mainstream district appointees whom the chief executive’s predecessors, specifically Presidents Bush and Obama, confirmed.<sup>157</sup> This avenue is venerable, because the nominees suggested have compiled accessible, comprehensive records and offer consummate distinguished applicable experience, while the chamber has already canvassed and

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*the Senate’s Important ‘Advice and Consent’ Role*, HILL (Apr. 11, 2014, 8:00 AM), <http://thehill.com/opinion/op-ed/203226-protect-the-senates-important-advice-and-consent-role>; Marcus, *supra* note 38; Savage, *supra* note 49. That may even erode citizen trust in judicial decision-making.

156. See 163 CONG. REC. S8021–24 (daily ed. Dec. 14, 2017) (statement of Sen. Leahy); 163 CONG. REC. S8042 (daily ed. Dec. 14, 2017) (statement of Sen. Durbin); Ruger, *supra* note 59.

157. Elisha Carol Savchak et al., *Taking It to the Next Level: The Elevation of District Court Judges to the U.S. Courts of Appeals*, 50 AM. J. POL. SCI. 478, 479 (2006).

confirmed them once.<sup>158</sup> Illustrations are Bush choices, Judges Amul Thapar, Ralph Erickson, and Amy St. Eve, whom Trump placed on appeals courts, and jurists Obama confirmed, Judge Diane Humetewa, who may become the first Native American circuit jurist, and Judge Manesh Shah, who could be the first Asian American proffered for the Seventh Circuit.<sup>159</sup>

A related pragmatic technique would be nominating again more of the twenty excellent, conservative, and moderate Obama district nominees who received Judiciary Committee hearings and approval without dissent but lacked final votes.<sup>160</sup> This construct would markedly expedite appointments, because renamed nominees in fact must only capture panel and floor ballots.<sup>161</sup> Trump has depended on renomination with fourteen Obama designees, including Karen Gren Scholer, five of whom attained confirmation;<sup>162</sup> however, there are multiple other candidates, encompassing Inga Bernstein, Julien Neals, and Florence Pan, who can supplement minority representation or directly fill numbers of prolonged empty judgeships.<sup>163</sup>

The President must also consider instituting, emphasizing, revitalizing, or improving numerous effective actions, which Trump has downplayed or rejected. One major concept would be assiduously consulting home-state politicians about nominees, which is a leading justification for the blue slip policy.<sup>164</sup> Meticulous consultation with the senators, especially political figures who deploy bipartisan selection panels to recommend strong individuals, promotes smooth nominations and confirmations.<sup>165</sup> A peculiarly telling example of

158. *Id.*; Tobias, *supra* note 47, at 2248.

159. *Diversity on the Bench*, FED. JUD. CTR., <https://www.fjc.gov/node/7491> (last visited Oct. 4, 2018). Many others, such as District Judges Philip Gutierrez and Lucy Koh, exist. Carl Tobias, *Combating the Ninth Circuit Judicial Vacancy Crisis*, 73 WASH. & LEE L. REV. ONLINE 687, 715–18 (2017). Bush named Gutierrez; Obama tapped Koh.

160. They were not confirmed because the GOP refused to conduct votes. Tobias, *supra* note 31, at 18–19.

161. The twenty enjoyed panel hearings and approvals with no dissents in 2015–16. *Id.*

162. The five are Karen Gren Scholer, David Nye, Scott Palk, Donald Coggins and Walter Counts. See 164 CONG. REC. S1333 (daily ed. Mar. 5, 2018) (confirming Scholer); Tobias, *supra* note 31, at 21–23.

163. See Carl Tobias, *Why Trump Should Renominate Inga Bernstein for the District of Massachusetts*, HILL (July 5, 2017, 5:20 PM), <http://thehill.com/blogs/pundits-blog/the-judiciary/340734-why-trump-should-renominate-inga-bernstein-for-the-district>; Carl Tobias, *Confirm Florence Pan for D.C. District Court*, WASH. POST (Nov. 21, 2016), [https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2016/11/21/confirm-florence-pan-for-d-c-district-court/?utm\\_term=.4d670274adea](https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2016/11/21/confirm-florence-pan-for-d-c-district-court/?utm_term=.4d670274adea); Carl Tobias, *Confirm Julien Neals for the District of New Jersey*, HILL (Aug. 25, 2016, 12:08 PM), <http://thehill.com/blogs/congress-blog/judicial/292539-confirm-julien-neals-for-the-district-of-new-jersey>.

