

2020

Filling the California Federal District Court Vacancies

Carl Tobias

University of Richmond - School of Law

Follow this and additional works at: <https://scholarship.richmond.edu/law-faculty-publications>



Part of the [Courts Commons](#), and the [Judges Commons](#)

Recommended Citation

Carl Tobias, *Filling the California Federal District Court Vacancies*, 11 Cal. L. Rev. Online 68 (2020).

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

Filling The California Federal District Court Vacancies

Carl Tobias*

Introduction	68
I. Contemporary Selection Difficulties	70
A. Persistent Vacancies	71
B. The Modern Dilemma.....	71
II. Trump Administration Judicial Selection	72
A. Nomination Process	72
B. Confirmation Process.....	77
III. Implications	82
IV. Suggestions For The Future.....	85
Conclusion	90

INTRODUCTION

President Donald Trump frequently argues that confirming federal appellate judges constitutes his quintessential success.¹ The President and the Republican Senate majority have dramatically eclipsed appeals court records by appointing fifty-one conservative, young, and capable appellate court nominees, which leaves merely one vacancy across the country.² Nonetheless, these

DOI: <https://doi.org/10.15779/Z381Z41T4R>.

Copyright © 2020 Carl Tobias.

*. Williams Chair in Law, University of Richmond School of Law. I wish to thank Margaret Sanner for valuable suggestions, Jamie Wood, Jane Baber and Emily Benedict for valuable research and careful editing, the University of Richmond Law Library staff for valuable research, the *California Law Review Online* editors for excellent editing and sound advice, Ashley Griffin Hudak and Leslee Stone for excellent processing as well as Russell Williams and the Hunton Andrews Kurth Summer Research Endowment Fund for their generous, continuing support. Remaining errors are mine alone.

1. White House, Office of the Press Sec’y, President Donald J. Trump is Appointing a Historic Number of Federal Judges to Uphold Our Constitution as Written, Nov. 6, 2019; Brie Stimson, *Trump Touts Number of Federal Judges Appointed in His Administration*, FOX NEWS, Jan. 25, 2020, <https://www.foxnews.com/politics/trump-touts-number-of-federal-judges-appointed-in-major-record-territory>.

2. White House, Office of the Press Sec’y, President Donald J. Trump Has Delivered Record Breaking Results for the American People in His First Three Years in Office, Dec. 31, 2019.

approvals have imposed costs, especially among the plentiful district courts that address seventy-four openings in 677 judicial positions.

The most striking example is the four California districts, which realize seventeen pressing vacancies among sixty posts. The Administrative Office of the United States Courts (AO), the federal judiciary's administrative arm, designates all of them "judicial emergencies," which means that numerous openings have remained unfilled for a lengthy period of time, many involve substantial caseloads, and the California emergencies comprise almost two-fifths of those throughout the country. Notwithstanding the perilous situation, the White House failed to make any nomination until October 2018, to marshal prospects for eleven other empty seats before a year later, or to confirm one jurist yet. Indeed, all openings lacked nominees until February 2019, mainly because the administration had delayed resending the upper chamber three nominees whom Trump proffered in 2018. The Senate Judiciary Committee has granted merely three nominees a panel hearing, Trump only renamed on February 13, 2020 the other ten Central and Southern District nominees whom the chamber returned to the President on January 3, and the White House has failed to choose nominees for four additional vacancies. Finally, it remains unclear when the Senate will provide chamber floor debates and confirmation votes to the three nominees who secured hearings, much less when the panel will afford the other ten nominees hearings.

California's circumstances aptly mirror the nation but comprise the worst-case scenario. District court judges are the California federal justice system's "workhorses" and manage immense caseloads. The rampant openings acutely pressure numbers of California jurists, litigants, and practitioners. Therefore, the endeavors to fill the vacancies by the White House, the chamber, and the home state politicians—Democratic Senators Dianne Feinstein, the Judiciary Committee's Ranking Member, and Kamala Harris—necessitate analysis.

The paper initially considers the background of federal judicial appointments, emphasizing contemporary difficulties. Section two reviews manifold procedures which Trump and the chamber deploy, finding that the chief executive and the Senate focus on the rapid appointment of extremely conservative, young, and competent appellate judges but deemphasize openings in trial court posts. The President also eliminates or restricts venerable norms, including meaningful consultation of senators from jurisdictions that encounter vacancies, which prior administrations had comprehensively implemented. The segment then assesses numerous confirmation practices, ascertaining that the committee abolishes or downplays salient traditions, particularly "blue slips"—which eliminate aspirants' processing, unless home state legislators favor candidates—while the panel seems less concerned about the careful arrangement of Senate hearings that previous committees had robustly adopted.

Section three analyzes the implications of the procedures used, determining that before August 2019 relatively more court openings existed than at the Trump

inauguration. Concentration on swift appointment of numerous conservative appeals court jurists and deviation from salutary precedents—notably reliance on meticulous consultation and blue slips that had long operated efficaciously—undercut fulfillment of the President’s constitutional duties to nominate and confirm respected trial judges. This focus also undermined discharge of the senators’ constitutional responsibilities to advise and consent. These phenomena result in monumental numbers of vacancies, most of which are protracted, while they complicate the judiciary’s expeditious, inexpensive and fair disposition of already mammoth caseloads. However, active executive branch consultation of Feinstein and Harris, the California home state lawmakers who adeptly cooperated with the White House, promoted the rather felicitous nomination, albeit severely delayed confirmation, processes afforded to the initial complement of strong, moderate district nominees and the comparatively smooth nomination, but seriously tardy confirmation, processes accorded to numerous other capable, mainstream trial level nominees.

