2019

Senator Chuck Grassley and Judicial Confirmations

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Iowa Republican Senator Chuck Grassley finished his second term as Chair of the Senate Judiciary Committee with the early January 2019 adjournment of the 115th Congress. He was the first nonlawyer to lead the

[*] Williams Chair in Law, University of Richmond School of Law. I wish to thank Margaret Sanner for her valuable suggestions, Jamie Wood, Emily Benedict and Jane Baber for their valuable research and editing, the University of Richmond Law Library staff for their valuable research, the *Iowa Law Review Online* editors, Joseph Steigmeyer and Kelsey Ridenhour, for their valuable research, advice, patience and editing, Leslee Stone for her exceptional processing as well as Russell Williams and the Hunton Andrews Kurth Summer Endowment Research Fund for their generous, continuing support. Remaining errors are mine alone.

august committee over almost 200 years.[1] A core panel duty is moving judicial nominees through the confirmation process, which helps senators discharge their constitutional advice and consent responsibility. Because the Chair plays an integral role—Grassley fulfilled this obligation in a critical, albeit controversial, manner—and because his service as Chair has ended, it is crucial to evaluate how the lawmaker discharged that important responsibility.

This Essay initially describes the history of federal judicial selection and Senator Grassley's role from the commencement of 2015 until the beginning of 2019. It finds striking discrepancies between how the Chair acted over the two periods. In the 114th Congress, during President Barack Obama's last half term when Republicans controlled a Senate majority, Grassley strictly enforced numerous rules and customs, mainly "blue slips," and seriously delayed the confirmation process. These phenomena meant that the Senate confirmed the fewest appeals court judges since 1897–98.[2] In profound contrast, across the 115th Congress during President Donald Trump's first two years when the Grand Old Party ("GOP") retained an upper chamber majority, Grassley jettisoned, changed or deemphasized a number of venerable strictures and conventions.[3] For example, he did not respect Democratic home state politicians' blue slips for appellate court nominees, limit the number of nominees in hearings to one appeals court prospect, or conduct panel votes after the American Bar Association ("ABA") had completed evaluating and rating circuit and district court nominees.[4] The dramatically accelerated pace of nominations and confirmations as well as Republican senators' penchant for rubberstamping nominees and lockstep voting in the Judiciary Committee and on the Senate floor enabled Trump to appoint the most circuit judges ever, numbers of whom are ideologically conservative, young and talented.[5] Indeed, a single Grand Old Party member cast the sole negative chamber ballot throughout 2017.[6]

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1. *See generally* CARL HULSE, CONFIRMATION BIAS: INSIDE WASHINGTON'S WAR OVER THE SUPREME COURT, FROM SCALIA'S DEATH TO JUSTICE KAVANAUGH (2019) (analyzing Senator Grassley's tenure as the Chair of the Judiciary Committee); Jimmy Hoover & Michael Macagnone, *9th Circuit Pick Forces Grassley to Choose: Trump or Tradition?*, LAW360 (Mar. 29, 2018), https://www.law360.com/articles/1025855 [https://perma.cc/8C94-FCD4].

2. *See infra* note 104 and accompanying text.

3. *See infra* notes 20–35 and accompanying text.

4. HULSE, *supra* note 1, at 186–92 (analyzing Grassley's appellate court blue slip policy in 2017-18); *see infra* notes 20–35, 87–91 and accompanying text.

5. Catie Edmondson, *Trump's Judicial Nominees Take Heat but Largely Keep Marching Through Senate*, N.Y. TIMES (Dec. 11, 2018), https://www.nytimes.com/2018/12/11/us/politics/republicans-judges-confirmation-votes.html [https://perma.cc/URX3-CJQK]; *see infra* notes 105–10, 152–54 and accompanying sources.

6. 163 CONG. REC. S7351 (daily ed. Nov. 28, 2017) (Sen. John Kennedy (R-LA) registered the sole negative chamber vote cast by a Grand Old Party member against Gregory Katsas, who secured confirmation to the United States Court of Appeals for the District of Columbia Circuit).

This Essay detects that President Trump, Senator Grassley and the Republican chamber majority exacerbated the selection process's counterproductive downward spiral, riven by Democratic and Republican politicization, divisiveness, and systematic paybacks, which undermined judicial appointments. Because these dynamics subvert the president's discharge of constitutional responsibilities to nominate and confirm excellent judges, the senators' fulfillment of their constitutional duty to provide advice and consent, as well as the courts' important responsibility to expeditiously, inexpensively and equitably resolve civil and criminal disputes, the last Part posits suggestions for improving this fundamental conundrum of American governance.

I. 2015–16 PROCESSES

Reviews of the circuit and district nomination and confirmation processes in the last two Congresses have distinct emphases. For 2015–16, the assessment considers first and stresses the initial year's district processes, because President Obama emphasized those systems by proffering no court of appeals nominees, the GOP chamber majority confirmed two appellate court jurists throughout both years, detailed scrutiny clarifies the processes, and the 2016 presidential election year meant that judicial appointments proceeded slowly and peremptorily stopped in early July. For 2017–18, the canvass treats initially and focuses on the circuit nomination and confirmation processes, because President Trump and the Republican Senate majority stressed court of appeals confirmations and this emphasis increases clarity. The years 2016 and 2018 deserve substantially less consideration, as each closely resembled the preceding year.

Ever since Republicans assumed a relatively slight chamber majority in 2015, the Grand Old Party leadership and individual Senate members promised to comprehensively reinstate and thoroughly comply with "regular order."[7] Senators dutifully recited the litany to describe the revitalization of strictures and customs which putatively governed before the Democratic

7. Jerry Markon, Robert Costa & David Nakamura, *Republicans Win Senate Control, as Polls Show Dissatisfaction with Obama*, WASH. POST (Nov. 4, 2014), https://www.washingtonpost.com/politics/senate-control-at-stake-in-todays-midterm-elections/2014/11/04/e882353e-642c-11e4-bb14-4cfea1e742d5_story.html [https://perma.cc/P4GC-YU57]. S*ee generally* Carl Tobias, *The Republican Senate and Regular Order*, 101 IOWA L. REV. ONLINE 12 (2016) [hereinafter Tobias, *Regular Order*] (highlighting the impact of the Republican Senate majority on the judicial confirmation process under President Barack Obama). I emphasize appellate court selection, because Trump has stressed filling appellate court vacancies, and because the tribunals are courts of last resort for 99 percent of cases and articulate considerably greater policy than the district courts. Moreover, each Supreme Court nomination and confirmation process seems unique. *See generally* Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089 (2017) [hereinafter Tobias, *Justices*] (analyzing the Republican Senate majority's decision not to consider President Obama's exceptional Supreme Court nominee Merrick Garland).

chamber majority undercut those rules and conventions starting in 2007.[8] As the 114th Congress opened, the new Senate Majority Leader Mitch McConnell (R-KY) implored Republican and Democratic Senate members to effectuate regular order again, incessantly repeating this notion.[9] Grassley vowed that the Judiciary Committee would duly process circuit and district court nominees in regular order.[10] Senator John Cornyn (R-TX), the Assistant Majority Leader, concomitantly echoed these sentiments in nominee committee hearings and discussions and on the Senate floor.[11]

A. THE 2015–16 DISTRICT COURT PROCESSES

1. The Nomination Process

Obama assiduously consulted politicians who represented home states which encountered vacancies by pursuing suggestions from the lawmakers regarding well qualified, mainstream candidates and employing that information to nominate prospects who could fill the openings.[12] This protocol facilitates confirmations, because senators defer to colleagues from jurisdictions with vacancies who can delay nominees by retaining blue slips. Despite persistent White House consultation, Senate members, especially Republicans, slowly instituted efforts in their jurisdictions that would proffer choices and some lawmakers even refused to propose any candidates.[13] For instance, eight of nine appellate court openings that the Administrative Office of the United States Courts (AO), which is the federal judiciary's administrative arm, characterized as "judicial emergencies"—because the judgeships had remained vacant for protracted times and their courts experienced substantial caseloads—lacked 2015 nominees from jurisdictions that GOP senators represented.[14]

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8. Tobias, *Regular Order*, *supra* note 7, at 13–14.

9. *E.g.*, 161 CONG. REC. S27–28 (daily ed. Jan. 7, 2015); 161 CONG. REC. S155 (daily ed. Jan. 12, 2015); 161 CONG. REC. S2767 (daily ed. May 12, 2015). *But see* 161 CONG. REC. S3223 (daily ed. May 21, 2015) (statement of Sen. Leahy).

10. *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 114th Cong. (Jan. 21, 2015) [hereinafter *Nominations Jan. 2015*]; *Attorney General Nomination: Hearing Regarding the Nomination of Loretta Lynch to be United States Attorney General Before the S. Judiciary Comm.*, 114th Cong. (Jan. 28, 2015) [hereinafter *Attorney General Nomination*]; David Catanese, *Chuck Grassley's Gavel Year*, U.S. NEWS & WORLD REP. (Jan. 28, 2015), https://www.usnews.com/news/articles/2015/01/28/chuck-grassleys-gavel-year [https:// perma.cc/V5JG-DQZD].

11. *See, e.g.*, *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 114th Cong. (Feb. 26, 2015); 161 CONG. REC. S702 (daily ed. Feb. 2, 2015).

12. Sheldon Goldman, et al., *Obama's First Term Judiciary: Picking Judges in the Minefield of Obstructionism*, 97 JUDICATURE 7, 15–17 (2013); Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2240 (2013).

13. Goldman et al., *supra* note 12, at 17.

14. *Judicial Emergencies for December 2015*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2015/12/emergencies [https://perma.cc/C6A8-3FKF] (last updated Dec. 1, 2015) [hereinafter *Emergencies Dec. 2015*]. The office premises emergencies on the substantial magnitude of dockets and the protracted length of vacancies.

The clearest example of complications which plagued the nomination process was the state of Texas. The jurisdiction encountered the most vacancies nationwide, despite the 2015 confirmations of Alfred Bennett, George Hanks, Jr., and Jose Rolando Olvera, Jr., three accomplished, consensus nominees, to serve on the Southern District of Texas.[15] Across Obama's final half term, Texas experienced a pair of circuit—and as many as 11 district—court openings, all of which the United States Courts Administrative Office categorized as emergencies and a number of those vacancies lacked nominees.[16] In an April 13 debate on Alfred Bennett, the first of the Texas re-nominees, Senator Patrick Leahy (D-VT), who was the Judiciary Committee Ranking Member in 2015 and served as Chair from 2007 until 2014, detected no reason why the panel needed almost seven months for review or did not vote on two more pending nominees,[17] elaborating that two Fifth Circuit (and seven additional district) vacancies which lacked nominees existed.[18] The senator asserted that the number of openings more than doubled the quantity of vacancies in the remaining states while he urged that Senators Cornyn and Ted Cruz (R-TX) cooperate with President Obama to rapidly fill all of the empty judgeships.[19]

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15. *Judicial Confirmations for December 2015*, U.S. COURTS, https://www.uscourts.gov/ judges-judgeships/ judicial-vacancies/ archive-judicial-vacancies/ 2015/ 12/ confirmations [https://perma.cc/3HDW-55VX] (last updated Dec. 1, 2015) (documenting the confirmation of Southern District of Texas Judges Alfred Bennett, George Hanks, Jr., & Jose Rolando Olvera, Jr.); Natalie Knight, *Will Cornyn and Cruz Stop the Flood of Judicial Vacancies in Texas?*, ALLIANCE FOR JUST.: JUST. WATCH (Aug. 26, 2015), https://www.afj.org/blog/will-cornyn-and-cruz-stop-the-flood-of-judicial-vacancies-in-texas [https://perma.cc/8ALJ-8ARQ] (documenting that the state of Texas experienced the most substantial number of vacancies of any jurisdiction across the United States throughout 2015).

16. For certain of these vacancies, especially the Texas Fifth Circuit openings, the Texas senators had apparently commenced comparatively little, if any, process for recommending candidates to Obama whom the president might nominate to fill those openings. *Judicial Emergencies for January 2017*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/01/emergencies [https://perma.cc/ZW9S-Z8MF] (last updated Jan. 1, 2017); *Current Judicial Vacancies for January 2017*, U.S. COURTS., https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/01/ vacancies [https:// perma.cc/8NA3-5K3H] (last updated Jan. 1, 2017) (documenting a pair of Texas Fifth Circuit and 11 Texas district court vacancies, merely five of which experienced nominees); *see supra* note 13 and accompanying sources.

17. 161 CONG. REC. S2104 (daily ed. Apr. 13, 2015) [hereinafter Leahy statement] (statement of Sen. Leahy). George Hanks, Jr., and Rolando Olvera, Jr., were the other two pending nominees.

18. *Id.*

19. *Id.* Numerous reasons explain these circumstances. Texas Senators Kay Bailey Hutchison, Cornyn and Cruz did not seem to anticipate Fifth Circuit or district court openings which might arise in the future or to respond particularly expeditiously to existing vacancies, they and the Texas Democratic House delegation frequently differed over the candidates to be recommended, and President Obama did not always concur with the lawmakers' recommendations.

2. The Confirmation Process

i. Committee Hearings

Grassley set the initial committee hearing two weeks after the 114th Congress began, promising to expeditiously process strong, consensus nominees in regular order.[20] The Chair proclaimed that American citizens should expect no "discernable difference" in the panel's operations, suggesting that he would conduct hearings every few weeks that lawmakers were in session.[21] However, disputes quickly arose. For instance, Grassley only convened the second hearing *seven* weeks after the first, and the third session *eight* weeks later, with the fourth hearing coming on June 10.[22] The March session included merely two nominees, and the last hearing encompassed only three, as contrasted to four or five nominees whom Leahy ordinarily mustered.[23] In the April 20 debate on the second Texas re-nominee, the Chair vigorously argued that he was proceeding similarly to how Democrats had proceeded in 2007,[24] which Grassley asserted by comparing the three hearings for "10 judges" that Leahy arranged in 2007 with his committee's four 2015 sessions on "six judges and four executive nominees."[25] The Chair alleged that President Obama had experienced "very fair" treatment because 309 of his appellate and district court nominees had captured appointment in contrast to 273 nominees whom President George W. Bush had proposed

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20. *Nominations Jan. 2015*, *supra* note 10; Jennifer Jacobs, *Grassley's Checklist of Priorities*, DES MOINES REG. (Jan. 7, 2015), https://www.desmoinesregister.com/story/news/politics/2015/01/07/grassley-checklist-priorities-judiciary-committee/21394233 [https://perma.cc/9YRJ-5VPX].

21. Leahy, as Chair, did follow this schedule throughout the first six years of President Obama's administration, and Grassley, as Ranking Member, cooperated with Leahy in implementing the schedule. *Compare Nominations Jan. 2015*, *supra* note 10, *Attorney General Nomination*, *supra* note 10, *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 114th Cong. (Mar. 11, 2015) [hereinafter *Nominations Mar. 11*], *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 114th Cong. (May 6, 2015) [hereinafter *Nominations May 6*], *and Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 114th Cong. (June 10, 2015) [hereinafter *Nominations June 2015*], *with Hearing on Judicial Nominations: Hearing Before the S. Judiciary Comm.*, 113th Cong. (Jan. 23, 2013), *Hearing on Judicial Nominations: Hearing Before the S. Judiciary Comm.*, 113th Cong. (Feb. 13, 2013), *and Hearing on Judicial Nominations: Hearing Before the S. Judiciary Comm.*, 113th Cong. (Jan. 28, 2014).