164. See *supra* notes 55–61 and accompanying text.

165. Ruger, *supra* note 59.

this mechanism's value was the nomination of two able, conservative Illinois Seventh Circuit picks, Amy St. Eve and Michael Scudder, whom both Democratic senators powerfully favored and the chamber easily approved, ideas evinced by their rapidly scheduled, uncontroversial panel hearing, committee discussion and vote, and floor debate and confirmation ballot.<sup>166</sup> In short, much efficacious consultation will not always yield the parties' first choices, but it would facilitate the vast majority of nominations and cautiously treat stalemates, like those which developed in Oregon and Wisconsin, that can erode the process and interparty trust.<sup>167</sup>

The Executive should correspondingly reconsider its mistaken decision to exclude the ABA from official responsibility for designee investigations and concomitant ratings, because presidents since the 1950s, except George W. Bush and Donald Trump, did carefully invoke the Bar Association's consummate expertise, massive network of incisive evaluators, and cogent, instructive reports.<sup>168</sup> Moreover, dependence on ABA examinations and rankings in candidates' *pre nomination* analyses could minimize the embarrassment imposed on Trump submissions who drew "not qualified" ratings.<sup>169</sup> The eventual appointment of most prospects who garnered this distinctive ranking can also suggest that ABA input could professionally alert selection participants to supposed problems with nominees.<sup>170</sup> Even

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166. Cooperation regarding Judges St. Eve and Scudder attended Mark Bennett's choice for a Hawaii Ninth Circuit vacancy. *Executive Business Meeting*, SENATE JUDICIARY COMMITTEE (Apr. 19, 2018), <https://www.judiciary.senate.gov/meetings/committee-executive-business-meeting> (St. Eve and Scudder panel approvals); *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Mar. 21, 2018), <https://www.judiciary.senate.gov/meetings/03/21/2018/nominations> (statements of Sens. Durbin and Grassley) (stating that White House Counsel carefully consulted senators and Sen. Grassley quickly set a panel hearing); 164 CONG. REC. S2655 (daily ed. May 14, 2018) (St. Eve & Scudder confirmations); Press Release, Office of the Press Sec'y, President Donald J. Trump Nominates His Eleventh Wave of Judicial Nominees (Feb. 12, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-eleventh-wave-judicial-nominees/>. For Bennett's quickly-set and rather similarly uncontroversial hearing, panel discussion, approval, floor debate, and vote, see *Executive Business Meeting*, SENATE JUDICIARY COMMITTEE (May 10, 2018), <https://www.judiciary.senate.gov/meetings/05/10/2018/executive-business-meeting>; *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Apr. 11, 2018), <https://www.judiciary.senate.gov/meetings/04/11/2018/nominations-1>; 164 CONG. REC. S4858 (daily ed. July 10, 2018) (Bennett's confirmation).

167. See *supra* notes 55, 58–59, 84–86 and accompanying text. Similar disputes arose in Ohio, Washington, and New Jersey. See Kaplan, *supra* note 54; sources cited *supra* note 87.

168. See *supra* note 63 and accompanying text. *But see also* sources cited *supra* note 64.

169. See sources cited *supra* note 68. The President can decline to nominate or the candidate may withdraw privately.

170. See sources cited *supra* note 64. When the ABA rated Charles Goodwin and Holly Teeter not qualified, chief judges where each was nominated voiced strong support. *Executive Business Meeting*, SENATE JUDICIARY COMMITTEE (Jan

should Trump insist on eschewing a formal ABA role, his White House Counsel must allow certain picks and some nominees to cooperate with the Bar Association, which diligently conducts investigations and prepares ratings on designees.<sup>171</sup>

The White House should correspondingly revisit its determination to accelerate the nomination and confirmation of conservative appellate judges. For example, it might adopt a regime centered on the needs of *all* circuit and district courts. One estimable approach may be prioritizing nominations by initially sending prospects who reduce the sixty-three emergency vacancies.<sup>172</sup> The President can stress the 115 trial level openings and the many courts with large vacancy percentages and cohorts, including certain districts in Texas and particular courts across California and in New York.<sup>173</sup> Emphasizing the latter states considerably more, and related jurisdictions, notably Florida, Illinois, New Jersey, and Pennsylvania, might concomitantly address the lack of nominees from states represented by Democrats.<sup>174</sup> The White House Counsel ought to effectuate this by affording home-state congressional members greater responsibility for detecting, recruiting, and proposing superb candidates whom Trump names.<sup>175</sup> If the Trump Administration persistently stresses appellate courts, the President should at least target emergency circuit openings.