The last segment posits multiple suggestions for the future. Now that the executive branch has renamed the two 2018 district nominees and one 2019 district nominee, who have secured hearings, and proffered many additional talented submissions but neglected to rename five more Central District and five Southern District nominees until February 13, all of whom clearly await chamber processing with a swift panel hearing, the White House must thoroughly consult and collaborate with Senators Feinstein and Harris plus ninety-eight more of their colleagues while reviving salient ideas on which numerous Presidents and members have plainly capitalized to diligently fill all seventeen openings. The chamber should astutely revitalize creative devices, primarily blue slips, rigorous hearings and committee discussions, and robust chamber debates. These activities would provide constructive advice that would help to confirm trial level jurists across California and throughout the country.

I.

CONTEMPORARY SELECTION DIFFICULTIES

The history needs little recounting; some observers have explored the background and the present situation has more pertinence.³ One specific conundrum is the persistent vacancies dilemma, which results from expanded federal court jurisdiction, lawsuits, and judicial slots.⁴ The other, contemporary

3. *E.g.*, Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 *MISS. C. L. REV.* 319 (1994); Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice, Federal Judicial Selection, 1789-1861*, 100 *IOWA. L. REV.* 55 (2015); MILLER CENTER REPORT, *Improving the Process for Appointing Federal Judges* (1996) [hereinafter MILLER REPORT].

4. The permanent vacancies difficulty warrants somewhat less treatment than the contemporary complication, because considerable delay is inherent in the selection process, while the problem resists easy solution and has been assessed elsewhere. Bermant et al., *supra* note 3; *Remedying*

difficulty is political and can be attributed to conflicting White House and Senate control which commenced some forty years ago.

A. Persistent Vacancies

Legislators enhanced federal court jurisdiction in the 1960s,⁵ enlarging causes of action plus criminalizing more activity, phenomena which intrinsically drove federal litigation.⁶ Congress addressed rising cases with seats.⁷ Over the fifteen years ahead of 1995, confirmation times mounted.⁸ For example, appellate nominations consumed one year, and confirmations required three months.⁹

The processes' substantial number of phases and participants makes some delay inherent.¹⁰ White Houses cultivate politicians from home states, pursuing effective advice on choices, and the lawmakers submit preeminent suggestions. The Federal Bureau of Investigation (FBI) directs professional "background checks." The American Bar Association (ABA) examines and rates candidates.¹¹ The Department of Justice (DOJ) helps scrutinize individuals while rigorously preparing nominees for Senate analyses. The Judiciary Committee assesses possibilities, schedules their hearings, discusses choices and quickly votes; candidates approved may receive chamber debates, when necessary, which precede final ballots.

B. The Modern Dilemma

Article II envisions that senators will correct mistaken nominations, while strident partisanship has long suffused judicial appointments.¹² Politicization has

the Permanent Vacancy Problem in the Federal Judiciary, 42 RECORD ASS'N BAR CITY N.Y. 374 (1987).

5. MILLER REPORT, *supra* note 3, at 3; see Carl Tobias, *The New Certiorari and a National Study of the Federal Appeals Courts*, 81 CORNELL L. REV. 1264, 1268-70 (1996).

6. *E.g.*, Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990); Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

7. 28 U.S.C. §§ 44, 133 (2012); ADMIN. OFFICE OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (2020) [hereinafter JUDICIAL VACANCIES].

8. Bermant et al., *supra* note 3, at 323, 329-32. See generally U.S. JUDICIAL CONF., LONG RANGE PLAN FOR THE FEDERAL COURTS 103 (1995).

9. Bermant, *supra* note 3, at 323, 329-32. Appellate court nominations needed twenty months and court of appeals confirmations required six months during 1997, the initial year of President Bill Clinton's last term, and in 2001, the first year of President George W. Bush's initial term. Both of those years closely resembled 2009 and 2015-16, President Barack Obama's first year and his last half term. Carl Tobias, *Curing the Federal Court Vacancy Crisis*, 53 WAKE FOREST L. REV. 883, 887 (2018).

10. Bermant et al., *supra* note 3; Sheldon Goldman, *Obama and the Federal Judiciary: Great Expectations but Will He Have a Dickens of a Time Living Up to Them?*, FORUM 7:1 (2009).

11. MILLER REPORT, *supra* note 3; see AMERICAN BAR ASSOCIATION, STANDING COMM. ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS (1983); see also *infra* notes 27-28, 30 & 57 and accompanying text.

12. The Federalist No. 76, at 513 (Alexander Hamilton) (Jacob Cooke ed., 1961); see also MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND

continued, significantly increasing when President Richard Nixon expressly intimated that he would deliver “law and order” by forwarding “strict constructionists,”¹³ and palpably so prior to United States Court of Appeals for the District of Columbia Circuit Judge Robert Bork’s massive Supreme Court imbroglio.¹⁴ Partisanship skyrocketed, while divided government and the fervent hope that the party without the executive branch could recapture it and confirm jurists animated dilatory conduct. Slow nominations and confirmations might explain the lack of appointments in the Clinton and Bush presidencies that 1997 and 2001 selection epitomizes.¹⁵ In President Barack Obama’s tenure, the Republican senators eviscerated coordination, revealed in their unprecedented refusal to analyze D.C. Circuit Chief Judge Merrick Garland, Obama’s distinguished Supreme Court nominee.¹⁶ After the GOP won a chamber majority in November 2014, Republican members vowed to duly effectuate “regular order” again, which Democrats had purportedly subverted once they became the majority in 2007. However, the GOP confirmed a mere two Obama appeals court and eighteen trial level nominees in 2015-16, the fewest since Harry Truman was President; these considerations meant that the nation encountered more than 100 vacancies at Trump’s inauguration with California experiencing four unoccupied appellate court positions, all of which implicated emergencies, and six open district court positions, one of which slots involved an emergency.¹⁷

II.