22. *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 114th Cong. (Mar. 11, 2015) [hereinafter *Nominations Mar. 2015*]; *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 114th Cong. (May 6, 2015); *Nominations June 2015*, *supra* note 21.

23. *Compare Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 114th Cong. (Mar. 11, 2015) *and Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 114th Cong. (June 10, 2015), *with Hearing on Judicial Nominations: Hearing Before the S. Judiciary Comm.*, 113th Cong. (Jan. 28, 2014), *and Hearing on Judicial Nominations: Hearing Before the S. Judiciary Comm.*, 113th Cong. (Sept. 9, 2014).

24. George Hanks, Jr., was the second of the four Texas re-nominees. 161 CONG. REC. S2264 (daily ed. Apr. 20, 2015).

25. The executive nominees included the candidates whom Obama had nominated to serve as the Attorney General and the Deputy Attorney General. *Id.*

and the Senate confirmed.[26] Senator Harry Reid (D-NV), the Minority Leader, responded that the Grand Old Party was conducting very few hearings,[27] while, by June 8, 2007, Democrats had helped Bush confirm "18 judges, including 3" for circuit courts.[28]

ii. Committee Votes

Despite Senator Grassley's numerous pledges, which insistently extolled the many virtues of regular order, the Chair persistently "held over" practically all committee votes.[29] Grassley retained a measure that the Republican Senate minority had employed throughout Obama's initial six years, which delayed committee ballots on highly qualified, consensus nominees whom the panel listed for consideration the first time until the next executive business meeting, which the Chair usually arranged one week later.[30] The committee, under Grassley's leadership, slowly considered five accomplished, mainstream United States Court of Federal Claims re-nominees who had felicitously secured panel approval in 2014.[31] Grassley also stalled committee votes on four prominent, mainstream district re-nominees—two for emergencies—with enthusiastic home state Republican committee member support.[32] The circumstances which surrounded additional nominees' consideration analogously illustrate delay. Western District of Missouri nominee Roseann Ketchmark, who was a well-qualified, consensus district nominee, enjoyed a

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26. 161 CONG. REC. S2263–64 (daily ed. Apr. 20, 2015).

27. 161 CONG. REC. S3850 (daily ed. June 8, 2015).

28. The number of judges whom the Democratic Senate majority helped Bush confirm was substantially greater than the number of jurists whom the Republican Senate majority helped Obama to confirm: merely four district jurists. *Id.*

29. *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 114th Cong. (Feb. 12, 2015); *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 114th Cong. (Feb. 26, 2015) (holding over); *S. Judiciary Comm.*, *Rules of Procedure United States S. Comm. on the Judiciary*, *Meetings of the Comm.* (documenting the Judiciary Committee rule which provides for holding over committee action until the next meeting); *supra* note 10 and accompanying sources. At meetings, members vote on, but infrequently engage in substantive discussion regarding nominees, even controversial ones.

30. *E.g.*, *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 113th Cong. (Sept. 11, 2014); *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 113th Cong. (Nov. 13, 2014). The Democratic Senate minority has held over discussions and ballots for virtually all Trump judicial nominees in the 115th and 116th Congresses similarly to how the Republican minority held over discussions and ballots for practically all Obama nominees in the 113th and 114th Congresses.

31. No Senate member had opposed any of the nominees. *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 113th Cong. (Nov. 20, 2014); *supra* note 18 and accompanying sources; *infra* note 66 and accompanying sources.

32. Senators Cornyn and Cruz, who represented Texas, as well as Senators Orrin Hatch and Mike Lee, who represented Utah, were the home state members. The Utah district court nominee was Utah Supreme Court Justice Jill Parrish. *Emergencies Dec. 2015*, *supra* note 14; *Nominations Jan. 2015*, *supra* note 10 (home state senators' supportive statements); *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 114th Cong. (Feb. 26, 2015) (showing home state senators' positive votes); 161 CONG. REC. S3224 (daily ed. May 21, 2015) (confirming District of Utah Judge Jill Parrish).

March 11 hearing, but the committee only conducted her discussion and approval vote on April 23.[33] Four strong, centrist district nominees testified on May 6 yet the panel did not provide their discussions and reports for 30 days, while two excellent, moderate nominees with a June 10 hearing only received discussions and approvals one month later.[34] The Chair also did not convene meetings each week that the chamber was in session, which contrasted to how Leahy conducted the panel.[35]

iii. Floor Votes

A critical leadership test arose with February 26 committee approval of nominees and McConnell's decision to slowly permit floor debates and votes. The senator had rejected expeditious accords for chamber debates and ballots when he was the Minority Leader in Obama's first term and a half,[36] thus making Democrats seek cloture often and eventually alter filibusters by detonating the "nuclear option."[37] However, McConnell pledged greater collaboration when he became the Majority Leader, so arranging ballots provided an opportunity to respect this vow.[38]

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33. *Nominations Mar. 2015*, *supra* note 22; *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 114th Cong. (Apr. 23, 2015) [hereinafter *Mtg. Apr. 2015*]; *see infra* note 63 and accompanying text.

34. The four strong centrist nominees, who testified at a May 6 hearing, were Eastern District of California nominee Dale Drodz, Eastern District of New York nominees Ann Donnelly and Lashann DeArcy Montique Hall and Western District of New York nominee Lawrence Vilardo. *See also infra* note 64 and accompanying text. The two excellent, moderate nominees who enjoyed a June 10 hearing were Eastern District of Tennessee nominee Travis McDonough and Middle District of Tennessee nominee Waverly Crenshaw. *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 114th Cong. (June 10, 2015); *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 114th Cong. (May 6, 2015); *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 114th Cong. (July 9, 2015); *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 114th Cong. (June 4, 2015); *supra* note 22; *see also infra* note 65 and accompanying text.

35. *See, e.g.*, *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 113th Cong. (June 26, 2014); *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 113th Cong. (June 19, 2014); *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 113th Cong. (June 12, 2014); *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 113th Cong. (April 8, 2014); *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 113th Cong. (April 3, 2014); *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 113th Cong. (Mar. 27, 2014). *But cf. infra* note 188 and accompanying text (conducting meetings practically every week that Congress was in session throughout Trump's presidency).

36. 158 CONG. REC. S8375 (daily ed. Dec. 21, 2012) (statement of Sen. Leahy); Tobias, *supra* note 12, at 2243.

37. On a majority ballot, Democrats altered the Senate rules for cloture to a majority from 60 votes, which basically eliminated the filibuster for appellate court and district court nominees. 159 CONG. REC. S8418–19 (daily ed. Nov. 21, 2013); *see* Jeffrey Toobin, *How Harry Reid Changed the Federal Courts*, NEW YORKER (Mar. 27, 2015), https://www.newyorker.com/news/news-desk/how-harry-reid-changed-the-federal-courts [https://perma.cc/HDM2-SN7X].

38. Neil Eggleston, *Judicial Nominations: Accomplishments and the Work That Lies Ahead*, WHITE HOUSE BLOG (Dec. 17, 2014, 3:39 PM), https://obamawhitehouse.archives.gov/blog/2014/12/17/judicial-nominations-accomplishments-and-work-lies-ahead [https://perma.cc/6E45-HZQZ]; Colleen McCain Nelson, *Obama Tries to Woo GOP on His Priorities*, WALL ST. J. (Jan. 13,

Nevertheless, McConnell conducted no prompt final votes regarding the four district court and five Court of Federal Claims re-nominees. A month passed until the Majority Leader staged an April 13 debate and ballot for one district choice, which apparently responded to Leahy's contention that voting on no 2015 nominee by March's end[39] sharply contrasted with the Democratic majority helping to approve 15 of President George W. Bush's nominees by that juncture in 2007.[40] The Ranking Member alleged that the Senate had not concluded the chamber's important judicial appointments work because the 114th Congress was in a president's last two years.[41] Leahy argued that senators must continue providing advice and consent and that Congress should authorize 73 new federal circuit and district court judgeships, which the Judicial Conference of the United States—the federal courts' policymaking arm—proposed would supply judicial resources necessary for courts to expeditiously, inexpensively and fairly decide cases.[42] The Ranking Member also refuted Grassley's claim that 11 appointees in the 2014 lame duck session must count as 2015 confirmations by urging that senators had frequently approved consensus nominees at prolonged chamber recesses and that Democrats only had to follow this approach because Republican delay meant that Obama confronted 90 circuit and district court vacancies across most of his first term.[43] In the April 13 floor debate, Leahy contended that "baseless political obstructionism" was the reason why the GOP had granted no jurists appointment in 2015, despite many pledges to

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2015, 7:29 PM), https://www.wsj.com/articles/obama-congressional-leaders-discuss-how-to-spur-economic-progress-1421169018 [https://perma.cc/A68Y-8Q9J].

39. 161 CONG. REC. S2029–30 (daily ed. Mar. 26, 2015). Southern District of Texas Judge Alfred Bennett was the nominee.

40. The Democratic Senate majority continued to conduct nomination hearings and helped to confirm 68 judges (ten for appellate courts) throughout George W. Bush's final two years. 161 CONG. REC. at S2104–05 (daily ed. Apr. 13, 2015); 161 CONG. REC. S2029 (daily ed. Mar. 26, 2015) (statement of Sen. Leahy); *see also infra* note 57.

41. 161 CONG. REC. S2029–30 (daily ed. Mar. 26, 2015). *Accord* 161 CONG. REC. S2264 (daily ed. Apr. 20, 2015).

42. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 16–17 (Mar. 14, 2017), https://www.uscourts.gov/sites/default/files/2017-03_0.pdf [https://perma.cc/8ZWW-BEDV] [hereinafter REPORT]. The federal courts' policymaking arm bases judgeships recommendations for Congress on conservative work and case load projections.

43. 161 CONG. REC. S2029–30 (daily ed. Mar. 26, 2015). In each of the initial five months during 2011, there were more than 90 appellate court and district court judicial vacancies. *E.g.*, *Judicial Vacancy List for May 2011*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2011/05/vacancies/html [https://perma.cc/ESV6-KJYS] (last updated May 1, 2011); *Judicial Vacancy List for February 2011*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2011/02/vacancies/html [https://perma.cc/6K6A-QPSS] (last updated Feb. 1, 2011). For the appointment of consensus nominees, see Goldman et al., *supra* note 12, at 13–14; Michael L. Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 292 (2012).

restore regular order,[44] and described the three months required to debate and vote as disconcerting.[45]

McConnell did not publicly announce exactly when the Republican Senate majority might stage confirmation debates and ballots on the other district re-nominees whom the committee had reported, but the Majority Leader did grant a debate and vote on one re-nominee for April 20, prompting Leahy's claim that the individual was merely the second appointee throughout Congress' first three months.[46] This extended period showed that GOP "delay and obstruction" had resurfaced,[47] and the Ranking Member derided the "slow trickle" of nominees which undermine federal court operations.[48] Grassley argued that the Senate was moving nominees like the chamber did in 2007,[49] but the Chair premised this contention on the Democratic Senate majority's violation of "standard practice" by confirming 11 jurists in the 2014 lame duck session and, thus, when they were counted, the 2015 pace resembled that of the Democrats in 2007.[50]

When McConnell scheduled no debates and ballots on the last district court re-nominees for emergency vacancies, Minority Leader Reid asserted in May that the Grand Old Party Senate majority had confirmed only two judges all year,[51] and that eschewing the fulfillment of its constitutional duty was unfair to American citizens who litigate in federal court.[52] When the Majority Leader ignored Reid, the Minority Leader repeated earlier concerns,[53] which

44. Leahy Statement, *supra* note 17.

45. Leahy contended that home state Republican lawmakers had recommended and supported all of the nominees whom the panel approved, urging expeditious confirmation of ten more consensus nominees who were awaiting votes. *Id.*; 161 CONG. REC. at S2104–05 (daily ed. Apr. 13, 2015).

46. Southern District of Texas Judge George Hanks, Jr., was the nominee who captured appointment. 161 CONG. REC. S2264–65 (daily ed. Apr. 20, 2015); Jennifer Steinhauer, *McConnell Makes Changes, But Senate Gridlock Remains*, N.Y. TIMES (Mar. 20, 2015), https://www.nytimes.com/2015/03/21/us/politics/mitch-mcconnell-makes-changes-but-senate-gridlock-remains.html [https://perma.cc/7NLA-LYQP]; *supra* notes 19–20 and accompanying text.

47. 161 CONG. REC. S2264–65 (daily ed. Apr. 20, 2015).

48. Leahy contended that these phenomena harmed citizens. *Id.*

49. 161 CONG. REC. S2263 (daily ed. Apr. 20, 2015).

50. *Id.* at S2264. *But see supra* note 46 and accompanying sources.

51. The two appointees, Southern District of Texas Judges Alfred Bennett and George Hanks, Jr., contrasted to the 16 nominees whom the Democratic Senate majority had helped to confirm over the comparable period during 2007, while emergency vacancies had doubled throughout 2015. 161 CONG. REC. S2659 (daily ed. May 6, 2015).

52. Reid urged the GOP to heed this solemn obligation. *Id.*

53. Reid stressed the seven Texas judicial emergency vacancies and Republican pledges to follow regular order and quickly confirm nominees. 161 CONG. REC. S2949 (daily ed. May 18, 2015); *see also* Carl Tobias, *Filling Texas Federal Court Vacancies*, 95 TEX. L. REV. SEE ALSO 170, 173–75 (2017); *supra* note 50 and accompanying sources. *But see supra* note 46.

seemingly prodded McConnell to arrange late May debates and votes.[54] Leahy used this occasion to criticize and summarize 2015 confirmations, arguing that in September Obama had named each person and they received January hearings and February reports yet languished almost 90 days.[55] The Ranking Member declared that Rolando Olvera would fill one in six Texas district court emergencies,[56] reiterating the chamber duty to debate and vote on judges regardless of which party controls the Senate majority.[57] Leahy alleged that the GOP continued making excuses for obstruction and delay.[58] He replied to Grassley's assertion that Democrats only confirmed 18 judges in 2007, as the jurists were held over from 2006, by contending that the Chair neglected to state that the nine judges appointed in 2007 were not left on the floor at 2006's end.[59] Leahy also claimed that Grassley's contention ignored the constitutional responsibility to fill openings.[60] The Ranking Member then reviewed—and urged swift confirmation of—ten nominees awaiting final votes,[61] after which the two nominees captured appointment with 100-0 ballots.[62]

McConnell did not publicly remark when six 2015 district court nominees who had secured panel approval would enjoy floor debates and votes, but one of them with a March hearing and an April committee report earned September confirmation.[63] Three of four nominees with May hearings and June panel approvals captured October ballots, because Grassley had vociferously objected to a July unanimous consent request from New York Democratic Senator Chuck Schumer by repeating the Chair's notions about 2014 lame duck confirmations and how 2015 resembled 2007.[64] One

54. The last two district re-nominees had waited almost 90 days for a confirmation vote. 161 CONG. REC. S3224 (daily ed. May 21, 2015).

55. *Id.*; *see supra* notes 19, 32.

56. 161 CONG. REC. S3223 (daily ed. May 21, 2015); *see supra* notes 14, 19, 52.

57. The Democratic Senate majority had helped to confirm 68 judges (ten for appellate courts) throughout George W. Bush's final two years, including 18 during the comparable period when the Republican Senate majority confirmed merely four Obama district court nominees. 161 CONG. REC. S3223 (daily ed. May 21, 2015).