President Trump as well must implement practices that will further bench diversity because pronounced minority representation

18, 2018), [https://www.judiciary.senate.gov/meetings/01/18/2018/executive-business-meeting-\(Teeter\)](https://www.judiciary.senate.gov/meetings/01/18/2018/executive-business-meeting-(Teeter)); *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Dec. 13, 2017), [https://www.judiciary.senate.gov/meetings/12/13/2017/nominations-\(Goodwin\)](https://www.judiciary.senate.gov/meetings/12/13/2017/nominations-(Goodwin)); 164 CONG. REC. S5590 (daily ed. Aug. 1, 2018) (Teeter confirmation); 164 CONG. REC. S5981 (daily ed. Aug. 28, 2018) (Goodwin confirmation); Peter Hancock, *Senate Panel Advances Johnson County Attorney for Federal Judgeship in Kansas*, LAWRENCE J. WORLD (Nov. 9, 2017, 12:46 PM), <http://www2.ljworld.com/news/2017/nov/09/senate-panel-advances-teeter-federal-judgeship-kan/>; Justin Wingerter, *Oklahoma City Federal Judge Defends His Work Ethic Before Senate Committee*, OKLAHOMAN (Dec. 13, 2017, 5:15 PM), <https://newsok.com/article/5575779/oklahoma-city-federal-judge-defends-his-work-ethic-before-senate-committee>.

171. See sources cited *supra* note 65.

172. See sources cited *supra* notes 71–73, 75–77, 142–43.

173. See sources cited *supra* notes 71–73, 75–77, 124, 142–43. Florida and Pennsylvania have ten vacancies and split delegations. See Press Release, Office of the Press Sec’y, President Donald J. Trump Announces Thirteenth Wave of Judicial Nominees and Seventh Wave of United States Marshal Nominees (Apr. 26, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-thirteenth-wave-judicial-nominees-seventh-wave-united-states-marshal-nominees/> (sending five Florida district nominees).

174. See 28 U.S.C. § 133 (2012); see also *supra* notes 77, 140 and accompanying text. States, like Nebraska and Idaho, with few authorized judges, also deserve emphasis, as one vacancy can be a high percentage.

175. The White House has apparently deferred significantly to many home-state politicians, especially on district vacancies. See *supra* notes 66–67 and accompanying text.



could furnish numerous benefits.<sup>176</sup> The Executive should accord diversity high priority while communicating to all involved with court selection and the public that Trump believes expanding minority representation has importance. The White House Counsel needs to spearhead this endeavor by actively conveying the message that increasing diversity is a critical priority analogous to conservatism. This message can be implemented by his staff, the DOJ, the Judiciary Committee, and politicians from jurisdictions that do encounter openings.

The White House Counsel should prescribe full recommendations to accentuate diversity. For instance, White House Counsel employees and others who collaborate on appointments now ought to include minorities while committing enough resources to foster smooth discharge of the responsibility for increasing diversity. Every participant in the nomination process must recruit, identify, evaluate, and submit numerous qualified people of color, women, and LGBTQ designees by contacting individuals and organizations that have familiarity with those groups. The White House Counsel should persuade officers from all states with current vacancies to pinpoint and forward capable minorities. The counsel then necessarily must scrutinize, interview, and proffer these choices, asking that Trump seriously examine the named individuals. The President may lead by example with consequent nominations, urging lawmakers to support and promptly consider them.

In short, Trump and the chamber must thoroughly explore plenty of near-term solutions that would improve the processes for selecting and confirming judges. The President might assertively consult home-state legislators and restore ABA participation from which numerous chief executives, senators, jurists, and other parties. The Senate may correspondingly revive salient procedures, namely blue slips' delivery and complete, rigorous hearings and floor debates.

### *B. Longer-Term Suggestions*

The review conducted above demonstrates the confirmation wars that preceded Trump's ascension have insistently continued since his election, illuminated by the minority party's rare agreements on chamber votes and the majority party's extension of the nuclear option to Supreme Court nominees.<sup>177</sup> Many phenomena indicate that 2018 is past time for seriously contemplating activities that can permanently enhance the atrophied selection practices: the small

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176. See *supra* notes 147–50 and accompanying text.