TRUMP ADMINISTRATION JUDICIAL SELECTION

A. Nomination Process

During his presidential election campaign, Trump promised to nominate and seat ideological conservatives. The administration respected the pledges by

HISTORICAL ANALYSIS 28 (2000). *See generally* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997).

13. GOLDMAN, *supra* note 12, at 205; DAVID O’BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 20 (1988).

14. *See, e.g.*, MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER’S ACCOUNT OF AMERICA’S REJECTION OF ROBERT BORK’S NOMINATION TO THE SUPREME COURT (1992); JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 18 (2007).

15. Tobias, *supra* note 9, at 888-89 (providing more analysis of lower federal court selection issues during the Clinton and Bush Administrations).

16. *See, e.g.*, Robin Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama’s Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53 (2016). *See generally* Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1093 (2017).

17. JUDICIAL VACANCIES, Confirmation Lists, Emergencies (2015-17), *supra* note 7; 163 CONG. REC. S8,022-24 (daily ed. Dec. 14, 2017) (statements of Sens. Durbin, Feinstein & Leahy); *see* David Smith, *Trump Is Seizing the Courts - Only a Democratic Win in November Can Stop Him*, THE GUARDIAN, Apr. 29, 2020; Carl Tobias, *The Republican Senate and Regular Order*, 101 IOWA L. REV. ONLINE 12 (2016) (explaining the concept of regular order and how the Republican Senate majority repeatedly promised to restore regular order but actually failed to restore regular order).

confirming two Supreme Court Justices, Neil Gorsuch and Brett Kavanaugh, and many similar court of appeals judges, even though the White House appointed comparatively few analogous district nominees.¹⁸ The chief executive actually created appellate court records in the first presidential year by appointing twelve jurists, eighteen during the second, and twenty in 2019.¹⁹

Trump uses certain widely accepted conventions but jettisons or downplays numbers of efficacious customs. For instance, he, as every contemporary President, assigns lead responsibility to the White House Counsel (Donald McGahn), related duties to the Justice Department and crucial responsibility for district vacancies to in-state politicians, and emphasizes circuit openings.²⁰ In sending appellate court picks, White House Counsel accentuates conservatism and youth while employing the “short list” of probable Supreme Court prospects whom the Federalist Society and the Heritage Foundation compiled.²¹ Those ideas apparently control, because Leonard Leo, the Federalist Society’s Executive Vice President,²² assists Trump, who stresses the courts of appeals, which comprise tribunals of last resort for nearly all cases, articulate greater policy than district courts, and issue rulings that cover multiple states.²³ His appellate confirmees are extremely conservative, young, and competent.

Nevertheless, this White House reverses or dilutes vaunted traditions. One is undertaking meaningful consultation with politicians about home state vacancies, a convention which recent Presidents have diligently applied. During the Obama presidency, consultation received significant priority through the use

18. JUDICIAL VACANCIES, Confirmation Lists (2017-20), *supra* note 7; see Tobias, *supra* note 16, at 1103; Tom McCarthy, *Trump’s Judges: A Revolution To Create a New Conservative America*, THE GUARDIAN, Apr. 28, 2020; Russell Wheeler, *Judicial Appointments in Trump’s First Three Years: Myths and Realities* (BROOKINGS INSTITUTION 2020).

19. JUDICIAL VACANCIES, Confirmation Lists (1993-95, 2001-03, 2009-11, 2017-19), *supra* note 7; see 166 CONG. REC. S979 (daily ed. Feb. 11, 2020) (confirming District Judge Andrew Brasher as the fifty-first appellate court jurist); Tom McCarthy, *Why Has Trump Appointed So Many Judges and How Did He Do It?*, THE GUARDIAN, Apr. 28, 2020.

20. Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2240 (2013); Michael S. Schmidt & Maggie Haberman, *Top Lawyer for President Steps Down From Post*, N.Y. TIMES, Oct. 18, 2018, at A13 (documenting that McGahn had completed his tenure as White House Counsel in October 2018 and Patrick Cipollone has served as White House Counsel since then).

21. 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); see Rebecca Ruiz et al., *Trump Stamps G.O.P. Imprint on the Courts*, N.Y. TIMES, Mar. 15, 2020, at A1; Charlie Savage, *Courts Reshaped at Fastest Pace in Five Decades*, N.Y. TIMES, Nov. 12, 2017, at A1.

22. 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; Zoe Tillman, *After 8 Years on the Sidelines, This Conservative Group Is Reshaping the Courts Under Trump*, BUZZFEED NEWS, Nov. 20, 2017; see Madison Alder, *Leonard Leo to Keep Judicial Advocacy Focus in New Venture*, U.S. LAW WEEK, Jan. 7, 2020 (Leo stepping down from being Federalist Society Executive Vice President but remaining as its board’s Co-Chair and apparently retaining role as Trump advisor regarding judicial selection).

23. GOLDMAN, *supra* note 12; Tobias, *supra* note 20, at 2240-41; Feinstein statement, *supra* note 17.

of blue slips, which only permitted hearings when each home state politician directly returned slips. Democrats alleged that the first Counsel actively consulted little about numerous states' appellate court openings, and McGahn replied that the Constitution does not explicitly mention the notion.²⁴ Most relevantly, California Senators Feinstein and Harris contended that Trump failed to "adequately consult" before the White House designated four attorneys—Daniel Bress, Patrick Bumatay, Daniel Collins, and Kenneth Lee—as nominees for California Ninth Circuit vacancies.²⁵ Yet, when the administration proposed several capable, mainstream trial level nominees in 2018 and ten additional competent, moderate nominees in 2019, Counsel appeared to meticulously consult the politicians, who adeptly relied on expert, bipartisan merit selection commissions that facilitated collaboration.²⁶