58. *Id.*

59. *Id.*

60. Leahy decried Republican senators' delay for delay's sake. *Id.*; *see supra* note 51.

61. 161 CONG. REC. S3223 (daily ed. May 21, 2015). All of Leahy's arguments deflate the Republican regular order mantra.

62. Home state senators strongly supported both nominees. *Id.* at S3224; *see also supra* note 32 and accompanying text.

63. 161 CONG. REC. S6457 (daily ed. Sept. 8, 2015) (confirming Western District of Missouri Judge Roseann Ketchmark); *see supra* note 33.

64. *See supra* note 34. Senator Grassley urged that Senator Schumer "put that in your pipe and smoke it." 161 CONG. REC. S6151–52 (daily ed. July 30, 2015). For the confirmations of Eastern District of California Judge Dale Drozd, Eastern District of New York Judge Ann Donnelly and Western District of New York Judge Lawrence Vilardo, and the fourth nominee, Eastern District of New York Judge LaShann Moutique DeArcy Hall, see *Judicial Confirmations for December*

Tennessee district court nominee who received a June 10 hearing and July discussion and report attained December confirmation.[65]

In short, despite nonstop Republican invocation of the regular order mantra, from January 6 until April 12, 2015, the Senate failed to debate about or confirm a single judge. The Senate approved only ten district court jurists all year. Before June, the panel granted merely three hearings, one included only two nominees; the committee accorded merely four district court, and five Court of Claims, re-nominees February 26 discussions and votes and two others discussions and ballots in late April.[66]

Federal district court selection in 2016 merits comparatively less treatment, mainly because Republican leaders behaved similarly, albeit more egregiously, by confirming significantly fewer nominees than in 2015 and halting all confirmations on July 6,[67] and Democrats repeated criticisms analogous to those which they leveled in 2015. Similar, but even less salutary, considerations roiled judicial appointments over 2016—a presidential election year wherein judicial selection slows and concludes early.[68] The committee scheduled hearings and ballots in ways similar to those for 2015. However, the Senate confirmed only eight district judges, all before July 7, while the nominations of 20 accomplished, mainstream circuit and district

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2015, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2015/12/confirmations [https://perma.cc/6VQN-L29C] (Dec. 1, 2015).

65. For Eastern District of Tennessee Judge Travis McDonough's confirmation, see *Judicial Confirmations for January 2016*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2016/01/confirmations [https://perma.cc/2M6Y-XJJU] (last updated Jan. 1, 2016). For the other Tennessee nominee, Middle District of Tennessee Judge Waverly Crenshaw Jr., who captured confirmation subsequently, see *Judicial Confirmations for May 2016*, U.S. COURTS, https://www.uscourts.gov/ judges-judgeships/judicial-vacancies/ archive-judicial-vacancies/2016/05/confirmations [https://perma.cc/GM8V-A5VD] (May 1, 2016); *see also supra* note 34.

66. The five highly-qualified, mainstream Court of Federal Claims nominees never received chamber debates and votes and their nominations expired in early January 2017. *See supra* notes 14, 18, 31, 34–35, 64. However, the court's vacancies substantially increased to 11, while Trump has confirmed merely three judges for the tribunal. *Judicial Confirmations for December 2019*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/confirmation-listing [https://perma.cc/PGN5-KDHR] (last updated Nov. 30, 2019) [hereinafter *Confirmations Dec. 2019*]; *Current Judicial Vacancies for December 2019*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies [https://perma.cc/WF6G-AUG7] (last updated Nov. 30, 2019) [hereinafter *Vacancies Dec. 2019*].

67. *Judicial Confirmations for January 2017*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/01/confirmations [https://perma.cc/J23Q-UFKE] (last updated Jan. 1, 2017) [hereinafter *Confirmations Jan. 2017*].

68. Carl Tobias, *Confirming Circuit Judges in a Presidential Election Year*, 84 GEO. WASH. L. REV. ARGUENDO 160 *passim* (2016); *see* HULSE, *supra* note 1, at 17–18 (explaining the "Thurmond Rule" which suggests that the judicial nomination and confirmation processes slow and conclude relatively early in presidential election years).

nominees who captured panel reports expired when Congress adjourned.[69] This impoverished record contrasts with the record that Democrats compiled across Obama's first six years, as well as the record which Democrats helped George W. Bush amass (especially near his tenure's close in 2007–08).[70]

B. THE 2015–16 APPELLATE COURT PROCESSES

In November 2014, President Obama nominated Kara Farnandez Stoll, an experienced, mainstream lawyer, and Eastern District of Pennsylvania Judge Luis Felipe Restrepo, a prominent centrist jurist, each of whom is ethnically diverse,[71] to the United States Courts of Appeals for the Federal Circuit and the Third Circuit respectively.[72] The president eschewed tendering more appellate court nominations until 2016, because Republican senators represented most jurisdictions with vacancies that lacked nominees and the legislators cooperated little with the White House.[73]

1. Kara Farnandez Stoll

Stoll earned a March 11 hearing that progressed well [74] and the panel reported her on April 23 but the well qualified counsel languished for weeks.[75] McConnell did not announce when he would grant Stoll a confirmation debate and ballot, although the Majority Leader intimated that appellate court confirmation debates and votes might stop,[76] even though his

69. The nominations of 28 additional well-qualified, centrist appellate court and district court nominees who lacked committee reports also expired. 162 CONG. REC. S7183–84 (daily ed. Jan. 3, 2017).

70. Leahy statement, *supra* note 17, at S2029–30. Democrats' actions, particularly their 2013 detonation of the nuclear option, seemed to prolong the "confirmation wars." *See generally* Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L.J. 121 (2015) (detailing the deterioration of relations between both parties regarding judicial nominations and confirmations which prompted detonation of the nuclear option).

71. Press Release, President Obama Nominates Two to Serve on the U.S. Courts of Appeals (Nov. 12, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/12/president-obama-nominates-two-serve-united-states-courts-appeals [https://perma.cc/GUU9-UZBP]. Stoll is a Latina, and Restrepo is a Latino.

72. *Id.*; *see Presidential Nominations Sent to the Senate* (Jan. 8, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/01/07/presidential-nominations-sent-senate [https://perma.cc/4DHS-SV47].

73. Russell Wheeler, *With Senate Control, Will the GOP Stop Confirming Circuit Judges?*, BROOKINGS (June 10, 2015), https://www.brookings.edu/blog/fixgov/2015/06/10/with-senate-control-will-the-gop-stop-confirming-circuit-court-judges [https://perma.cc/F8QF-6SK7]; *see supra* notes 13–19 and accompanying text.

74. *Nominations Mar. 2015*, *supra* note 22.

75. *Mtg. Apr. 2015*, *supra* note 33.

76. Steve Benen, *McConnell's Silent Governing Failure*, MSNBC.COM (June 5, 2015, 3:08 PM), http://www.msnbc.com/rachel-maddow-show/mcconnells-silent-governing-failure [https://perma.cc/AQL9-CRDN]; Burgess Everett & Nick Gass, *McConnell Vows to Slow Judicial Nominees*, POLITICO (June 5, 2015, 1:06 PM), https://www.politico.com/story/2015/06/mitch-mcconnell-judicial-nominations-118674 [https://perma.cc/NQB2-3YRN].

staff member informed the press that there was no shutdown of floor debates and ballots on circuit nominees.[77] In June, Reid accused McConnell of halting Senate consideration of appeals court nominees and invoked McConnell's 2008 plea for quick final consideration of George W. Bush nominees, stating that Republicans had not confirmed anyone—"even a consensus nominee such as Kara Stoll."[78] The Minority Leader concomitantly urged swift debate and appointment.[79] Leahy criticized the minuscule number of 2015 confirmation debates and ballots, calling for Stoll's prompt review, which apparently fostered her July confirmation debate and vote.[80]

2. Felipe Restrepo

Obama decided to elevate Judge Felipe Restrepo, partly because of strong endorsements from Pennsylvania's Senators, Democrat Robert Casey and Republican Patrick Toomey,[81] but the nominee waited seven months on a committee hearing, because Toomey only produced his blue slip in May 2015.[82] The Pennsylvania senators had previously suggested Restrepo for an Eastern District of Pennsylvania vacancy, and the jurist easily won 2013 approval.[83] The lawmakers then decided to pursue elevation, with Toomey contending that the experienced judge would be a "superb addition to the Third Circuit."[84] Nonetheless, the panel excluded Restrepo from a May 6

77. Alexander Bolton, *McConnell Backs Away from Shutdown Talk*, HILL (June 6, 2015, 1:05 PM), https://thehill.com/homenews/senate/244196-mcconnell-backs-away-from-judicial-shutdown-talk [https://perma.cc/DK7J-ULVP].

78. 161 CONG. REC. S3849–50 (daily ed. June 8, 2015).

79. *Id.* McConnell never elucidated his June 2015 suggestion regarding Senate floor consideration of appellate court nominees. *See supra* note 76.

80. 161 CONG. REC. S4591 (daily ed. June 24, 2015); *see supra* notes 55–62; 161 CONG. REC. S4678 (daily ed. July 7, 2015).

81. Casey submitted his blue slip in November 2014 immediately after President Obama nominated Judge Restrepo; Obama renominated Restrepo in early January 2015 after the judge's nomination had expired. *See supra* note 72.

82. Laura Olson, *What's Holding Up a Pa. Appeals Court Nominee ?*, MORNING CALL (May 6, 2015, 3:32 PM), https://www.mcall.com/news/pennsylvania/capitol-ideas/mc-whats-holding-up-a-pa-appeals-court-nominee-20150506-story.html [https://perma.cc/LWV5-3ET4]; Saranac Hale Spencer, *Toomey Submits Blue Slip, but Will Restrepo Get a Hearing?*, LEGAL INTELLIGENCER (May 19, 2015, 12:00 AM), https://www.law.com/thelegalintelligencer/almID/1202726785818/Toomey-Submits-Blue-Slip-but-Will-Restrepo-Get-a-Hearing/?cmp=share_twitter&slreturn=20190728125125 [https://perma.cc/US5M-WTK4].

83. 159 CONG. REC. S4516 (daily ed. June 17, 2013); Spencer, *supra* note 82. Restrepo was then serving as an Eastern District of Pennsylvania Judge. All modern Presidents have deployed the technique of elevation by nominating federal and state appellate court and trial court judges to the federal appellate courts and district courts. *See infra* notes 167–70.

84. Press Release, Senators Applaud Nomination of Judge Restrepo to Third Circuit (Nov. 12, 2014), https://www.casey.senate.gov/newsroom/releases/casey-toomey-applaud-nomination-of-judge-luis-felipe-restrepo-to-us-court-of-appeals-for-the-third-circuit [https://perma.cc/8MCV-A2F2].

hearing.[85] The day before this hearing the press queried Toomey, who asserted that he powerfully supported Restrepo.[86] Grassley promised to expeditiously schedule a hearing once Toomey had provided the slip.[87] One of the Chair's aides suggested to the press that the committee evaluated nominees under *regular order*,[88] and that senators may retain slips until committee analysis concludes.[89] The next day on the Senate floor, Reid quoted Toomey's glowing praise for Restrepo and criticized the delay,[90] and Grassley released a document which showed that the Republican Senate majority's 2015 processing resembled the Democratic majority's processing during 2007.[91]

In the ensuing days, Toomey vociferously denied that he was stalling Judge Restrepo, claimed that the committee was assessing the jurist but would only convene a hearing after vetting concluded, and pledged to return the slip then, unless problems arose.[92] On May 14, Toomey tendered the slip, but Grassley only convened the panel hearing in June.[93] The session progressed

85. It was only the third hearing which the Judiciary Committee conducted in 2015, but the Senate had been meeting for 13 weeks and Obama had tapped no nominee before Judge Restrepo. *Nominations Mar. 11*, *supra* note 21; *Nominations May 6*, *supra* note 21; *Nominations Jan. 2015*, *supra* note 10.

86. Jennifer Bendery, *Pat Toomey Is Blocking His Own Judicial Nominee, For Some Reason*, HUFF. POST (May 6, 2015, 4:18 PM), https://www.huffpost.com/entry/pat-toomey-luis-restrepo_n_7214790 [https://perma.cc/BWC2-TPTV]; Tracie Mauriello, *Confirmation Vote on Pennsylvania Jurist Awaits 'Blue Slip' from Toomey*, PITTSBURGH POST-GAZETTE (May 6, 2015, 11:19 PM), https://www.post-gazette.com/local/2015/05/06/Toomey-holding-up-confirmation-of-Pennsylvania-jurist-he-supports/stories/201505060171 [https://perma.cc/8Z3U-MKTS]; Saranac Hale Spencer, *Political Maneuvers Hold Up Restrepo*, LEGAL INTELLIGENCER (May 6, 2015, 12:00 AM), https://www.thelegalintelligencer.com/almID/1202725590790/Political-Maneuvers-Holding-Up-Nominee-for-Third-Circuit?mcode=1202615580822&slreturn=20150406084228 [https://perma.cc/F6TH-EXF3]; *see supra* note 10.

87. The press reported that Toomey was retaining the blue slip. Bendery, *supra* note 86; Mauriello, *supra* note 86.

88. Spencer, *supra* note 86 (emphasis added); Olson, *supra* note 82 (the panel processes nominees in the order they are received).

89. The aide remarked that issues regarding the nominee's fitness to serve can surface in this review. Mauriello, *supra* note 86; Olson, *supra* note 82; *see* Jennifer Bendery, *Pat Toomey Insists He's Not Holding Up a Judicial Nominee He's Holding Up*, HUFF. POST (May 14, 2015), https://www.huffpost.com/entry/pat-toomey-judge-restrepo_n_7277332 [https://perma.cc/JX7Y-YG9S].

90. 161 CONG. REC. S2660 (daily ed. May 6, 2015); *see supra* notes 81, 83–84.

91. Prepared Statement of Sen. Chuck Grassley (May 6, 2015), https://www.judiciary.senate.gov/imo/media/doc/05-06-15%20Grassley%20Statement-Noms%20Hearing1.pdf [https://perma.cc/X3B9-T9SJ]. *Accord supra* notes 24–26, 49–50. *But see supra* notes 27–28, 40–45, 51–62.

92. Pat Toomey, *I Am Not Delaying Judge L. Felipe Restrepo's 3rd Circuit Nomination*, PITTSBURGH POST-GAZETTE (May 13, 2015, 11:00 PM), https://www.post-gazette.com/opinion/letters/2015/05/13/I-am-not-delaying-Judge-L-Felipe-Restrepo-s-3rd-Circuit-nomination/stories/201505130068 [https://perma.cc/QM9A-W7WG].