177. See also John Gramlich, *Federal Judicial Picks Have Become More Contentious, and Trump's Are No Exception*, PEW RES. CTR. (Mar. 7, 2018), <http://www.pewresearch.org/fact-tank/2018/03/07/federal-judicial-picks-have-become-more-contentious-and-trumps-are-no-exception>; Tobias, *supra* note 38, at 1107, n.81. For additional discussion, see *supra* notes 104–06, 112, 115 and accompanying text.

number of confirmations during Obama's final two years, the selection process' downward spiral manifested by unproductive paybacks and strident partisanship—which culminated in GOP refusal to assess Judge Garland—the sharply limited coordination between the parties so early in Trump's presidency, and the seemingly dismal prospects for rectifying the resulting complications.<sup>178</sup>

The Trump Administration's omission, change, or de-emphasis of numerous appointment constructs, which had functioned rather effectively, is significantly accelerating the procedures' steady decline. Yet, 2018 was a promising season to initiate longer-term reforms. As a midterm election year—Democrats and Republicans were unsure which party would win the Senate in November 2018, and they remain uncertain which party will capture the presidency come 2020. Thus, 2018 was replete with uncertainties and opportunities for compromise. Accordingly, 2018 could have been a very auspicious period for instituting several longer-term practices when both parties should have favored permanent solutions, while the President and the Senate needed to honor essential constitutional appointment duties with meaningful cooperation.<sup>179</sup> The best time for adopting solutions was prior to the midterm elections because uncertainty about the outcomes provided greater incentives to reach agreement;<sup>180</sup> however, some consensus may be possible in a lame duck session or even in early 2019 and certainly in the 2020 presidential election year.

Trump and senators can agree to dramatically change the present system through introduction of a bipartisan judiciary that would allow the party without executive control to recommend some percentage of nominees.<sup>181</sup> Members of Congress from specific jurisdictions have implemented relatively analogous constructs over various times. New York lawmakers adopted a concept that enabled an official whose party did not control the White House to submit one in a few district nominees,<sup>182</sup> and this measure worked efficaciously

178. See *supra* text accompanying notes 37–41, 57–58, 121.

179. For many longer-term ideas that could help conclude or at least ameliorate the confirmation wars, see generally Michael Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 298–311 (2012); Tobias, *supra* note 47, at 2255–65.

180. See Carl Tobias, *Fixing the Federal Judicial Selection Process*, 65 EMORY L.J. ONLINE 2051, 2057–58, 2058 n.42 (2016), [http://law.emory.edu/elj/\\_documents/volumes/65/online/tobias.pdf](http://law.emory.edu/elj/_documents/volumes/65/online/tobias.pdf) (arguing that the period before the 2016 election was an opportune time for reform of the judicial selection process because neither party could guarantee that it would be able to take advantage).

181. Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 688 (2003); Tobias, *supra* note 15, at 790 n.124.

182. JOAN BISKUPIC, *BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE* 59 (2014). The allocation for the senator not of the same

from the 1970s until the 1990s.<sup>183</sup> Pennsylvania is a modern example. Senators Bob Casey (D) and Pat Toomey (R) now rely on bipartisan merit-selection panels, which have canvassed and chosen individuals since 2011,<sup>184</sup> and the legislator whose party does not control the administration might stipulate one in four trial court nominees.<sup>185</sup> Florida's Marco Rubio (R) and Bill Nelson (D) have deployed comparatively analogous commissions to propose suggestions.<sup>186</sup>

Varying requirements within the jurisdictions would encourage negotiation between senators and the President.<sup>187</sup> Central strictures should include the percentages of submissions the opposition party affords, the number it could muster for every opening, and whether designees need to be ranked.<sup>188</sup> In split delegations, relevant concerns are whether the Democrats, the Republicans, or the President will initially delineate favorites and how to cautiously resolve differences between the senators and the President. A salutary approach could include having the lawmakers agree while proffering one candidate at a time until the executive concurs, as the solution reflects constitutional language and contemporary practice.<sup>189</sup>

Another issue may be which tribunals should have eligibility. For instance, a number of courts, particularly the D.C. District, might

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party as the President was at first one in four but later became one in three. *See id.*; *see also* 143 CONG. REC. 4254 (1997).

183. *See* Kline, *supra* note 23, at 299 n.161.

184. Press Release, Senator Pat Toomey, Senators Casey and Toomey Continue Bipartisan Agreement on District Court Vacancies (Mar. 10, 2017), <https://www.toomey.senate.gov/?p=news&id=1896>.