Another crucial departure from many valuable precedents is Trump's systematic removal of the American Bar Association from appointments. Presidents following Dwight Eisenhower, save George W. Bush, conscientiously invoked ABA evaluations and ratings when denominating choices. Obama refused to pick any candidate whom the ABA deemed not qualified.²⁷ Trump has marshaled nine nominees across the country who had this ranking, but seven enjoyed confirmation, while the ABA dutifully rated most California nominees well qualified yet the bar group failed to rate any not qualified.²⁸

In contrast to eschewing appointments precedents when confirming appellate nominees, Trump adopts multiple strong customary practices when sending ample district court nominees. For instance, he, like recent Presidents,

24. Thomas Kaplan, *Trump Is Putting Indelible Conservative Stamp on Judiciary*, N.Y. TIMES, July 31, 2018; Zoe Tillman, *Here's How Trump Is Trying to Remake His Least Favorite Court*, BUZZFEED NEWS, Mar. 16, 2018.

25. Carl Tobias, *Filling the California Ninth Circuit Vacancies*, 92 S. CAL. L. REV. POSTSCRIPT 83, 91-95 (2019); Press Release, Harris on Nomination of Patrick Bumatay to the Ninth Circuit, Sept. 20, 2019; see sources cited *infra* note 48 (providing additional analysis of Bumatay's nomination and confirmation processes and California senators' opposition to Bumatay); Tobias, *supra* note 9, at 898 (documenting similar White House treatment accorded other Democratic senators who represent jurisdictions that experience appellate court vacancies). For early assessments of the effects that Trump's ten Ninth Circuit appointees, especially the four California appointees, have had on the court, see Maura Dolan, *Trump Has Flipped the Ninth Circuit - and Some New Judges Are Causing a 'Shock Wave'*, L.A. TIMES, Feb. 22, 2020; Andrew Kragie, *How Trump's 10 Picks Have Already Shifted the Ninth Circuit*, LAW360.COM, Feb. 20, 2020; Tom McCarthy, *How Trump Has Tipped the Scales in America's Most Powerful Courts*, THE GUARDIAN, May 1, 2020.

26. S. Judiciary Comm., *Hearing on Nominees*, Mar. 13, 2019 (statement of Sen. Feinstein); *infra* notes 35-37 and accompanying text.

27. Adam Liptak, *White House Cuts A.B.A. Out of Judge Evaluations*, N.Y. TIMES, Apr. 1, 2017, at A16; senators' statements, *supra* note 17 (touting the value of American Bar Association evaluations and ratings and documenting Obama's refusal to nominate candidates who received not qualified ABA ratings); S. Judiciary Comm., *Hearing on Nominees*, Oct. 30, 2019 (Senator Mike Lee (R-UT) criticizing the American Bar Association as a liberal political organization and recommending that the White House and the Department of Justice terminate cooperation with the ABA in the selection process).

28. AMERICAN BAR ASSOCIATION STANDING COMM. ON THE FEDERAL JUDICIARY: *Ratings of Art. III Judicial Nominees, 115th and 116th Congress* (2017-20); Tobias, *supra* note 9, at 893.

draws upon home state politician submissions while premising most nominations on the ability to resolve mammoth caseloads, as California demonstrates.²⁹ Numbers of suggestions are prominent choices who earn the highest ABA rankings,³⁰ however, some did withdraw, and Trump cautioned Republican lawmakers to vote against prospects who lack sufficient qualifications.³¹

Trump ignores or downplays efficacious mechanisms. One real problem with district court selection is failing to prioritize the seventy-four vacancies—forty-five of which implicate emergencies - in the haste to rapidly confirm abundant exceptionally conservative, young appeals court judges.³² Trump proposes fewer jurists in states that Democrats represent, although the jurisdictions confront plenty of emergencies, such as the monumental seventeen which California addresses.³³ California had openings in up to four appellate court and seventeen district court positions (all emergencies). However, the administration failed to recommend a single California Ninth Circuit or district nominee ahead of mid-October 2018, deliver the Senate picks for ten additional trial court vacancies until one year later, nominate anyone to four remaining district openings since then and confirm a judge for that level yet, or appoint court of appeals jurists prior to May 2019.³⁴

In October 2018, Trump forwarded Bumatay, Collins, and Lee as Ninth Circuit nominees and Stanley Blumenfeld, Jeremy Rosen, and Mark Scarsi for the Central District of California, and on January 30, the White House renamed Collins and Lee and proffered Daniel Bress for the Ninth Circuit while renominating the three Central District nominees and Bumatay to the Southern District of California.³⁵ In mid-October 2019, Trump presented to the Senate

29. Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9, 19 (2017). *But see* Seung Min Kim, *Trump Could Remake Judiciary For 40 Years*, POLITICO, Oct. 17, 2017.

30. Texas District Court Judges Walter Counts and Karen Gren Scholer are excellent illustrations. *See* sources cited *supra* notes 28-29.

31. Tobias, *supra* note 9, at 894; Tom McCarthy, *Judge Not: Five Judicial Nominees Trump Withdrew - and Four Pending*, THE GUARDIAN, Mar. 10, 2019.

32. The one appellate court opening nationally is an emergency; appeals court and district court emergencies soared from twelve to as many as eighty-six after Republicans assumed a Senate majority in January 2015. The single appellate court opening is fewer than one percent and the seventy-four district court vacancies comprise eleven percent. JUDICIAL VACANCIES, Emergencies (2015-2020), *supra* note 7.

33. *Id.* (2020). *But see* White House, Office of the Press Sec'y, President Donald Trump Nominates Ninth Wave of Judicial Nominees, Dec. 20, 2017 (tapping additional appellate court and district court nominees from "blue" states); *infra* notes 92-93.