93. Toomey provided the slip putatively because the Judiciary Committee had concluded Restrepo's assessment. *Nominations June 2015*, *supra* note 21; Tracie Mauriello, *Toomey Signs Off*

smoothly; the Pennsylvania senator expressed powerful support and Restrepo's clear answers apparently satisfied members. Grassley claimed that the 2015 appellate court hearings which the committee had arranged resembled the number of 2007 hearings that Democrats had scheduled for circuit nominees.[94] The Chair reiterated the propositions that Democrats reviewed more nominees during 2007 because at 2006's end the majority had returned numerous individuals whom George W. Bush had renominated the next year under standard practice but ignored custom by confirming myriad nominees in the 2014 lame duck session of Congress—and, therefore, 2007 and 2015 were similar.[95]

Senators Reid and Leahy responded to Grassley's contentions with empirical information on the selection process and committee hearings.[96] Even if the Chair's numbers were more convincing—because Grassley employed analogous parameters—in some respects the material lacks relevance, as the information can support many propositions. The principal difficulty was that senators were not discharging their constitutional responsibility to fill vacancies, even with strong, consensus nominees.[97]

No plausible proposition could explain Restrepo's substantial delay. Obama tapped the jurist in 2014 for a judicial emergency vacancy.[98] Restrepo strikingly contrasted to Stoll, whom Obama had nominated the same day, enjoying a March committee hearing and an April report,[99] while Obama recommended the May 6 hearing nominees together with or after Restrepo.[100] None of these nominees had enjoyed prior, close scrutiny like Restrepo, so it is unclear why panel review needed six months when the jurist had experienced comprehensive analysis in 2013 while being considered for the Eastern District opening.[101] Grassley's mention of no ongoing committee

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on Nominee for Federal Appeals Court, PITTSBURGH POST-GAZETTE (May 14, 2015, 7:12 PM), https://www.post-gazette.com/local/region/2015/05/14/Toomey-signs-off-on-nominee-for-federal-appeals-court/stories/201505140325 [https://perma.cc/P62G-U927]; Spencer, *supra* note 82.

94. *Nominations June 2015*, *supra* note 21. Sen. Grassley contended that the identical number of nominees had testified. Prepared Statement of Sen. Chuck Grassley, June 10, 2015. *Accord supra* notes 24–25. *But see supra* notes 27, 49.

95. Prepared Statement, *supra* note 91; *supra* notes 49–50. *But see supra* notes 46, 59.

96. *See supra* notes 31, 43–46.

97. Republicans had proffered and supported many of the nominees. *See supra* notes 32, 45 and accompanying text.

98. JUDICIAL VACANCIES, Emergencies (2015), *supra* note 14.

99. *See supra* notes 74–75.

100. Obama submitted the Drozd, Hall, and Donnelly nominations the same day, Jan. 7, 2015, and the Vilardo nomination on Feb. 4, 2015. *See supra* note 64.

101. Restrepo was then serving as a district court judge. These ideas show that vetting did not "start from scratch." Paul Gordon, *Toomey's Explanation for Restrepo Delay Raises More Questions*, HUFF. POST (May 13, 2016), https://www.huffpost.com/entry/toomeys-explanation-for-restrepo-delay-raises-more-questions_b_7276448 [https://perma.cc/N4ME-MMGH]; *see also* Bendery, *supra* note 86.

assessment for Restrepo and setting a hearing upon receipt of the blue slip undercut Toomey's reason for delay.[102] Partisanship explained stalling, because the Republican Senate majority only confirmed Restrepo in 2016, while it approved merely four district court nominees by May 2015.[103]

In short, across President Obama's final two years, Grassley, as Chair, stringently applied most chamber rules and customs, especially blue slips, and much delay plagued the selection process, while the Senate confirmed the fewest court of appeals judges since 1897–98.[104] These data sharply contrasted with President Trump's initial half term.

II. 2017–18 PROCESSES

A. NOMINATION PROCESSES

During the presidential campaign and following the 2016 election, President Trump vowed to appoint conservative jurists and subsequently honored this pledge by confirming Supreme Court Justices Neil Gorsuch and Brett Kavanaugh and many analogous appellate court judges and a few similar district jurists.[105] The chief executive established records for appeals court judges, with 12 confirmed in his administration's first year and 18 the next.[106] Trump did invoke some measures and conventions that had earlier proved helpful, although he deleted or revised numerous others. For example, Trump, like modern presidents, delegated principal responsibility to the first

102. After the press queried Toomey, the senator contended that committee review, rather than the blue slip's retention, had been creating delay. Gordon, *supra* note 101; s*ee* Bendery, *supra* note 86; *supra* notes 86–87 and accompanying text.

103. 162 CONG. REC. S38 (daily ed. Jan. 11, 2016) (confirming Third Circuit Judge Restrepo). This significantly contrasted to the Democratic Senate majority's efforts which helped to confirm three appellate, and 15 district, court jurists during the comparable period across 2007. Leahy statement, *supra* note 9; Bendery, *supra* note 86.

104. The Democratic Senate majority's endeavors helped George W. Bush to appoint ten appellate court judges throughout 2007–08. Christopher Kang, *Republican Obstruction of Courts Could Be the Worst Record Since the 1800s*, HUFF. POST (Apr. 21, 2017), https://www.huffpost.com/entry/republican-obstruction-of_b_9741446 [https://perma.cc/J8Z4-T84J]; *see* HULSE, *supra* note 1, at 186 (analyzing Grassley's strict application of the appellate court blue slip policy in 2015-16); *supra* notes 40, 57.

105. *Confirmations Dec. 2019*, *supra* note 66; *Confirmations Jan. 2019*, *supra* note 67; *see Tobias, Justices*, *supra* note 7, at 1103.

106. 163 CONG. REC. S8022 (daily ed. Dec. 14, 2017) [hereinafter Feinstein Statement] (statement of Sen. Feinstein). President George W. Bush appointed six appellate court jurists and President Obama confirmed three appellate court judges throughout the initial years of their respective presidencies. Trump has already confirmed 18 more appellate court judges during 2019 in addition to the 30 appellate court jurists whom the president appointed throughout his initial half term. *Confirmations Dec. 2019*, *supra* note 66; *Judicial Confirmations for January 2010*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2010/01/confirmations/html [https://perma.cc/8PC2-6C2U] (last updated Jan. 1, 2010); *Judicial Confirmations in the 107th Congress*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2002/01/confirmations/pdf [https://perma.cc/WP9E-N8ZR] (last updated Jan. 2, 2002).

White House Counsel (Donald McGahn), located related duties in the Justice Department, and stressed circuit vacancies.[107] When sending appellate court prospects, the White House Counsel emphasized youth and conservatism by, for instance, deploying litmus tests, while McGahn considered and relied substantially on the 2016 list of potential Supreme Court possibilities whom the Federalist Society and Heritage Foundation compiled.[108] These ideas persist, because the Society's Executive Vice President Leonard Leo advises Trump on selection.[109] The president accentuates the circuits, because they are courts of last resort for nearly all cases, enunciate significantly more policy than district courts, and publish opinions which govern multiple states.[110]

However, the Trump Administration violates or downplays a substantial number of respected strictures and customs. Essential is the practice of assiduously consulting home state elected officers, an effective convention on which modern presidents depend that has been a major reason for blue

107. Tobias, *supra* note 12, at 2240; 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 [https://perma.cc/2ZSM-FD2Q]. *See generally* Donald McGahn, II, *A Brief History of Judicial Appointments from the Last 50 Years Through the Trump Administration*, 60 WM. & MARY L. REV. ONLINE 105 (2019) (chronicling the history of judicial appointments over the last half century and especially during the Trump Administration); Michael S. Schmidt & Maggie Haberman, *McGahn, Soldier for Trump and Witness Against Him Leaves White House*, N.Y. TIMES (Oct. 18, 2018), https://www.nytimes.com/2018/10/17/us/politics/don-mcgahn-leaves-trump-administration.html [https://perma.cc/9FEV-6XEH] (reporting that in Autumn 2018, Trump appointed Pat Cipollone to serve as his second White House Counsel).

108. Jeremy W. Peters, *Trump's New Judicial Litmus Test: Shrinking 'the Administrative State,'* N.Y. TIMES (Mar. 26, 2018), https://www.nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html [https://perma.cc/ND84-6VKT]; Charlie Savage, *Trump is Rapidly Reshaping the Judiciary. Here's How.*, N.Y. TIMES (Nov. 11, 2017), https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html [https://perma.cc/U6AB-6999]; HULSE, *supra* note 1, at 4–6, 194 (describing McGahn's efforts when helping to develop and capitalize on the Supreme Court list when campaigning and characterizing McGahn as the "White House powerhouse on judges").

109. Robert O'Harrow, Jr., & Shawn Boburg, *A Conservative Activist's Behind-the-Scenes Campaign to Remake the Nation's Courts*, WASH. POST (May 21, 2019), https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/?utm_term=.283b26907d1d [https://perma.cc/6B3G-8YK9]; Zoe Tillman, *After Eight Years on the Sidelines, This Conservative Group Is Primed to Reshape 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 [https://perma.cc/6RGU-5GXV]; *see* Amanda Hollis-Brusky & Calvin Terbeek, *The Federalist Society Says It's Not an Advocacy Organization. These Documents Show Otherwise*, POLITICO (Aug. 31, 2019), https://www.politico.com/magazine/story/2019/08/31/federalist-society-advocacy-group-227991 [https://perma.cc/9WYT-9WEQ] (refuting the Federalist Society's contention that the entity is not an advocacy organization); Peters, *supra* note 108 (assessing Leonard Leo's substantial impact on federal judicial selection).

110. Tobias, *supra* note 12, at 2240–41; Feinstein statement, *supra* note 106.

slips.[111] Numerous Democratic politicians ascertained that McGahn consulted minimally regarding their home states' vacancies, while the White House Counsel argued that the Constitution did not expressly mandate consultation.[112] Wisconsin Seventh Circuit Democratic Senator Tammy Baldwin alleged that the chief executive promoted the candidacy of Wisconsin Seventh Circuit nominee Michael Brennan, who lacked the required votes of a bipartisan selection commission, which had efficaciously sought out, evaluated, interviewed and recommended well-qualified, mainstream candidates over three decades.[113] Louisiana Republican Senator John Kennedy tellingly revealed Counsel's approach in a committee hearing by saying that McGahn had informed him that Kyle Duncan would be the Louisiana Fifth Circuit nominee.[114]

Another significant deviation from longstanding precedent was excluding the American Bar Association from the judicial selection process. All chief executives after President Dwight Eisenhower, save President George W. Bush, had relied substantially on its professional evaluations and ratings.[115] However, Trump nominated nine individuals whom the ABA evaluated and

111. Memorandum from the Senate Judiciary Comm. Majority to Members of the News Media (Nov. 2, 2017), https://www.toomey.senate.gov/files/documents/Blue%20Slip.pdf [https://perma.cc/SZ2B-X3RH] [hereinafter Memo to News Media].

112. Thomas Kaplan, *Trump Is Putting Indelible Conservative Stamp on Judiciary*, N.Y. TIMES (July 31, 2018), https://www.nytimes.com/2018/07/31/us/politics/trump-judges.html [https://perma.cc/93VZ-P2HD]; 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 [https://perma.cc/ULT9-FYGJ]; Donald McGahn, White House Counsel, Keynote Remarks at the Federalist Soc'y National Lawyers Convention (Nov. 17, 2017), https://www.c-span.org /video/?437462-8/2017-national-lawyers-convention-white-house-counsel-mcgahn [https://perma.cc/YYD9-HWSV].

113. Tobias, *supra* note 12, at 2266; *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 115th Cong. (Jan. 24, 2018); *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 115th Cong. (Feb. 15, 2018) [hereinafter Mtg. Feb. 2018]; 164 CONG. REC. S2607 (May 10, 2018) (confirming Judge Michael Brennan); *see* HULSE, *supra* note 1, at 198–201; *infra* note 130 and accompanying text (describing Judge Brennan's Seventh Circuit nomination and confirmation processes).

114. *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 115th Cong. (Nov. 29, 2017) [hereinafter *Nominations Nov. 2017*] (statement of Sen. Kennedy); *see also* Kaplan, *supra* note 112; *infra* note 131 and accompanying text (detailing similar sentiments expressed by Democratic senators who represent Michigan, Minnesota, New Jersey, Ohio, Oregon and Washington); *Exec. Business Mtg., Meeting of the S. Judiciary Comm.*, 115th Cong. (July 19, 2018); *infra* note 131 and accompanying text (documenting similar sentiments expressed by Pennsylvania Democratic Senator Bob Casey); *see also infra* note 131 (documenting similar sentiments expressed by New York Democratic Senators Chuck Schumer and Kirsten Gillibrand California Democratic Senators Dianne Feinstein and Kamala Harris).

115. Obama refused to nominate any candidate whom the American Bar Association rated not qualified. Feinstein statement, *supra* note 106; 163 CONG. REC. S8042 (daily ed. Dec. 14, 2017) (statement of Sen. Durbin).

rated not qualified, while the Senate has confirmed a pair of these nominees for the Eighth Circuit and three for district court seats.[116]

President Trump invokes more customary techniques when naming district aspirants. For example, the chief executive, similarly to his modern predecessors, relies on home state senators' proposals and seemingly grounds nominations in competence vis-à-vis ability to expeditiously, inexpensively and equitably resolve substantial caseloads.[117] Many nominees are strong choices who earned well qualified ABA ratings.[118] However, three nominees withdrew and others experienced "not qualified" ratings mostly because those picks supplied limited information or their administration review or hearing preparation lacked sufficient care—and Trump even urged Republican members to vote against nominees whom they determined lacked the requisite qualifications.[119]

This White House also contravenes or deemphasizes efficacious measures. One instructive example is the failure to prioritize selections by first tendering nominees who reduce the 87 district court—and the 51 judicial

116. ABA STANDING COMM. ON THE FED. JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES: 115TH CONGRESS (2018), https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Web%20rating%20Chart%20Trump%20115.pdf [https://perma.cc/2YY6-LJFW] [hereinafter ABA RATINGS 2018]; ABA STANDING COMM. ON THE FED. JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES: 116TH CONGRESS (2019), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/webratingchart-trump116.pdf?logActivity=true [https://perma.cc/BJ5L-4EB7]. Republican senators disputed Eighth Circuit nominee Steven Grasz's not qualified American Bar Association rating, because the GOP members contended that the ABA is a liberal political interest group. *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 115th Cong. (Nov. 1, 2017); *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 115th Cong. (Dec. 7, 2017) [hereinafter *Mtg. Dec. 2017*]. *But cf.* Hollis-Brusky & Terbeek, *supra* note 109 (rebutting Federalist Society contention that the group is not an advocacy organization). For confirmation of Grasz, Jonathan Kobes, Holly Teeter, Charles Goodwin and Justin Walker, each of whom the ABA had rated not qualified, see *Confirmations Jan. 2019*, *supra* note 67; 166 CONG. REC. S6142 (daily ed. Oct. 24, 2019) (Walker); *see also infra* note 178; *see generally* HULSE, *supra* note 1, at 195–98.

117. Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9, 19 (2017). *But see* Seung Min Kim, *Trump's Judge Picks*: '*Not Qualified*,' *Prolific Bloggers*, POLITICO (Oct. 18, 2017, 12:43 PM), https://www.politico.com/story/2017/10/17/trump-judges-nominees-court-picks-243834 [https://perma.cc/K9X5-DA7B].

118. Texas Federal District Court Judges Walter Counts and Karen Gren Scholer are valuable examples of strong nominees who secured well-qualified ratings. ABA RATINGS 2018, *supra* note 116.