185. Lisa Thompson, *Candidate Recommended for Erie Federal Judge Post*, GOERIE (June 14, 2015, 12:01 AM), <http://www.goerie.com/news/20150614/candidate-recommended-for-erie-federal-judge-post>. Illinois used a similar system when the delegation was split, and the two Democrats retain that regime. Press Release, Senator Dick Durbin, White House Nominates Two to Fill Federal Judicial Vacancies in Northern District (Aug. 5, 2014), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-white-house-nominates-two-to-fill-federal-judicial-vacancies-in-northern-district>.

186. FLA. R.P. 1, FED. JUD. NOMINATING COMM'N, <https://www.floridabar.org/wp-content/uploads/2018/02/Federal-JNC-Rules-2017-19.pdf>; *see* Jay Weaver, *Former Prosecutor, Two Miami Judges To Be Nominated to South Florida Federal Bench*, MIAMI HERALD (Feb. 13, 2018, 8:32 PM), <https://www.miamiherald.com/news/local/article199972219.html>.

187. *See* sources cited *supra* note 181. *But see* 143 CONG. REC. 4253–54 (1997) (statement of Sen. Biden) (stating that there are limits as to the level of negotiation possible).

188. The systems that members now use suggest opposition senators can pick one in three or four. Using 2018, in states with two Democrats, Democrats choose; in states with two GOP members, the senior Democratic official picks; and in states with split delegations, the Democrat picks. All lawmakers then must work with the President.

189. *See infra* note 196 and accompanying text. The lawmakers also may send multiple picks and rank them to increase flexibility and expedite selection by obviating the need to start over when the President and senators differ.

require omission, as the District of Columbia lacks senators and the White House customarily heads this nomination regime.<sup>190</sup> Because appellate court positions are empty infrequently and the circuits encompass a few states, the bipartisan judiciary may apply best to courts with numerous judges.<sup>191</sup> However, those operational factors and perceptions that seating these jurists is distinctly political, complex, and crucial—as circuit opinions enunciate substantially more policy and, therefore, raise the stakes—indicate excluding courts of appeals would be preferable.

Congress should package the bipartisan judiciary device with legislation that authorizes fifty-seven court posts.<sup>192</sup> This would actualize Judicial Conference recommendations from lawmakers in 2017, astutely derived by the federal courts' policymaking arm from conservative approximations of case and workloads that will grant tribunals resources necessary to supply justice.<sup>193</sup> Those constructs must take effect over 2019 or 2021, thus marshaling advantages for neither party when first created by decreasing the ability to game the regime.<sup>194</sup>

Combining a bipartisan judiciary and fifty-seven positions, which the Judicial Conference recommended to Congress,<sup>195</sup> could yield multiple benefits. It would halt or slow the process's slide while affording each party incentives to collaborate as well as jurists who are comparatively diverse vis-à-vis experience, ideology, ethnicity, gender, and sexual orientation. Had senators adopted this idea in 2018, with implementation correspondingly mustered during next year, the concept would have minimized both parties' opportunities to extract unfair advantages, although the notion could be prescribed in early 2019 or late 2020.

Nonetheless, implementing this proposal might require some care. For example, Joe Biden, when he was a Delaware legislator,

190. Those courts with a bipartisan judiciary could be matters for negotiation or be left to the opposition party. Small districts may warrant exclusion, as they rarely experience vacancies. See sources cited *supra* note 174.

191. Even the Ninth Circuit, the largest, has vacancies once in a generation in Alaska, Hawaii, Idaho, and Montana. 28 U.S.C. § 44(c) (2012) requires that each circuit's states have one active judge.

192. *Judicial Conference Asks Congress to Create New Judgeships*, UNITED STATES CTS. (Mar. 18, 2003), <http://www.uscourts.gov/news/2003/03/18/judicial-conference-asks-congress-create-57-new-judgeships> [hereinafter *Judicial Conference New Judgeships*]; see also Tobias, *supra* note 106, at 140. If the selection process keeps spiraling downward, more judgeships will not improve selection or the judicial vacancy crisis.

193. JUDICIAL CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. 16–17 (2017), [http://www.uscourts.gov/sites/default/files/2017-03\\_0.pdf](http://www.uscourts.gov/sites/default/files/2017-03_0.pdf); see Federal Judgeship Act of 2013, S. 1385, 113th Cong. (2013) (providing the most recent comprehensive judgeships bill).