34. Empirical data verify "red" state priority. JUDICIAL VACANCIES (2017-20), *supra* note 7 (four California district court vacancies are currently lacking nominees); *see id.*, Confirmation Lists (in two-Republican senator states, confirming 103 appellate court and district court judges and nominating 113 candidates; in two-Democratic senator states, confirming forty-two appellate court and district court judges and nominating fifty-seven candidates); *infra* note 48 (appellate court confirmations).

35. White House, Office of the Press Sec'y, President Donald J. Trump Announces Eighteenth Wave of Judicial Nominees, Oct. 10, 2018; White House, Office of the Press Sec'y, President Donald J. Trump Announces Intent to Nominate Judicial Nominees, Jan. 30, 2019 (announcing intent to nominate Bress as well as to renominate Collins and Lee to California Ninth Circuit vacancies and

Bumatay as a Ninth Circuit nominee again and Central District nominees Fernando L. Aenlle-Rocha, Sandy Nunes Leal and Rick Richmond as well as Southern District nominees Adam Braverman and Shireen Matthews,³⁶ while in November, the chief executive transmitted to the Senate Central District nominees John Holcomb and Steve Kim and Southern District nominees Knut Johnson, Michelle Pettit and Todd Robinson.³⁷

Last November 13, the committee granted Aenlle-Rocha, Blumenfeld and Scarsi a hearing, but the panel only approved the nominees on March 5 by voice vote.³⁸ Upon the end of the 116th Congress's initial session, the members returned all thirteen district nominees to the President because they lacked unanimous consent to be carried over to the second session, while Trump did muster renomination of the three nominees with 2019 hearings on January 9 but delayed renaming the other ten Central and Southern District nominees until February 13, which means that none of the ten may enjoy hearings before June.³⁹

An essential role which Trump violates or deemphasizes is expanding minority judicial representation.⁴⁰ He initiated negligible action to pinpoint, consider, tap, and confirm able, conservative ethnic minorities or lesbian, gay, bisexual, transgender, and queer (LGBTQ) candidates by, for instance, relying upon diverse appointments employees or comprehensively urging that senators

Bumatay to a Southern District of California vacancy); White House, Office of the Press Sec'y, Twelve Nominations Sent to the Senate, Feb. 6, 2019 (sending California Ninth Circuit nominees Bress, Collins & Lee and Central District of California nominees Blumenfeld, Rosen & Scarsi to the Senate).

36. White House, Office of the Press Sec'y, President Donald J. Trump Announces Judicial Nominees and United States Attorney Nominee, Aug. 28, 2019 (announcing intent to nominate Aenlle-Rocha, Leal, Richmond, Braverman & Matthews); White House, Office of the Press Sec'y, President Donald J. Trump Announces Intent to Nominate Judicial Nominees, Sept. 20, 2019 (announcing intent to renominate Bumatay to the Ninth Circuit after Judge Carlos Bea announced his intent to assume senior status); White House, Office of the Press Sec'y, Eighteen Nominations Sent to the Senate, Oct. 17, 2019 (sending Bumatay and district nominees Aenlle-Rocha, Leal, Richmond, Braverman & Matthews to the Senate).

37. White House, Office of the Press Sec'y, President Donald J. Trump Announces Judicial Nominees, Sept. 12, 2019 (announcing intent to nominate Robinson); *Sept. 20 Notice of Intent*, *supra* note 36 (announcing intent to nominate Holcomb, Kim, Johnson and Pettit); White House, Office of the Press Sec'y, Nominations Sent to the Senate November 21, 2019 (sending district nominees Holcomb, Kim, Johnson, Pettit & Robinson to the Senate).

38. S. Judiciary Comm., *Hearing on Nominees*, Nov. 13, 2019; S. Judiciary Comm., *Exec. Business Mtg.*, Mar. 5, 2020; see Madison Alder, *Judicial Picks for Understaffed California District Advance*, U.S. LAW WEEK, Mar. 5, 2020; Ross Todd, *After Chief Judge's Outcry, Senate Takes Up 2 Central District of Calif. Nominees*, THE RECORDER, Nov. 13, 2019.

39. 166 CONG. REC. S10 (daily ed. Jan. 3, 2020) (returning all thirteen district nominees); White House, Office of the Press Sec'y, Nominations Sent to the Senate, Jan. 9, 2020 (renaming three district nominees with 2019 hearings); White House, Office of the Press Sec'y., Eleven Nominations Sent to the Senate, Feb. 13, 2020 (renaming the other ten district nominees).

40. Stacy Hawkins, *Trump's Dangerous Judicial Legacy*, 67 UCLA L. REV. DISCOURSE 20 (2019); Carl Tobias, *President Donald Trump's War on Federal Judicial Diversity*, 54 WAKE FOREST L. REV. 531 (2019); Hailey Fuchs, *Democrats Question Absence of Black or Hispanic Nominees Among Trump's 41 Circuit Court Judges*, WASH. POST, July 8, 2019; Shira Scheindlin, *Trump's Judges Are a Giant Step Backward for America*, THE GUARDIAN, Apr. 28, 2020.

review numerous minority aspirants⁴¹ In Trump's 190 appellate court and district court appointees, two constitute LGBTQ judges, while twenty-eight are people of color.⁴² Among 237 marshaled nominees, merely thirty-five now comprise ethnic minorities—sixteen Asian American, nine Latinx, one Jamaican, and nine African American candidates, and zero in the last ethnic group for circuits.⁴³ Among the California nominees, an overwhelming majority constitute men, though Lee, Bumatay, Kim and Matthews are Asian Americans, while Aenlle-Rocha and Leal are Latinx and Bumatay identifies as gay.⁴⁴

B. Confirmation Process

The confirmation system resembles the nomination process' deleterious elements in some ways, principally by abrogating or changing rules and customs that have long worked effectively. Illuminating are selective modifications of (1) the century-old policy for the blue slip—which directly provides hearings only when each senator who represents the jurisdiction proffers a slip—and (2) panel hearings.