119. Jennifer Bendery, *Trump Judicial Nominee Drops Out After Embarrassing Hearing*, HUFF. POST (Dec. 18, 2017, 1:35 PM), https://www.huffpost.com/entry/donald-trump-judicial-nominee-matthew-petersen _n_5a37ec14e4boff955ad51e82 [https://perma.cc/DUK8-EZSA]; *see Judicial Vacancy List for February 2018*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/02/vacancies [https://perma.cc/Q3FN-YZ6M] (last updated Feb. 1, 2018). *But see* Zoe Tillman, *Trump Had a Good Year Getting Judges Confirmed, But He's Still 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 [https://perma.cc/YLX8-HMS8] (documenting Leonard Leo's strong defense of Donald McGahn's vetting).

emergency—openings.[120] Judicial emergencies soared once Republicans controlled the Senate beginning in 2015.[121] Moreover, Trump has named many fewer nominees in states which Democratic senators represent, although those jurisdictions face numerous emergencies.[122] Indeed, New York experiences 12 district court vacancies and California encounters 15 appellate and district court openings; all of California's vacancies comprise judicial emergencies, but the president only first recommended any New York choices in May 2018 and merely initially suggested four California possibilities in October of last year, although the Senate only afforded a hearing for two California district court nominees in this November.[123]

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120. *Judicial Emergencies for December 2019*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2019/12/emergencies [https://perma.cc/ZFE7-T4BF] (last updated Dec. 1, 2019) [hereinafter *Emergencies Dec. 2019*] (one circuit, and 50 of 87 district, vacancies are judicial emergencies; overall district court vacancies are 13 percent and the one circuit opening is fewer than one percent).

121. Judicial emergency vacancies skyrocketed from 12 when Republicans assumed a Senate majority to as many as 86. *Judicial Emergencies for April 2019*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2019/04/emergencies [https://perma.cc/Z4MX-5TKG] (last updated April 1, 2019) (listing 86 judicial emergency vacancies); *Judicial Emergencies for January 2015*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2015/01/emergencies/html [https://perma.cc/3XVB-5RM8] (last updated Jan. 1, 2015) (listing 12 judicial emergency vacancies). *But see President Donald J. Trump Announces Nomination of Indiana Attorney James Sweeney to Fill Judicial Emergency*, WHITE HOUSE (Nov. 1, 2017), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-nomination-indiana-attorney-james-sweeney-fill-judicial-emergency [https://perma.cc/AC84-QR33].

122. *Emergencies Dec. 2019*, *supra* note 120. *But see President Donald J. Trump Announces Ninth Wave of Judicial Nominees and Tenth Wave of United States Attorney Nominees*, WHITE HOUSE (Dec. 20, 2017), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-ninth-wave-judicial-nominees-tenth-wave-united-states-attorney-nominees [https://perma.cc/H9BH-HQ6X] [hereinafter *Ninth Wave of Nominees*].

123. Data verify the priority that the Republican Senate majority accords the "red" states. *Emergencies Dec. 2019*, *supra* note 120; *see also President Donald J. Trump Announces Thirteenth Wave of Judicial Nominees and Seventh Wave of United States Marshal Nominees*, WHITE HOUSE (Apr. 26, 2018), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-thirteenth-wave-judicial-nominees-seventh-wave-united-states-marshal-nominees [https://perma.cc/CQ8Q-DGRB] [hereinafter *Thirteenth Wave of Nominees*] (announcing one 2018 New York Second Circuit nominee); *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*, WHITE HOUSE (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 [https://perma.cc/4KC3-Q6Z3] [hereinafter *Fourteenth Wave of Nominees*] (announcing seven New York district nominees); *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*, WHITE HOUSE (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 [https://perma.cc/3AJZ-ZNY9] [hereinafter *Eighteenth Wave of Nominees*] (announcing three California Ninth Circuit and three California district court nominees and two additional New York Second Circuit nominees); *President Donald J. Trump Announces Judicial Nominees*, WHITE HOUSE (Sept. 12, 2019),

Another valuable concept which Trump rejects or downplays is the enhancement of minority judicial representation, especially vis-à-vis Democratic presidents and senators.[124] For example, the Trump Administration seemingly adopted comparatively few, if any, initiatives that would promote the nomination and confirmation of ethnic minorities or lesbian, gay, bisexual, transgender and queer ("LGBTQ") nominees by, for instance, appointing diverse employees to judicial selection teams or urging that senators undertake special efforts to recruit, discover, evaluate and

https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-5 [https://perma.cc/9JMB-W5FL] (announcing an additional California district court nominee); *President Donald J. Trump Announces Judicial Nominees, United States Attorney Nominees, and United States Marshall Nominees*, WHITE HOUSE (Aug. 14, 2019), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-united-states-attorney-nominees-united-states-marshal-nominees [https://perma.cc/EB9E-FBDJ] (announcing one additional New York Second Circuit nominee); *President Donald J. Trump Announces Judicial Nominees and United States Marshal Nominee*, WHITE HOUSE (Sept. 20, 2019), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-united-states-marshal-nominee-5 (announcing one additional California Ninth Circuit nominee and four additional California district nominees); *President Donald J. Trump Announces Judicial Nominees and United States Marshal Nominee*, WHITE HOUSE (Aug. 28, 2019), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-united-states-marshal-nominee-4 [https://perma.cc/KL6L-T3J3] (announcing four additional California district court nominees); *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 115th Cong. (Aug. 1, 2018) (conducting New York district court nominee hearing); *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 116th Cong. (Feb. 13, 2019) (conducting New York Second Circuit nominee hearing); *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 116th Cong. (Sept. 11, 2019) (conducting another New York Second Circuit nominee hearing); *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 116th Cong. (Mar. 13, 2019) (conducting hearing for two California Ninth Circuit nominees); *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 116th Cong. (May 22, 2019) (conducting hearing for one California Ninth Circuit nominee); *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 116th Cong. (Oct. 30, 2019) (conducting hearing for one California Ninth Circuit nominee and one New York district court nominee); *Confirmations Jan. 2019*, *supra* note 67; *Confirmations Dec. 2019*, *supra* note 66; *Judicial Confirmations for January 2018*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/01/confirmations [https://perma.cc/D7FM-PFSR] (last updated Jan. 1, 2018); *Vacancies Dec. 2019*, *supra* note 66; *Judicial Vacancy List for January 2019*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2019/01/vacancies [https://perma.cc/VFD6-KMA7] (last updated Jan. 1, 2019) [hereinafter *Vacancies Jan. 2019*]; *Judicial Vacancy List for January 2018*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/01/vacancies [https://perma.cc/6SVK-V849] (last updated Jan. 1, 2018) [hereinafter *Vacancies Jan. 2018*] (showing that in states with two Republican senators, confirming 91 judges and nominating 108; in states with two Democratic senators, confirming 33 judges and nominating 53).

124. Carl Tobias, *President Donald Trump and Federal Bench Diversity*, 74 WASH. & LEE L. REV. ONLINE 400, 410–17 (2018); Dahlia Lithwick, *Mitch McConnell Is Spending the Shutdown Confirming More Trump Judges*, SLATE (Jan. 23, 2019, 10:52 AM), https://slate.com/news-and-politics/2019/01/mcconnell-shutdown-judge-confirmations-trump.html [https://perma.cc/UK2Z-UKZN].

recommend strong minority candidates.[125] Of 162 Trump confirmees, only Amul Thapar, James Ho, John Nalbandian, Neomi Rao, Michael Park, Kenneth Lee, Karen Gren Scholer, Jill Otake, Nicholas Ranjan, Martha Pacold, Barbara Lagoa, Fernando Rodriguez, Terry Moorer, David Morales, Rodolfo Ruiz, Raúl Arias-Marxuach, Rossie Alston, Rodney Smith, John Younge, Jason Pulliam and Ada Brown are persons of color and Mary Rowland is a lesbian;[126] in 228 nominees, merely 34 are people of color: the first ten confirmees, Patrick Bumatay, Diane Gujarati, Anuraag Singhal, Steve Kim, Shireen Matthews, and Iris Lan constitute Asian Americans; Lagoa, Rodriguez, Morales, Ruiz, Arias-Marxuach, Fernando L. Aenlle-Rocha, Silvia Carreño-Coll and Sandy Nunes Leal comprise Latino/as; Moorer, Alston, Smith, Younge, Pulliam, Brown, Stephanie Dawkins Davis, Robert Molloy and Bernard Jones constitute African Americans; Richard Myers is Jamaican; while Rowland and Bumatay are LGBTQ individuals.[127]

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125. LGBTQ means openly disclosed sexual preference, which some candidates, nominees and judges may have chosen to not divulge. LGBTQ individuals are considered "minorities" throughout this piece. *See infra* note 139.

126. *Confirmations Dec. 2019*, *supra* note 66; *Confirmations Jan. 2019*, *supra* note 67; *Confirmations Jan. 2018*, *supra* note 123.

127. *President Donald J. Trump Announces Intent to Nominate Judge Amul R. Thapar for the U.S. Court of Appeals for the Sixth Circuit*, WHITE HOUSE (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/ [https://perma.cc/KT6M-EJQD]; *President Donald J. Trump Announces Seventh Wave of Judicial Candidates*, WHITE HOUSE (Sept. 7, 2017), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-seventh-wave-judicial-candidates [https://perma.cc/9RM2-3N9U] (nominating Rodriguez, Gren Scholer and Moorer); *President Donald J. Trump Announces Eighth Wave of Judicial Nominees*, WHITE HOUSE (Sept. 28, 2017), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-eighth-wave-judicial-candidates [https://perma.cc/U75G-VSP5] (nominating Ho); *Ninth Wave of Nominees*, *supra* note 122 (nominating Otake); *President Donald J. Trump Announces Tenth Wave of Judicial Nominees*, WHITE HOUSE (Jan. 23, 2018), https://www.white house.gov/presidential-actions/president-donald-j-trump-announces-tenth-wave-judicial-nominees [https://perma.cc/WE8P-EWTL] (nominating Nalbandian); *President Donald J. Trump Announces Twelfth Wave of Judicial Nominees, Twelfth Wave of United States Attorneys, and Sixth Wave of United States Marshals*, WHITE HOUSE (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 [https://perma.cc/G2X3-TF7G] (nominating Arias-Marxuach and Morales); *Thirteenth Wave of Nominees*, *supra* note 123 (renominating Bumatay to the Ninth Circuit and nominating Ruiz and Smith); *Fourteenth Wave of Nominees*, *supra* note 123 (nominating Gujarati); *President Donald J. Trump Announces Fifteenth Wave of Judicial Nominees, Fourteenth Wave of United States Attorney Nominees, and Ninth Wave of United States Marshal Nominees*, WHITE HOUSE (June 7, 2018), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-fifteenth-wave-judicial-nominees-fourteenth-wave-united-states-attorney-nominees-ninth-wave-united-states-marshal-nominees [https://perma.cc/LD72-XW96] (nominating Alston, Pacold and Rowland); *President Donald J. Trump Announces Sixteenth Wave of Judicial Nominees, Sixteenth Wave of United States Attorney Nominees, and Eleventh Wave of United States Marshal Nominees*, WHITE HOUSE (July 13, 2018), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-sixteenth-wave-judicial-nominees-sixteenth-wave-united-states-attorney-nominees-eleventh-wave-united-states-marshal-nominees [https://perma.cc/E7YH-WBA7] (nominating Ranjan and

B. THE CONFIRMATION PROCESSES

The confirmation process in some ways resembles nominations' troubling facets, mainly by deleting or altering lengthy customs and efficacious practices. Clearest are changes in the 100-year-old blue slip policy and committee hearings. In the autumn of 2017, Grassley decided to revise slips by moving circuit nominees without slips that two home state politicians submitted, peculiarly when senators' opposition was based on "political or ideological" reasons.[128] This determination amended the slip concept which

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Younge); *Eighteenth Wave of Nominees*, *supra* note 123 (nominating Bumatay, Lee and Park); *President Donald J. Trump Announces Nomination of OIRA Administrator Neomi Rao to Replace Justice Brett Kavanaugh on the D.C. Circuit*, WHITE HOUSE (Nov. 14, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-announces-nomination-oira-administrator-neomi-rao-replace-justice-brett-kavanaugh-d-c-circuit [https://perma.cc/S5BB-BJF2]; *President Donald J. Trump Announces His Intent to Nominate Judicial Nominees,* WHITE HOUSE (Jan. 22, 2019), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judicial-nominees [https://perma.cc/33ZZ-LRBK] (renominating Park, Rao, Ranjan, Morales, Arias-Marxuach, Ruiz, Smith, Alston and Younge whose nominations had expired on Jan. 2, 2019); *President Donald J. Trump Announces His Intent to Nominate Judicial Nominees*, WHITE HOUSE (Jan. 30, 2019), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judicial-nominees-2 [https://perma.cc/F4Q8-VZCW] (renominating Lee to the Ninth Circuit and Bumatay to the Southern District of California whose nominations had expired on Jan. 2, 2019); *President Donald J. Trump Announces Judicial Nominees, a United States Attorney Nominee, and United States Marshal Nominees*, WHITE HOUSE (Mar. 1, 2019), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-united-states-attorney-nominee-united-states-marshal-nominees [https://perma.cc/2H59-33LD] (nominating Pulliam); *President Donald J. Trump Announces Judicial Nominees*, WHITE HOUSE (Mar. 8, 2019), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees [https://perma.cc/QV72-7RB2] (nominating Dawkins Davis); *President Donald J. Trump Announces Judicial Nominees*, WHITE HOUSE (Mar. 15, 2019), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-2 [https://perma.cc/SJX4-SGP3] (nominating Brown); *President Donald J. Trump Announces Nomination of Judicial Nominees,* WHITE HOUSE (Apr. 8, 2019), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominations [https://perma.cc/ZB4C-NBH5] (renominating Pacold, Rowland & Gujarati whose nominations had expired on Jan. 2, 2019); *President Donald J. Trump Announces Judicial Nominees and United States Marshall Nominee*, WHITE HOUSE (May 29, 2019), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-united-states-marshal-nominee-2 [https://perma.cc/6VBV-6NMN] (nominating Molloy); *President Donald J. Trump Announces Judicial Nominees and United States Marshal Nominees*, *supra* note 123 (nominating Myers and Singhal); *President Donald J. Trump Announces Judicial Nominees and United States Marshal Nominee*, *supra* note 123 (renominating Bumatay to the Ninth Circuit and nominating Aenlle-Rocha, Carreño-Coll, Kim, Leal and Matthews); *President Donald J. Trump Announces Judicial Nominees*, WHITE HOUSE (Oct. 2, 2019); https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-6 [https://perma.cc/XS6Q-QEER] (nominating Jones); *President Donald J. Trump Announces Judicial Nominees*, WHITE HOUSE (Nov. 6, 2019), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-8 [https://perma.cc/5QCF-LPRD] (nominating Lan); *supra* notes 122–23.

128. For Grassley's efforts to explain his revision decision, see 163 CONG. REC. S7174 (daily ed. Nov. 13, 2017); 163 CONG. REC. S7285 (daily ed. Nov. 16, 2017). *See also Nominations Nov. 2017*, *supra* note 114; Memo to News Media, *supra* note 111; *see generally* HULSE, *supra* note 1, at

each party had honored during Obama's tenure—the most recent relevant precedent.[129] That situation deteriorated when the Chair processed Trump's Wisconsin nominee—even though Brennan lacked sufficient Wisconsin merit selection commission votes and McGahn consulted little—especially because Grassley nominally supported giving the Chair (himself) expansive discretion for ascertaining whether the White House Counsel had adequately consulted.[130] Grassley employed this policy for Oregon Ninth Circuit nominee Ryan Bounds, although Counsel minimally consulted and the nominee failed to divulge salient material for a bipartisan selection panel, while the Chair set a hearing on a Pennsylvania nominee, despite Senator Casey's strenuous opposition and proposal of multiple accomplished, mainstream selections to Counsel, who rejected the candidates after limited review and consultation.[131]

186–92 (describing how Grassley's perspectives on the appellate court blue slip policy apparently evolved).