194. When the parties agree *before* elections, it is more difficult to game the system. Midterm election years seem less felicitous than presidential ones, as the President is not running, will remain in office, and may fail to cooperate.

195. *Judicial Conference New Judgeships*, *supra* note 192.

castigated a related proposition because it was unconventional and the Constitution says that the President nominates and confirms jurists with Senate advice and consent.<sup>196</sup> However, Biden's point applies equally to the unprecedented gridlock manifested since 2009, while a bipartisan judiciary can actually be devised which respects the Constitution.<sup>197</sup> Initiating this effort appears complicated, but most difficulties could be felicitously treated.<sup>198</sup>

Another longer-term possibility would be reforming the filibuster that was integral to the modern confirmation wars. Filibuster traditionally safeguarded the minority party, but various abuses show this concept now deserves greater recalibration.<sup>199</sup> For example, application could be limited to nominees without the intelligence, ethics, temperament, diligence, or independence for providing exceptional court service. This goal would be achieved through permitting filibusters only in "extraordinary circumstances," a framework that served rather efficaciously across 2005, while comprehensively defining the precept.<sup>200</sup> These actions might facilitate reinstatement of sixty votes for cloture, a decision that

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196. Biden was alluding to "trades" between senators and President Clinton, which the Republicans proposed. Georgia senators and Obama seemed to employ trades when they could not agree on nominees for many Georgia vacancies. Dan Malloy, *The Delegation of Georgians in D.C.: Woodall Does Balancing Act in House GOP Post*, ATLANTA J. CONST., July 20, 2014, at A14; see *2017 National Lawyers Convention*, *supra* note 51 (highlighting McGahn's similar view on consultation).

197. The Constitution does not bar these concepts, to which Trump and Congress can agree. The ideas may further politicize selection or deny political victors spoils. However, they could improve selection. The confirmation wars need to end, and litigant and judicial needs must be paramount. For "unprecedented," see Josh Chafetz, *Unprecedented: Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 98–99 (2017); Michael Gerhardt, *Practice Makes Precedent*, 131 HARV. L. REV. F. 32, 39–40 (2017).

198. Congress has treated more complex issues, notably how to resolve substantial, increasingly complex dockets with comparatively few resources, by authorizing many judgeships, but the last comprehensive law passed in 1990. See Federal Judgeship Act of 1990, Pub. L. No. 101-650, §§ 201–206, 104 Stat. 5089, 5098–04. The ideas above treat many issues that a bipartisan judiciary may create.

199. Filibuster abuse led to the nuclear option's detonation, which narrowed use by requiring a majority vote for cloture, while GOP refusal to grant Obama nominees 2015–16 floor votes was abusive, as may be 2017–18 nearly automatic cloture petitions, which consume thirty hours of floor time. See sources cited *supra* notes 38–39, 106, 113–14.

200. See Michael Gerhardt & Richard Painter, "Extraordinary Circumstances": *The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform*, 46 U. RICH. L. REV. 969, 970 (2012); *Text of Senate Compromise on Judge Nominations*, N.Y. TIMES, May 24, 2005, at A18. Some senators argued that nominee ideological views and the number of court cases and judges were *not* extraordinary in a dispute over three D.C. Circuit vacancies. Tobias, *supra* note 106, at 126–28. *But see id.* at 125–27.

would reverse the nuclear option and perhaps stimulate enhanced cooperation.<sup>201</sup>

## VI. CONCLUSION

President Donald Trump and the 115th Senate have insistently continued and exacerbated the rampant, counterproductive dynamics which attend the renewed and increasingly destructive confirmation wars. Therefore, his administration must collaborate with Republican and Democratic lawmakers to cure or ameliorate the federal vacancy crisis that has been acutely undermining the courts for the good of litigants, the judiciary, the President, the Senate, and the country.

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201. The GOP maintains a Senate majority, so it may oppose the changes, but filibuster reform can be one aspect of a global solution, which also mandates two hours of post-cloture debate for district nominees. See sources cited *supra* note 114. The GOP will not retain the majority forever and may agree to this trade. Tobias, *supra* note 106, at 140; see sources cited *supra* notes 44–46. An effective 2007–08 custom was floor votes on all strong, centrist district nominees before long Senate recesses. Tobias, *supra* note 37, at 31. The Senate could also use many other customs to reinstitute regular order.

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