In fall 2017, Senator Chuck Grassley (R-IA), as then-Chair of the Judiciary Committee, announced a new circuit exception for nominees who lack blue slips of two senators who represent jurisdictions which face appellate court vacancies, especially when the legislators' opposition to nominees derives from "politics or ideology."⁴⁵ Grassley altered the slip concept, to which Republican *and* Democratic senators closely adhered for eight years in Obama's presidency—the most recent, salient precedent.⁴⁶ This situation deteriorated when the Chair permitted numbers of aspirants' Senate canvassing - although Trump had marginally consulted - because Grassley nominally supported according the

41. LGBTQ means openly divulged sexual orientation, which some may have not disclosed. LGBTQ individuals are considered "minorities" throughout this piece. *See* sources cited *infra* note 56.

42. Tobias, *supra* note 40, at 555 & n.124; JUDICIAL VACANCIES, Confirmation Lists (2017-20), *supra* note 7. California Ninth Circuit Judge Bumatay and Illinois Northern District Judge Mary Rowland are the only LGBTQ individuals whom Trump has confirmed or nominated. 165 CONG. REC. S6,920 (daily ed. Dec. 10, 2019) (confirming Bumatay). *See* sources cited *supra* note 40.

43. *See* sources cited *supra* notes 35-42; *see also infra* note 94 (Trump has yet to nominate a single African American to a California vacancy).

44. *See* sources cited *supra* notes 35-37 (in January 2019, Trump renominated Lee and Collins to the Ninth Circuit, but Trump renominated Bumatay to the Southern District and in October, renominated Bumatay to the Ninth Circuit).

45. 163 CONG. REC. S7,174 (daily ed. Nov. 13, 2017); 163 CONG. REC. S7,285 (daily ed. Nov. 16, 2017); S. Judiciary Comm., *Hearing on Nominees*, Nov. 29, 2017; Carl Hulse, *Judge's Death Gives Trump a Chance to Remake a Vexing Court*, N.Y. TIMES, Apr. 8, 2018, at A13; *see generally* Carl Tobias, *Senator Chuck Grassley and Judicial Confirmations*, 104 IOWA L. REV. ONLINE 31 (2019) (evaluating Senator Grassley's role as Senate Judiciary Committee Chair from 2015-2018).

46. As Chair, Grassley did strictly adhere to the blue slip policy for appellate court and district court nominees in Obama's final two years, and Patrick Leahy (D-VT) did strictly follow the policy over the first six years. S. Judiciary Comm., *Exec. Business Mtg.*, Feb. 15, 2018 (statements of Sens. Grassley & Leahy); *see* Carl Tobias, *Senate Blue Slips and Senate Regular Order*, YALE L. & POL'Y REV. INTER ALIA (Nov. 20, 2018).

Chair major responsibility to ascertain whether Trump consulted adequately.⁴⁷ Particularly relevant for California was strenuously-expressed opposition by Senators Feinstein and Harris to Bress, Collins, and Lee, which Senator Lindsey Graham (R-SC), who became the Judiciary Committee Chair in January 2019, dismissively reviled as “ideological disputes.”⁴⁸

When Grassley was serving as the Chair of the Judiciary Committee, he powerfully acknowledged that blue slips were meant to ensure that Presidents meaningfully consult home state politicians while safeguarding their judicial appointments prerogatives, and Grassley respected district slips.⁴⁹ Nonetheless,

47. *E.g.*, Feb. 15 Exec. Business Mtg., *supra* note 46 (statements of Sens. Feinstein & Leahy); *see* sources cited *supra* note 24 (Republican Senate majority honoring practically no blue slips which Democratic senators retained for nominees to appellate court vacancies in the states that the senators represented); Tobias, *supra* note 46, at 23-26 (minimal precedent justifies circuit exception); *see supra* notes 24-25.

48. For the processes, *see* S. Judiciary Comm., *Hearings on Nominees*, Mar. 13, 2019 (Collins and Lee hearing), May 22, 2019 (Bress hearing); S. Judiciary Comm., *Exec. Business Mtgs.*, Apr. 4, 2019 (Collins and Lee approval), June 20, 2019 (Bress approval); 165 CONG. REC. S2,878 (daily ed. May 5, 2019) (Lee confirmation); 165 CONG. REC. S2,994 (daily ed. May 21, 2019) (Collins confirmation); 165 CONG. REC. S4,724 (daily ed. July 9, 2019) (Bress confirmation). The California senators expressed very strong opposition to Bumatay, Collins and Lee when Trump nominated them in October 2018. *See* sources cited *supra* note 25. However, their nominations expired on January 2, 2019, so Grassley never stated publicly whether he believed that Trump had adequately consulted the senators regarding those three nominees. 165 CONG. REC. S23 (daily ed. Jan 2, 2019); *see* Jordain Carney, *Trump, Feinstein Feud Intensifies Over Appeals Court Nominees*, THE HILL, Oct. 16, 2018.

When Trump did not renominate the nominees, but did rename more than fifty other lower court nominees, the *Wall Street Journal* criticized the White House Counsel for negotiating with the senators and urged swift renomination, which apparently provoked renaming of Collins and Lee to the Ninth Circuit and of Bumatay to the Southern District and naming of Bress to the circuit, actions which the senators strongly opposed. Editorial, *A Bad Judges Deal*, WALL ST. J., Jan. 29, 2019; White House, Office of the Press Sec’y, President Donald Trump Announces His Intent to Nominate Judicial Nominees, Jan. 22, 2019; Jan. 30 Notice, *supra* note 35; Press Release, Feinstein, Harris on Ninth Circuit Nominees, Jan. 30, 2019.