129. Grassley strictly applied this practice when he served as Chair throughout Obama's last two years as president, and Leahy followed the practice when he was Chair across the first six years. HULSE, *supra* note 1, at 190; *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 115th Cong. (Feb. 15, 2018) (statements of Sens. Grassley and Leahy).

130. *See supra* note 113. Grassley employed case-specific comparatively vague criteria to gauge White House consultation's adequacy, but the Chair explained little about his determinations. Exchanges between Grassley and home state senators reveal this idea's weakness. Letter from Charles E. Grassley, Chairman of the Senate Judiciary Comm., to Patty Murray, United States Senator and Maria Cantwell, United States Senator (Oct. 18, 2018), *available at* https://www.judiciary.senate.gov/imo/media/doc/2018-10-18%20CEG%20to%20Murray,%20Cantwell%20-%20Eric%20D.%20MIller%20Nomination.pdf [https://perma.cc/5Y6B-4JRU]; Letter from Patty Murray, United States Senator and Maria Cantwell, United States Senator, to Charles E. Grassley, Chairman of the Senate Judiciary Comm. (Oct. 22, 2018), *available at* https://assets.documentcloud.org/documents/5017920/Murray-Letter-to-Grassley-10-22-18.pdf [https://perma.cc/6SRN-DYSG]; *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 115th Cong. (Nov. 13, 2018). Little precedent supports a circuit exception; Republicans and Democrats agree that appellate courts are more crucial, because their rulings govern multiple states and enunciate more policy. *See supra* notes 106–11.

131. For Oregon, see *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 115th Cong. (May 9, 2018); Maxine Bernstein, *Oregon's U.S. Senators Say Federal Prosecutor Ryan Bounds Unsuitable for 9th Circuit Vacancy*, OREGONIAN (Jan. 30, 2019), https://www.oregonlive.com/portland/2018/02/oregons_us_senators_say_federa.html [https://perma.cc/X3JD-ZNF7]; 164 CONG. REC. S5098 (daily ed. July 19, 2018) (withdrawing nominee); HULSE, supra note 1, at 201. For Pennsylvania, see *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 115th Cong. (June 6, 2018); 164 CONG. REC. S6799 (daily ed. Oct. 11, 2018) (confirming Third Circuit Judge David Porter); HULSE, supra note 1, at 201–02.

When Senator Lindsey Graham (R-S.C.) became the Chair of the Judiciary Committee in January 2019, he continued following Grassley's blue slip policy for appellate court and district court nominees. *See* HULSE, *supra* note 1, at 274–79 (describing Graham's actions in the judicial selection process and as Chair). This decision allowed Trump to fill three California Ninth Circuit vacancies with Judges Daniel Bress, Daniel Collins and Kenneth Lee whom Democratic Senators Dianne Feinstein and Kamala Harris vociferously opposed and three New York Second Circuit openings with Judges Joseph Bianco, Michael Park and Steven Menashi whom Democratic Senators Chuck Schumer and Kirsten Gillibrand strongly opposed. For California, see 165 CONG. REC. S4724 (daily ed. July 9, 2019) (Bress); *id.* at S2878 (daily ed. May 5, 2019) (Lee); *id.* at S2994 (daily ed. May 21, 2019) (Collins); *see also* Carl Tobias, *Filling the California Ninth Circuit*

Grassley expressly recognized that slips were intended to ensure that presidents consult home state politicians while safeguarding those officials' prerogatives in the selection process and the essential interests of constituents whom they represent.[132] Nonetheless, the GOP aggressively capitalized on slips to obstruct excellent, mainstream nominees during Obama's time, most for political or ideological reasons, which are the very premises that the Chair explicitly denounced as illegitimate.[133]

Grassley also changed several committee hearing rules and customs. Telling was the fact that the Chair conducted *ten* sessions in the first two years of Trump's presidency for two appellate court nominees and usually three or four district court nominees without Democrats' accord; this markedly contrasted with Democrats' arrangement of *three* similar hearings in Obama's eight years of service and then in peculiar situations with GOP approval.[134] Perhaps most troubling was scheduling one hearing for two disputed circuit—

Vacancies, 92 S. CAL. L. REV. POSTSCRIPT 83 (2019) (highlighting the vacancies in the Ninth Circuit following the departure of Judges Kozinski and Reinhardt and Trump's efforts to fill them). For New York, see 165 CONG. REC. S6596 (daily ed. Nov. 14, 2019) (confirming Judge Menashi); *id.* at S2762 (daily ed. May 9, 2019) (confirming Judge Park); *id.* at S2710 (daily ed. May 8, 2019) (confirming Judge Bianco); Press Release, Gillibrand Statement on President Trump and Senate Republicans Forcing the Nominations of Two Far Right New York Circuit Judges Over Strong Objections From Both Home State Senators (Feb. 13, 2019), https://www.gillibrand.senate.gov/news/press/release/gillibrand-statement-on-president-trump-and-senate-republicans-forcing-the-nominations-of-two-far-right-new-york-circuit-court-judges-over-strong-objections-from-both-home-state-senators [https://perma.cc/9GXY-VKF4]; Press Release, Schumer Statement on Senate Republicans Advancing the Nominations of Michael Park and Joseph Bianco for the Second Circuit (Mar. 7, 2019), https://www.democrats.senate.gov/newsroom/press-releases/schumer-statement-on-senate-republicans-advancing-the-nominations-of-michael-park-and-joseph-bianco-for-the-second-circuit [https://perma.cc/UJ94-TA76]; Press Release, Schumer, Gillibrand Denounce Menashi Nomination To New York 2nd Circuit, Cite Long, Disturbing Record (Sept. 11, 2019), https://www.democrats.senate.gov/newsroom/press-releases/schumer-gillibrand-denounce-menashi-nomination-to-new-york-2nd-circuit-cite-long-disturbing-record- [https://perma.cc/YWB4-CXHG] (last visited Nov. 8, 2019); *see also* Carl Tobias, *Filling the New York Federal District Court Vacancies*, 76 WASH. & LEE L. REV. ONLINE 1 (2019) (emphasizing the New York Second Circuit vacancies and Trump's efforts to fill them and the New York district court vacancies). Senator Casey also opposed Trump's determination to elevate Western District of Pennsylvania Judge Peter Phipps to the Third Circuit because he had served on the district court only briefly. *See* 165 CONG. REC. S4847 (daily ed. July 16, 2019) (confirming Judge Peter Phipps); Tracie Mauriello, *Senate Confirms Peter Phipps of Pittsburgh, to U.S. Court of Appeals*, PITTSBURGH POST-GAZETTE (July 16, 2019, 4:49 PM), https://www.post-gazette.com/news/politics-state/2019/07/16/Peter-Phipps-Third-circuit-confirmation-blue-slip-trump-federal-court/stories/201907160118 [https://perma.cc/MXX3-C6WS].

132. *See supra* note 129.

133. *See id.*; *see also* HULSE, *supra* note 1, at 186–92. Many GOP senators even offered no reasons. *See supra* note 12.

134. Feinstein statement, *supra* note 106, at S8023–25. For example, President Obama nominated exceptionally qualified, mainstream North Carolina Fourth Circuit nominees Albert Diaz and James Wynn on the identical day and the Senate considered them together throughout the confirmation process. Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2174–76 (2011). Senator Graham conducted Feb. 13, Mar. 13, Sept. 25, Oct. 16 & Oct. 30 hearings in which two circuit nominees appeared.

and four district—nominees and an ABA assessor, but Grassley also held rare sessions in the pendency of Justice Kavanaugh's Supreme Court nomination and during a Senate recess to campaign in the 2018 midterm elections.[135]

Numerous hearings seemed hurried and lacking in sufficient care for the appointment of public officials who can possess life tenure.[136] Most nominees appeared to stall by reiterating queries and deflecting or evasively responding to questions.[137] Closely related was the nominees' unwillingness to divulge whether nominees, once confirmed, would recuse themselves in cases regarding particular issues—notably involving abortion, civil rights, or discrimination—that the nominees had litigated or about which they possessed strongly held perspectives.[138] Indeed, a third of Trump's appointees had compiled anti-LGBT records.[139] These facets meant that hearings could become relatively meaningless exercises in which little substantive information was elicited.

The discussions before panel votes analogously lacked content and context. Members rarely engaged on issues, even about qualifications which are critical to service as lifetime appointees who resolve crucial matters.[140]

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135. The American Bar Association evaluator thoroughly explained why the Standing Committee on the Federal Judiciary had assigned Trump Eighth Circuit nominee Steven Grasz a not qualified rating. *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 115th Cong. (Nov. 15, 2017) [hereinafter *Nominations Nov. 2017 II*]; *see supra* note 116 and accompanying text (discussing the nominees with not qualified rankings who secured confirmation); *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 115th Cong. (Sept. 6, 2017) (showing a similarly-packed hearing); *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 115th Cong. (Aug. 1, 2018) [hereinafter *Nominations Aug. 2018*] (showing a similarly-packed hearing and conducting a hearing while the Kavanaugh Supreme Court nomination was pending); *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 115th Cong. (Aug. 22, 2018) (conducting another hearing while the Kavanaugh nomination was pending). For hearings in the recess, see *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 115th Cong. (Oct. 17, 2018); *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 115th Cong. (Oct. 24, 2018).

136. *See supra* notes 19 & 21 and accompanying text; Feinstein statement, *supra* note 106, at S8023–25. For the lack of sufficient care, see *id.* at S8024. The Judiciary Committee strictures prescribe one five-minute round of questioning for each panel member. This meant that most senators experienced one five-minute round in which to question many nominees. However, Chairs Grassley and Graham rather flexibly granted senators' requests for second rounds.

137. Judge Ho would not discuss the legal memorandum on torture that he had prepared while serving in the George W. Bush Justice Department, and Judge Don Willett unresponsively answered many questions. *Nominations Nov. 2017 II*, *supra* note 135; *see* Feinstein statement, *supra* note 106, at S8023–25.

138. *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 115th Cong. (June 14, 2017) (John Kenneth Bush); *Hearing on Nominations: Hearing Before the S. Judiciary Comm.*, 115th Cong. (Mar. 7, 2018) (John B. Nalbandian).

139. LAMBDA LEGAL, TRUMP'S JUDICIAL ASSAULT ON LGBT RIGHTS 1–2 (2018), *available at* https://www.lambdalegal.org/sites/default/files/publications/downloads/2018_eoy_judicial_report.pdf [https://perma.cc/99JC-WBBU]; *see* Adam Liptak, *Supreme Court Revives Transgender Ban for Military Service*, N.Y. TIMES (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/us/politics/transgender-ban-military-supreme-court.html [https://perma.cc/9Q4P-RUL7].

140. *See, e.g.*, *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 115th Cong. (June 7, 2018) (conducting no committee discussion of Oregon Ninth Circuit nominee Ryan Bounds, even

One deviation from regular order was the Chair's decision not to wait for ABA evaluations and ratings, despite constant pleas from Dianne Feinstein (D-CA), the Ranking Member, to have ballots *after* the ABA completed its examinations and rankings.[141] Grassley vigorously claimed that this outside political group would not delay panel work.[142] It, thus, was predicable that most controversial nominees had party-line votes.[143]

After committee approval, similar elements frustrated rigorous chamber scrutiny: both Republican and Democratic party members engaged in lockstep voting and demanded cloture and roll call votes on practically all nominees, and detonation of the nuclear option during 2013 enabled a Senate majority to secure cloture and confirm judges.[144] Most problematic were the stacking of four appellate court nominee ballots in less than a week in 2017 and six appeals court nominees during one week in 2018, each after last-minute notice.[145] Because there were such substantial complements of nominees, their massive records and the tardy notice meant that Democrats as the minority party lacked sufficient resources to prepare.[146] In George W. Bush's presidency, senators never approved that many appellate court nominees over the course of a week;[147] during Obama's tenure, this happened

though he was an extremely controversial nominee); *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 116th Cong. (Feb. 7, 2019) (conducting practically no discussion of several dozen Trump renominees whom the panel expeditiously reported).

141. *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 115th Cong. (Nov. 2, 2017); Press Release, Feinstein Speaks on Importance of ABA Ratings on Judicial Nominations (June 28, 2017), https://www.judiciary.senate.gov/press/dem/releases/feinstein-speaks-on-importance-of-aba-on-judicial-nominations [https://perma.cc/ZN8J-4979]; *see* HULSE, *supra* note 1, at 195–98.

142. Michael Macagnone, *DC Court Picks Face Senate 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 [https://perma.cc/RNG6-9EX4]; *Nominations Aug. 2018*, *supra* note 135 (two nominees lacked ABA evaluations and ratings before their hearing and four received evaluations and ratings the day of their hearing); *see* Tobias, *Regular Order*, *supra* note 7, at 36. *But see* Feinstein statement, *supra* note 106, at S8024 (praising the critical value of ABA evaluations and ratings).

143. *See, e.g.*, *Mtg. Dec. 2017*, *supra* note 116 (approving Judge Grasz); *Mtg. Feb. 2018*, *supra* note 113 (approving Judge Michael Brennan).

144. 159 CONG. REC. S8418 (daily ed. Nov. 21, 2013) (detonating the "nuclear option" to confirm D.C. Circuit Judge Patricia Ann Millett and to restrict filibuster deployment by requiring a majority, rather than 60 votes, for cloture); Tobias, *supra* note 70, at 131.

145. For 2017, notice came on Thursday evening as senators recessed. *See* U.S. SENATE DEMOCRATS, Schedule for Oct. 26, 2017; U.S. SENATE DEMOCRATS, Oct. 31, 2017; U.S. SENATE DEMOCRATS, Schedule for Apr. 26, 2018, May 7, 2018.

146. Feinstein asserted these ideas. *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 115th Cong. (Nov. 3, 2017).

147. Three were the largest number of judges whom President George W. Bush confirmed in one week during June 2004 and 2005. *Judicial Confirmations for August 2004*, U.S. COURTS (Aug. 1, 2004), https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2004/08/confirmations/pdf [https://perma.cc/HA9J-GXB6]; *Judicial Confirmations for July 2005*, U.S. COURTS (July 1, 2005), https://www.uscourts.gov/judges-judgeships/judicial-

once in unusual circumstances and with permission from Republicans.[148] The quality of debates which preceded floor votes resembled panel discussions.[149] The minority required cloture for virtually all nominees, few post-cloture debates treated the nominees and, even when they did, numerous members were absent.[150] Republican senators deemed the Senate rule which provided 30 hours of post-cloture debate on district nominees so burdensome or unhelpful that the GOP majority exploded the nuclear option and decreased those hours to two.[151]

The Republican Senate majority prioritized vacancies in appellate courts, openings in jurisdictions which GOP senators represented, non-emergencies, and approving conservative white males.[152] At 2017's completion, these emphases allowed President Trump to set a court of appeals confirmation record but left 23 district nominees lacking final ballots—many vacancies were in states with Democratic senators or emergencies and strikingly few minority nominees captured appointment.[153] By the conclusion of 2018, the priorities also enabled Republicans to maintain the circuit record yet similarly affected district nominees, openings, and minorities as well.[154]

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vacancies/archive-judicial-vacancies/2005/07/confirmations/pdf [https://perma.cc/HH7S-2LGP].