On September 20, 2019, when Trump announced that he would rename Bumatay to the Ninth Circuit, the senators criticized that decision. Harris Press Release, *supra* note 25; *see supra* note 35. *But see* Editorial, *Judicial Make-Up Call*, WALL ST. J., Sept. 20, 2019. The senators’ expressed somewhat less fervent opposition to Bumatay’s second nomination for the Ninth Circuit. *See, e.g.*, S. Judiciary Comm., *Exec. Business Mtg.*, Nov. 21, 2019 (Feinstein statement). Harris’ presidential campaign efforts may explain her somewhat less strongly expressed opposition. 165 CONG. REC. S6,944 (daily ed. Dec. 10, 2019) (Harris stating she “was absent but had I been present I would have voted no” on Bumatay’s cloture motion). *But see* Senator Kamala Harris, Statement for the Record, Oct. 30 Hearing, *supra* note 27. For Bumatay’s process, *see* Oct. 30 Hearing, *supra* note 27; Nov. 21 Exec. Business Mtg., *supra*; source cited *supra* note 42 (Bumatay’s confirmation).

49. *See* sources cited *supra* note 46. Graham closely followed Grassley’s appellate court blue slip policy for California Ninth Circuit nominees, including Bress, Collins, Lee and Bumatay, and Grassley’s district court policy for California Central and Southern District Court nominees. S. Judiciary Comm., *Exec. Business Mtg.*, Feb. 7, 2019; sources cited *infra* note 52; *see* sources cited *supra* note 48. During Graham’s tenure as Chair, Senator Kirsten Gillibrand (D-NY) retained her blue slip for Trump Northern District of New York nominee Thomas Marcelle, and the White House ultimately decided to withdraw his nomination. White House, Office of the Press Sec’y, Eight Nominations and Three Withdrawals Sent to the Senate (Sept. 19, 2019), <https://perma.cc/EU2B-7QFH> (concerning the withdrawal of Northern District of New York nominee Thomas Marcelle purportedly because Senator Gillibrand did not return her blue slip); Robert Gavin & Mike Goodwin, *Gillibrand Blocked Judge’s*

GOP senators had persisted in deploying slips to exclude many quite talented, consensus Obama appellate court nominees for political or ideological reasons, the same premises which Grassley had explicitly declared illegitimate.⁵⁰

The Republican Senate majority has essential responsibility for the difficulties with the confirmation process, because the majority insisted on changing efficacious hearing rules and conventions. One modification of longstanding custom was prescribing *fifteen* sessions which granted two appellate court, and ordinarily four trial court, nominees absent the minority's permission; this situation contrasted to *three* analogous hearings conducted in Obama's eight years and then in unusual circumstances which enjoyed Republican assent.⁵¹ Most pertinent to California were single hearings that Graham afforded Collins and Lee as well Bumatay and Lawrence Van Dyke, who was a controversial nominee for a Nevada Ninth Circuit vacancy; both hearings proceeded with no minority party consent.⁵² Indeed, the hearings were so densely packed that senators had negligible time to lodge probing questions.⁵³ Sessions, especially which involved these picks, seemed accelerated while lacking due care for examining persons who might realize life tenure.⁵⁴ Specific nominees were delayed by reiterating queries, deflecting questions, and failing to remark whether, once confirmed, they would dutifully recuse when matters treat issues on which nominees had labored or about which many conveyed

Nomination to the Federal Bench, ALBANY TIMES UNION, (Aug. 29, 2019), <https://www.timesunion.com/news/article/U-S-Attorney-in-Albany-picked-for-federal-14397720.php>.

50. Numerous Republican senators even offered no reasons for retaining their blue slips. See sources cited *supra* notes 17, 46.

51. *E.g.*, Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2174-76 (2011); Leahy statement, *supra* note 17.

52. See *Mar. 13 Hearing*, *supra* note 26 (Collins and Lee hearing); *Oct. 30 Hearing*, *supra* note 27 (Bumatay and Van Dyke hearing). Across 2019, Graham convened five committee hearings in addition to the ten Grassley conducted in 2017-18 in which two appellate court nominees and usually several district court nominees appeared without Democrats' permission. S. Judiciary Comm., *Hearing on Nominees*, Feb. 13, 2019; S. Judiciary Comm., *Hearing on Nominees*, Oct. 16, 2019; S. Judiciary Comm., *Hearing on Nominees*, Sept. 25, 2019; *Mar. 13 Hearing*, *supra* note 26; *Oct. 30 Hearing*, *supra* note 27; see Tobias, *supra* note 9, at 901 (analyzing numerous additional similarly packed hearings).

53. Most senators had five minutes in which to question nominees. See sources cited *supra* note 52; S. Judiciary Comm., *Exec. Business Mtg.*, Apr. 25, 2019 (consuming the minority's limited resources).

54. See sources cited *supra* notes 24, 51-53; Feinstein & Leahy statements, *supra* note 17 (contending that the Senate evinced a lack of sufficient care in evaluating nominees).

extreme perspectives.⁵⁵ Numerous Trump appointees have consistently developed anti-LGBTQ records.⁵⁶

One clear deviation from regular order was Grassley's decision to recalibrate waiting on American Bar Association input before hearings, despite Feinstein's manifold requests for ABA evaluations and ratings prior to sessions and the work's completion. He argued the exogenous "political group" should never dictate the panel schedule.⁵⁷ It, thus, was predictable that more controversial suggestions received party-line votes.⁵⁸