148. In December 2010, as the 111th Congress was adjourning, President Obama confirmed four appellate court nominees who had waited nine months and one nominee who had waited more than a year. *See Judicial Confirmations for January 2011*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2011/01/confirmations/html [https://perma.cc/79SG-993J] (last updated Jan. 1, 2011). The largest number of appellate court nominees whom he confirmed other weeks throughout his eight-year administration was two. *See supra* note 106.

149. Some of the confirmation debates were even less constructive. *See supra* notes 143–44 and accompanying text.

150. For example, during most of the floor debates on the four district nominees whom the Senate confirmed throughout the week of April 8, 2019, the only Senate members who heard the speeches were the senators who delivered them and the presiding officers. *See, e.g.*, 165 CONG. REC. S2351 (daily ed. Apr. 10, 2019) (debate regarding Western District of Oklahoma Judge Patrick Wyrick); 165 CONG. REC. S2297 (daily ed. Apr. 9, 2019) (debate regarding District of Colorado Judge Daniel Domenico).

151. S. RULE XXII (2019); *Exec. Business Mtg.: Meeting of the S. Comm. on Rules & Administration*, 115th Cong. (Apr. 25, 2018) (approving S. Res. 355); S. Res. 50, 116th Cong. (2019); 165 CONG. REC. S2220 (daily ed. Apr. 3, 2019) (detonating the nuclear option to institute the rule change on a majority vote); Carl Hulse, *In Altering Debate Time, Senate Steadily Hands Reins to Majority Party*, N.Y. TIMES (Apr. 4, 2019), https://www.nytimes.com/2019/04/04/us/politics/senate-nuclear-option.html [https://perma.cc/JQ8S-EMFC].

152. Those elements mainly derived from the White House nomination practices. *See supra* notes 105–27 and accompanying text.

153. U.S. SENATE, Exec. Calendar, Dec. 23, 2017; *supra* note 126 and accompanying text.

154. 165 CONG. REC. D3 (daily ed. Jan. 3, 2019); *Judicial Emergencies for January 2018*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/01/emergencies [https://perma.cc/FX4P-FJDC] (last updated Jan. 1, 2018); *Confirmations Jan. 2018*, *supra* note 123.

III. IMPLICATIONS OF THE PROCESSES

The nomination and confirmation processes' descriptive assessment demonstrates that the concepts which Trump and the Republican Senate majority employed during the last two Congresses had numerous drawbacks. One valuable measure is today's single appellate court (and 87 district court) vacancies—51 of which are judicial emergencies.[155] Before July 31, 2019, the data surpassed the 103 appellate court and district court openings, 42 comprising emergencies, at the president's inauguration.[156] Substantial vacancies, many of which are emergencies and cluster in districts and jurisdictions that Democrats represent, and the comparatively few minority nominees and confirmees, are troubling. The unfilled positions substantially increase pressure on courts, litigants, and Democratic senators who represent jurisdictions in which openings persist.[157] District court judges are the justice system "workhorses" who finally resolve most cases, and party affiliation should not drive court judicial resource distribution.[158]

The significant number of district court and judicial emergency vacancies and the comparatively few minority jurists whom Trump appointed pinpoint the need to enhance diversity. Federal courts are an important locus where people of color may be overrepresented in the criminal justice process and are underrepresented on the bench.[159] Confining diversity is a lost opportunity to enhance the justice that parties require and courts supply. Increased judicial representation affords numerous benefits. Minorities

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155. Numerous vacancies arise in many states which Democratic senators represent; small numbers of appointees constitute ethnic minorities and merely one confirmee is an LGBTQ individual. *See supra* notes 47–54 and accompanying text.

156. The statistics for district court openings and judicial emergencies continue to remain higher than at Trump's inauguration. Appellate court and district court judges are assuming senior status comparatively slowly. Russell Wheeler, *Appellate Court Vacancies May Be Scarce in Coming Years, Limiting Trump's Impact*, BROOKINGS (Dec. 6, 2018), https://www.brookings.edu/blog/fixgov/2018/12/06/trump-impact-on-appellate-courts [https://perma.cc/RJ3T-E8J2]; *Vacancies Jan. 2018*, *supra* note 123; *Vacancies Jan. 2019*, *supra* note 123; *Vacancies Dec. 2019*, *supra* note 66.

157. FED. R. CIV. P. 1; *see generally* 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 (1995) (examining the issues presented by FED. R. CIV. P. 1 and its language that requires judges to construe, administer and employ the federal rules of civil procedure to "secure the just, speedy, and inexpensive determination of every action"). Constituents may blame senators for protracted openings.

158. 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 [https://perma.cc/ZDG3-9Y9J]; *see* Patrick L. Gregory, *Trump Drops Obama Picks, N.Y., Calif. Names from Judges List*, BLOOMBERG L. (Jan 23, 2019, 5:45 PM), https://news.bloomberglaw.com/us-law-week/trump-drops-obama-picks-n-y-calif-names-from-judges-list-1 [https://perma.cc/Y3YJ-3PJY].

159. Carl Tobias, *Diversity and the Federal Bench*, 87 WASH. U. L. REV. 1197, 1197–98 (2010); Carl Tobias, *President Donald Trump's War on Federal Judicial Diversity*, 54 WAKE FOREST L. REV. 531, 562–63 (2019).

supply certain, valuable "outsider" perspectives [160] and effective insights on essential issues about liberty, discrimination, and other complex matters which jurists decide.[161] They cabin biases that undercut justice.[162] Judges who reflect the nation increase public confidence in the bench by showing that persons of color, women, and LGBTQ judicial candidates serve effectively as jurists and can appreciate situations that might prompt minority individuals to appear before federal courts.[163]

Arguments for limiting diversity, notably the purportedly small "pool" of excellent conservatives, which may have appeared to have some plausibility in an earlier time frame, lack any force now. Highly qualified conservative individuals—namely Judges Thapar, Gren Scholer, Rodriguez, Moorer and Rowland—strongly rebut the idea that confirming numerous analogous nominees will undermine merit because the pool of diverse applicants lacks enough conservatives.[164] These strong confirmees demonstrate that Trump can felicitously nominate and appoint many well-qualified, conservative and diverse jurists, who simultaneously can provide merit and conservatism. The Trump Administration need only capitalize on this salient potential.

Trump's nominal consultation, exclusion of American Bar Association evaluations and ratings and other effective strictures, deployment of inefficacious or truncated rules, and penchant for approving conservative appellate court jurists may undermine his presidential constitutional duty to nominate and confirm highly-qualified individuals who fill the numerous vacancies. Chamber propensity to quickly appoint nominees—especially by changing blue slips, ignoring or confining other helpful measures, such as robust hearing questioning, and rubberstamping nominees—might undercut

160. Theresa M. Beiner, *The Elusive (but Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 610–17 (2003); *see generally* Senator John McCain & Senator Jeff Flake, *Federal Judge Diane Humetewa*, 40 HUM. RTS. 22 (2015) (documenting Arizona Federal District Judge Diane Humetewa's excellent qualifications and the benefits of a diverse bench).

161. Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005). *But see generally* Stephen Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504 (2011) (finding insignificant gender related differences in regard to judicial performance and case resolution).

162. *See, e.g.*, FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169–70 (1990); NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS AND ETHNIC FAIRNESS: FINAL REPORT (1997), *available at* https://home.heinonline.org/titles/Congress-and-the-Courts/Final-Report-of-the-Ninth-Circuit-Task-Force-on-Racial-Religious—Ethnic-Fairness/?letter=F (reporting on bias in the justice system).

163. 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), https://www.newyorker.com/magazine/2014/10/27/obama-brief [https://perma.cc/9BKX-6SMM]; *see generally* WILLIAM N. ESKRIDGE, GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999) (discussing legal issues surrounding LGBTQ individuals).

164. *See supra* notes 126–27; Editorial Board, *A Bad Judges Deal*, WALL ST. J. (Jan. 29, 2019, 7:21 PM), https://www.wsj.com/articles/a-bad-judges-deal-11548807717 [https://perma.cc/58EA-PEB7].

discharge of Senate constitutional responsibility for providing advice and consent. Many and prolonged openings could also impede the judiciary's realization of its compelling duty to swiftly, economically and fairly resolve cases by pressuring courts and delaying case resolution. Granting ideology constant, explicit stress can mean that the judiciary resembles the political branches.[165]

Grassley's disparate approach to chairing the Judiciary Committee in the 114th and 115th Congresses merits emphasis. Throughout Obama's last two years, the Chair strictly enforced multiple rules and customs, namely appellate court blue slips, yet gravely delayed appointments; over Trump's first half term, Grassley deleted or significantly changed effective rules and norms (mainly appellate court slips and rigorous, comprehensive nominee analysis), while drastically speeding confirmations.[166]

In sum, Trump has created records for confirming appellate court judges; many of these jurists are extremely conservative, well-qualified and young. However, the president and Republican senators rejected or modified valuable techniques which had promoted exceptional judges' confirmations, and Trump confronts more district court vacancies and emergencies now than the chief executive inherited at the time of his inauguration. Thus, the concluding Section of this Essay analyzes measures to improve selection.

IV. FUTURE SUGGESTIONS

A. SHORT-TERM SUGGESTIONS

Trump and the Republican Senate majority should apply numerous ideas which have performed efficaciously, like some that the White House Counsel and the chamber deploy. One idea is elevating prominent, conservative, and moderate, district confirmees whom Presidents George W. Bush and Obama appointed, because the jurists offer considerable applicable expertise and accessible, complete records.[167] For instance, Trump elevated George W. Bush district court appointees Thapar and Amy St. Eve; Trump could

165. *See generally* HULSE, *supra* note 1, at 193–95, 278–79; Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices As Advocates*, 94 NOTRE DAME L. REV. 1161 (2019) (highlighting the Supreme Court's drift toward more active political activity and advocacy); Savage, *supra* note 108. According ideology incessant, express emphasis may even undermine citizen trust in federal court jurists. Trump appointees' comparatively brief service frustrates detecting this phenomenon, collegiality and ability. *But see* Letter from Jon Green, Co-Founder of Data for Progress, to Demand Justice, The Ideology of Trump's Judges (Jan. 2019), http://filesforprogress.org/memos/Trump%20Judges%20Memo%20-%20Demand%20Justice%20-Final.pdf [https://perma.cc/5PVZ-VHMQ]; *Confirmed Judges, Confirmed Fears*, PEOPLE FOR THE AM. WAY (2019), http://www.pfaw.org/topics/confirmed-judges-confirmed-fears [https://perma.cc/7LR5-A527].

166. *Compare supra* notes 20–23, 29–35 *with supra* notes 128–31, 134–43; *see also* HULSE, *supra* note 1, at 190.

167. Elisha Carol Savchak et al., *Taking It To the Next Level: Elevation of District Court Judges To the U.S. Courts of Appeals*, 50 AM. J. POL. SCI. 478, 481 (2006); Tobias, *supra* note 12, at 2248.

analogously elevate Obama confirmees Pamela Ki Mai Chen and Alison Nathan who would become the first openly lesbian appellate court jurists.[168] State High Court Justices can tender similar experience and records. Presidents Bush and Obama deployed this construct,[169] as has Trump.[170]

Another constructive measure is re-nominating more of the 20 able conservative and moderate Obama district nominees who earned committee reports yet lacked final ballots.[171] This would speed appointments, because renamed nominees merely need to win panel and floor votes.[172] Trump sagely re-nominated 15 Obama nominees, including Judges Moorer and Gren Scholer; most have achieved confirmation.[173]

Trump must analyze the revival or improvement of many effective ideas which he rejected or changed. One is assiduous White House consultation of home state politicians.[174] Cultivating, and carefully assessing perspectives of, senators, who have robustly and fairly scrutinized choices, facilitate smooth nomination and confirmation processes. A trenchant example is that of two exceptional, conservative Illinois Seventh Circuit appointees, Judges St. Eve and Michael Scudder, whom Illinois Democratic Senators Dick Durbin and Tammy Duckworth actively supported, Grassley quickly processed and Senate members easily approved.[175]

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168. *Diversity on the Bench*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/node/7491 [https://perma.cc/E8BY-Q5VP]; *infra* note 175 and accompanying text (St. Eve's confirmation); Carl Tobias, *Combating the Ninth Circuit Judicial Vacancy Crisis*, 73 WASH. & LEE L. REV. ONLINE 687, 715–18 (2017) (providing additional examples).

169. George W. Bush and Obama elevated Ohio and Alaska Supreme Court Justices Deborah Cook and Morgan Christen to the Sixth and Ninth Circuits respectively. 157 CONG. REC. S8691 (daily ed. Dec. 15, 2011); 149 CONG. REC. S5742 (daily ed. May 5, 2003).

170. He placed Colorado and Georgia Supreme Court Justices Alison Eid and Britt Grant on the Tenth and Eleventh Circuits respectively. 164 CONG. REC. S5525 (daily ed. July 31, 2018); 163 CONG. REC. S6981–82 (daily ed. Nov. 2, 2017).

171. The Republican Senate majority refused to schedule appellate court confirmation votes in 2016 and their nominations expired. Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9, 18–20 (2017).

172. The 20 nominees earned committee hearings and unopposed approvals mostly across 2016. *Id.*

173. *See supra* note 126 (Moorer and Gren Scholer); Chris Cioffi, *The GOP Is Confirming Trump Judicial Nominees It Stalled Under Obama*, ROLLCALL (Aug. 26, 2019, 5:30 AM), https://www.rollcall.com/news/congress/unsuitable-before-the-election-trump-gets-obamas-judges-on-the-bench [https://perma.cc/T4S7-AGB4]. *But see* Gregory, *supra* note 158. The nominations of the 20 with committee approval and the additional 28 nominees without reports expired at the 114th Congress' conclusion. 162 CONG. REC. S7183–84 (daily ed. Jan. 3, 2017).

174. This is a major reason for blue slips. *See supra* notes 132–33.

175. 164 CONG. REC. S2655 (daily ed. May 14, 2018) (confirmation); *Hearing on Nominations: Hearing Before S. Judiciary Comm.*, 115th Cong. (Mar. 21, 2018); *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 115th Cong. (Apr. 19, 2018) (committee approval); *President Donald J. Trump Announces the Eleventh Wave of Judicial Nominees*, WHITE HOUSE (Feb. 12, 2018), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-eleventh-wave-judicial-nominees [https://perma.cc/FT6X-VPBH].

Trump and the GOP Senate leadership should rethink the mistaken choice to disregard American Bar Association examinations and ratings, as George W. Bush is the sole other president who eschewed the organization's expertise and cautious analyses.[176] Employing ABA input before nominations limits embarrassment for prospects whom the entity deems not qualified.[177] Because most nominees who were so rated—notably Judges Goodwin and Teeter—won approval, ABA input could alert participants in the selection process to potential difficulties, so that the chamber can analyze them.[178]

Trump must reassess accentuating conservative appellate court judges' confirmations.[179] He may deploy a regime that stresses the needs of all appeals courts and district courts by initially tapping nominees who decrease the 51 judicial emergencies.[180] Trump could emphasize the 87 district openings and the plentiful courts with ample cohorts, vacancies and emergencies, particularly in California and New York; California experiences 14 appellate court and district vacancies and New York experiences 12 district court openings while all California vacancies comprise judicial emergencies and eight New York openings comprise judicial emergencies.[181] Stressing them would concomitantly treat the relatively few nominees and confirmees from states which Democrats represent.[182]

The chief executive must also increase diversity, because enhanced minority representation offers numerous advantages.[183] Trump should grant diversity high priority while informing selection participants and citizens that he believes improved representation is essential. The White House Counsel ought to lead this initiative by according priority to diversity, just as the administration has emphasized conservatism.[184] Entities, such as the White House Counsel Office and the Justice Department Office of Policy Development, which discharge important judicial selection responsibilities, should include minority employees and commit enough resources to

176. *See supra* note 115. *But see supra* note 116.

177. *See supra* note 116. The president can decline to nominate or the aspirant may choose to withdraw privately.

178. When the ABA rated Goodwin and Teeter not qualified, district judges where both sit voiced strong support for the nominees. *Hearing on Nominations: Hearing of S. Judiciary Comm.*, 115th Cong. (Dec. 13, 2017) (Goodwin); *Exec. Business Mtg.: Meeting of the S. Judiciary Comm.*, 115th Cong. (Jan. 18, 2018) (Teeter); *see supra* note 116.

179. *See supra* notes 105–11.

180. *See supra* notes 154–58.

181. *Vacancies Dec. 2019*, *supra* note 66; Tobias, *supra* note 53 (evaluating the substantial number of judicial vacancies that Texas experienced throughout the Obama Administration, which have significantly decreased in the Trump Administration); *see supra* notes 154–58.

182. Emphasizing Illinois, New Jersey and Washington district court vacancies, many of which constitute emergencies, would be similar. *See Vacancies Dec. 2019*, *supra* note 66.

183. *See supra* notes 160–63.

184. Critical will be staff in the White House Counsel Office, the Justice Department and the panel and senators who represent states with vacancies.

profoundly enhance diversity. All participants in the selection process must robustly search for, discover, canvass, and proffer strong aspirants by contacting individuals, politicians, ethnic minority groups, women's interest organizations, LGBTQ interest entities, political groups, as well as state and local bar committees, which know able prospects. The White House Counsel should persuade lawmakers from states with openings to identify, evaluate and submit excellent minorities, whom he interviews and recommends while urging that Trump carefully assess naming them. The president might lead by example with consequent nominations.

Once Trump selects prospects, he, the White House, the Justice Department and senators must invoke comprehensive, prompt and fair confirmation regimes. Members should expeditiously investigate nominees, the White House and DOJ ought to fully prepare them, the panel must completely investigate nominees and schedule prompt, robust, and equitable hearings, discussions, and ballots. After the panel reports nominees, the chamber must swiftly, rigorously and fairly debate and vote.

Senator Graham, who recently became Chair of the Judiciary Committee, should capitalize on his relationship with Trump and the expertise which the legislator has derived from long panel service, especially the past two Congresses. Graham has worked on many Supreme Court confirmation processes, notably that for Kavanaugh, and was in the "Gang of 14," who halted the nuclear option's 2005 release.[185]

The new Chair should urge that members and staff fully review and employ numerous measures which improve the confirmation process by limiting politicization and divisiveness. They must survey effective practices that robustly and fairly vet nominees and stress and deploy efficacious ideas and enhance ones that are not.

Pertinent are rules and customs that Grassley ignored or diluted across his tenure as Chair. Extremely important was the blue slips' change which allowed processing of appellate court nominees about whom there was little consultation by elastically applying malleable criteria with nominal explanation of why the Chair determined that the White House adequately consulted.[186] Grassley also staged ten hearings in which two circuit nominees

185. *Text of Senate Compromise on Judge Nominations*, N.Y. TIMES (May 24, 2005), http://www.nytimes.com/2005/05/24/politics/24text.html [https://perma.cc/N9EU-69W4] [hereinafter *Senate Compromise*]; *see* Tobias, *supra* note 70, at 122; *see also* HULSE, *supra* note 1, at 274–79 (describing Sen. Graham's role in the judicial selection process and as Chair). Susan Collins (R-ME) is the only other currently-serving senator who participated as a Gang member.

186. *See supra* notes 130–31. Graham must honor slips when administration consultation is weak or White House Counsel rejects home state senators' fair offers to compromise regarding nominees who will serve as judges in their jurisdictions. Letter from Sen. Feinstein to White House Counsel McGahn (Oct. 5, 2018), https://www.feinstein.senate.gov/public/_cache/files/d/4/d4757388-8ebc-446c-8283-1719f1054d60/C0422EA4863812AFB2A2BEF78E24242 6.2018.10.5-df-letter-to-mcgahn-re.-ninth-circuit.pdf [https://perma.cc/SVW9-U3GC]. *But see* Lydia Wheeler, *Dems Push for Increased Scrutiny of Trump Court Picks*, HILL (Dec. 23, 2018, 7:14

appeared without Democrats' permission,[187] while the Chair scheduled hearings every other week (and conducted meetings practically each week) that Congress was in session.[188] These hearings and meetings seemingly afforded hurried processes for nominees, who, if confirmed, will probably serve for decades. Moreover, Grassley failed to await ABA evaluations and ratings, which could have informed panel decisionmaking regarding nominees.[189]

Graham, Grassley and other Republican senators, especially who serve as panel members, must assess whether rejecting or diluting rules and customs is effective, and, if not, remedy or minimize any concerns—while the lawmakers should scrutinize procedures that the chamber has employed in previous years to detect whether these notions proved efficacious and, if so, consider revitalizing them. Many examples of the former were examined above. Truncated hearings, which Senator Hatch, as Chair, applied to exceptional, consensus George W. Bush nominees, illustrate the latter.[190]

B. LONGER-TERM SUGGESTIONS

This canvass shows that the confirmation wars before Trump's 2016 victory have persisted since he assumed office, epitomized by rare agreements on chamber votes and the nuclear option's detonation for Supreme Court and district court nominees.[191] When the president or senators deleted or altered effective rules or conventions, this worsened the selection process' decline.[192]

PM), https://thehill.com/homenews/senate/422270-dems-push-for-increased-scrutiny-of-trumps-court-picks [https://perma.cc/TH2D-NP8Y] (Graham is following Grassley's circuit and district court blue slip policies).

187. Grassley also convened rare sessions when Justice Kavanaugh's Supreme Court nomination was pending and the Senate was in recess to campaign. *See supra* note 123 (documenting the current existence of merely one appellate court vacancy); *supra* notes 134–35; *see also* Wheeler, *supra* note 156 (asserting that there will be few new appellate court vacancies before the 2020 elections, which means that slip and two-nominee issues may be less troubling). However, Graham has already conducted five 2019 hearings in which two appellate court nominees appeared. *See supra* note 134.

188. *Compare Nominations Oct. 2018 I*, *supra* note 135, *and Nominations Oct. 2018 II*, *supra* note 135 *with supra* notes 21–23 and accompanying text.

189. *Compare supra* note 142 and accompanying text *with supra* note 115.

190. Tobias, *Regular Order*, *supra* note 7, at 36–37 (Hatch); *supra* notes 93–94 (Grassley employed a comparatively truncated hearing for Restrepo partly because he was so well qualified and the Pennsylvania senators powerfully supported his elevation).

191. Tobias, *Justices*, *supra* note 7, at 1107; John Gramlich, *Federal Judicial Picks Have Become More Contentious, and Trump's Are No Exception*, PEW RES. CTR. (Mar. 7, 2018), https://www.pewresearch.org/fact-tank/2018/03/07/federal-judicial-picks-have-become-more-contentious-and-trumps-are-no-exception [https://perma. cc/5USJ-4KYR]; *see* HULSE, *supra* note 1, at 10–11, 179–81 (describing the nuclear option's detonation for Supreme Court nominees); *supra* notes 144, 151.

192. For numerous longer-term suggestions, see Shenkman, *supra* note 43, at 298–311; Tobias, *supra* note 12, at 2255–65.

Nevertheless, there is one idea which can enhance selection. Trump and the chamber might institute a bipartisan judiciary that would permit the home state senator who is a member of the party which does not control the White House to suggest one in several picks.[193] New York seemingly effectuated the first measure, which operated efficaciously from the 1970s until the 1990s,[194] while the New York appellate court and district court nominees whom Trump has marshaled show that the president and the New York senators applied a comparatively similar regime.[195] Congress might conjoin this measure with legislation that authorizes 65 new posts that the Judicial Conference, which is the federal courts' policymaking arm, recommended to Congress.[196]

Both techniques may increase minority jurists and yield other benefits. The ideas afford each party incentives to cooperate in the selection process, judges who are rather diverse vis-à-vis ethnicity, gender, sexual preference, ideology and experience and courts additional judicial resources to deliver justice. The concepts would improve diversity's first three attributes, partly by enabling Democrats to recommend a small percentage of nominees, and could halt or at least ameliorate the process' counterproductive downward spiral. However, implementation will demand care.[197]

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193. *See* Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 688 (2003); *see generally* Carl Tobias, *Fixing the Federal Judicial Selection Process*, 65 EMORY L.J. ONLINE 2051 (2016) (providing more comprehensive explication of the bipartisan judiciary construct).

194. 143 CONG. REC. S2538 (daily ed. Mar. 19. 1987) (statement of Sen. Biden) (suggesting that the New York approach operated effectively over two decades).

195. The New York packages included two Obama 2016 district court nominees, Gary Brown and Diane Gujarati, whom Trump renominated as well as two George W. Bush district appointees, District Judges Richard Sullivan and Joseph Bianco. *Thirteenth Wave of Nominees*, *supra* note 123; *Eighteenth Wave of Nominees*, *supra* note 123. Home state senators and presidents negotiate specific constituents of the bipartisan judiciary, such as which courts have a bipartisan judiciary. The New York experience suggests that the White House chose the Second Circuit nominees and the senators recommended most district nominees and the California experience appears similar, although less formalized. However, most states which employ a bipartisan judiciary apparently confine its operation to district courts.

196. For example, the Conference recently recommended that Congress authorize four new judgeships for both California and New York. *Additional Judgeships or Conversion of Existing Judgeships Recommended By the Judicial Conference*, JUDICIAL CONFERENCE OF THE U.S., (Mar. 2019), https://www.uscourts.gov/sites/default/files/2019_judicial_conference_judgeship_recommendations_0.pdf [https://perma.cc/GT58-VKZ5]; *see* REPORT, *supra* note 42 (providing earlier recommendation); Federal Judgeship Act of 2013, S. 1385, 113th Cong. (2013) (most recent comprehensive judgeships bill); *supra* note 42.

197. The bipartisan judiciary would pass constitutional muster. The concept may additionally politicize judicial selection; however, the idea could enhance judicial appointments. Moreover, the confirmation wars must end and litigant needs deserve precedence. The idea seems complex, yet many issues can be solved, as examples above show. Congress has faced and solved more complicated issues, namely, how to address substantial numbers of cases, many of which are complex, with comparatively few resources, by authorizing new judgeships, but Congress passed the last comprehensive statute in 1990. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 201–206, 104 Stat. 5089–5104 (1990).

A related prospect is changing filibusters which have been essential to the modern confirmation wars. Graham's experience with the measure should prove valuable. The Chair has refereed filibuster battles, while he appreciates the mechanism's history, operation, and abuse, as well as potential reforms' efficacy.[198] The device has customarily safeguarded the minority party, but abuses suggest that it now merits recalibration.[199] For example, deployment can be reserved for nominees who lack the intelligence, ethics, temperament, diligence, or independence to furnish excellent service. This goal would be realized by allowing filibusters only in "extraordinary circumstances," a phrase that operated rather effectively across 2005, while more clearly defining it.[200]

V. CONCLUSION

Senator Chuck Grassley fulfilled his responsibilities as Chair of the Senate Judiciary Committee quite differently in President Barack Obama's last half term than over President Donald Trump's first two years. However, in both half terms, the unproductive dynamics which attended the escalating confirmation wars intensified. Thus, President Trump must collaborate with

198. Ed O'Keefe & Paul Kane, *A Brief History of the Senate Filibuster*, WASH. POST (Nov. 21, 2013, 10:03 AM), https://www.washingtonpost.com/news/the-fix/wp/2013/11/21/a-brief-history-of-the-senate-filibuster-fight [https://perma.cc/34SE-PNH5]; '*Gang*' *to Hang Together*, ROLLCALL (May 24, 2005, 2:36 PM), https://www.rollcall.com/news/-9416-1.html [https://perma.cc/LL2H-QY7K].

199. Republican and Democratic party abuses of the filibuster prompted explosion of the 2013 nuclear option that cabined filibuster deployment by permitting a majority vote for cloture. GOP denial of 2015–16 floor votes, especially for appeals court nominees, was abusive, as may be Democrats' demanding cloture and roll call votes for practically all nominees in 2017–19 as well as Republicans' detonation of the nuclear option for Supreme Court nominees in 2017 and for substantially reducing post-cloture debate hours on district nominees in 2019. *See supra* notes 39–48, 70, 144, 151, 191.

200. *Senate Compromise*, *supra* note 185; *see generally* 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 (2012) (discussing the agreement not to support a filibuster on a nominee except in "extraordinary circumstances"). Senators, including Graham, expressly contended that the ideology of nominees and the numbers of cases and judges which courts experience should *not* be considered extraordinary in a controversial dispute over three well-qualified, mainstream candidates whom Obama nominated to D.C. Circuit vacancies. Tobias, *supra* note 70, at 126–28. *But see id.* at 125–27. These actions may foster the reinstitution of 60 votes for cloture that would reverse the nuclear option for Supreme Court as well as federal appellate and district court nominees and might stimulate additional interparty cooperation. Republicans may oppose this suggestion, but filibusters can be one dimension of a solution, which includes two post-cloture debate hours for district nominees, while Republicans will not retain the majority forever and may agree to a compromise that promises to limit the confirmation wars. *Id.* at 140; *see* Burgess Everett & Marianne Levine, *McConnell Preps Nuclear Option to Speed Trump Judges*, POLITICO (Mar. 6, 2019, 7:45 AM), https://www.politico.com/story/2019/03/06/trump-mcconnell-judges-1205722 [https://perma.cc/D6J6-2L67] (Schumer offered honoring appellate court blue slips in return for two hours of post-cloture debate on district nominees but Republicans rejected the offer); *supra* note 151.

each party's senators, particularly those who are members of the committee and especially Senators Graham and Grassley, to cure or ameliorate the confirmation wars and the vacancy crisis which undermines the federal courts.

Moreover, Senator Grassley recently signaled that he intends to seeks the office of Chair in 2021, should Republicans manage to retain their Senate majority, an expression of interest to which Senator Graham has suggested that he will defer.[201] If these developments transpire, Senator Grassley will have another opportunity to lead the Judiciary Committee. The legislator must capitalize on his experience derived from prior service as Chair and the suggestions proffered above for enhancing the federal judicial selection process to rectify or ameliorate the confirmation wars and the vacancy crisis.

201. *See, e.g.*, Jordain Carney, *Grassley to Take Back Judiciary Gavel, If GOP Keeps Senate in 2020*, HILL (Oct. 31, 2019, 10:40 AM), https://thehill.com/homenews/senate/468292-grassley-to-take-back-judiciary-gavel-if-gop-keeps-senate-in-2020 [https://perma.cc/2Q4N-TLFU]; Marianne Levine, *Lindsey Graham Will Give Judiciary Chairmanship Back to Chuck Grassley*, POLITICO (Oct. 31, 2019, 12:13 PM), https://www.politico.com/news/2019/10/31/graham-judiciary-chairmanship-grassley-062993 [https://perma.cc/NP64-87G4].