Once nominees duly secure committee reports, analogous dimensions limit robust evaluation: Democrats provoke cloture votes and seek roll call ballots for most nominees; GOP and Democratic members constantly practice lockstep voting; and igniting the 2013 "nuclear option" means that nominees capture appointment on majority ballots.⁵⁹ Examples include ramming four circuit jurists' debates with floor votes into one 2017 week and pursuing six over a 2018 week; the proceedings convened after cursory notice.⁶⁰ The multiple nominees and their large records severely depleted the minority's resources to prepare.⁶¹ The checkered quality of Senate debates resembles that in panel discussions.⁶²

Republican senators prioritize appellate vis-à-vis district confirmations, filling non-emergency and red state court vacancies and confirming

55. Collins and Lee displayed these characteristics in their hearing. See Dolan, *supra* note 25; Kragie, *supra* note 25 (describing Collins' effect on the court after his confirmation). However, Bress seemed less tendentious, as did Bumatay whom senators asked fewer questions because members focused on Van Dyke, who was more controversial. Mar. 13 Hearing, *supra* note 26; May 22 Hearing, *supra* note 48; Oct. 30 Hearing, *supra* note 27; Ross Todd, *ABA Not Qualified Rating and Blue Slips Dominate Hearing for Ninth Circuit Nominees*, RECORDER, Oct. 30, 2019; see 28 U.S.C. § 455 (2012) (recusal law). The considerations reviewed can make hearings appear to be meaningless exercises in which participants exchange very few substantive ideas.

56. LAMBDA LEGAL, *Trump's Judicial Assault on LGBTQ Protections* (2019); see Eleanor Clift, *Trump's Judicial Nominees Don't Want LGBTQ People to Have Rights*, DAILY BEAST, Mar. 12, 2018.

57. S. Judiciary Comm., *Hearing on Nominees*, Aug. 1, 2018 (Grassley & Feinstein statements). The American Bar Association tendered evaluations and ratings regarding four New York district nominees on the hearing date, but the ABA provided that information later for two additional nominees. *Id.*; Tobias, *supra* note 17 (regular order); *supra* note 27 (Senator Lee's criticism of ABA).

58. Tobias, *supra* note 9, at 901 n.103.

59. Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L. J. 121,122 (2015). Cloture and roll call votes can block weak nominees; majority final votes may confirm strong nominees. Republican and Democratic political party and Senate actions reflect which party controls the presidency and the Senate.

60. U.S. SENATE DEMOCRATS, Schedule for Oct. 31, Oct. 26, 2017; U.S. SENATE DEMOCRATS, Schedule for May 7, Apr. 26, 2018.

61. S. Judiciary Comm., *Exec. Business Mtg.*, Nov. 2, 2017; *supra* note 53; see Tobias, *supra* note 9, at 902 (Bush never confirmed that many nominees in one week throughout his tenure, and Obama only did so once throughout his eight years).

62. See sources cited *supra* notes 51-55. The Republican Senate majority apparently considered the thirty hours of post-cloture debate time for district court nominees so unhelpful to Trump and the GOP majority or so valuable to the Democratic minority that Republicans drastically reduced the number to two. 165 CONG. REC. S2,220 (daily ed. Apr. 3, 2019); see Burgess Everett & Marianne Levine, *GOP Preps Nuclear Option to Speed Trump Judges*, POLITICO, Mar. 6, 2019.

accomplished, conservative, young white males.⁶³ This dearth of attention was unwarranted. Trial court appointees constitute the federal bench's plowhorses and resolve immense litigation. The emergency category applies in the most egregious circumstances, and Trump's non-stop political machinations and concomitantly senator party affiliation should not drive federal court judicial resource distribution. Further, minority judges proffer a number of benefits.⁶⁴ Those considerations were magnified by the need to fill Justice Antonin Scalia's Supreme Court opening, and the 103 circuit and trial court unoccupied positions at the Trump inauguration, both of which circumstances Senator Mitch McConnell (R-KY), the chamber leader, orchestrated.⁶⁵

These priorities enabled Trump to attain the circuit record his initial half term. Yet, they left twenty-three district nominees absent confirmation, large vacancies at 2017's close and more upon the next year's completion, emergencies profoundly increased, and comparatively few blue state or minority appointees.⁶⁶ California open posts skyrocketed from seven to sixteen, while emergencies imploded from two to sixteen.⁶⁷ Trump approved no California Ninth Circuit jurist prior to May 2019 and has yet to confirm a California District Court judge. One in three 2018 trial level nominees has yet to receive a hearing and nine in ten 2019 nominees await hearings. The White House failed to present the Senate a lone prospect for the numerous vacancies which lacked nominees until mid-October 2019. Moreover, Lee and Bumatay constitute the only attorneys of color who have actually secured confirmation.

In the end, the California nominee packages' makeup aptly suggests reasons for Trump's dilatory provision of trial court nominees and why so many people nominated could still lack hearings. He apparently proposed and confirmed four California Ninth Circuit nominees, and the California lawmakers seemingly recommended numerous Central and Southern District Court picks.⁶⁸

63. These priorities mirror the nominating regime. *See* sources cited *supra* notes 18-28, 32-44. White men comprise two of four California Ninth Circuit confirmees and nominees, while they constitute eight of thirteen district court nominees.

64. *See supra* notes 41-43, *infra* notes 74-77 and accompanying text.

65. Michael Cohen, *Mitch McConnell, Republican Nihilist*, N.Y. REV. BKS., Feb. 25, 2019; Charles Homans, *Mitch McConnell Got Everything He Wanted. But at What Cost?*, N.Y. TIMES, Jan. 27, 2019, at SM 35. *See generally* MITCH MCCONNELL, *THE LONG GAME* (2015); Jane Mayer, *How Mitch McConnell Became Trump's Enabler-in-Chief*, NEW YORKER, Apr. 20, 2020, at 54. Ariane de Vogue, Ted Barrett & Dan Berman, *As House Votes to Impeach Trump, McConnell Pushes 13 Judge Nominations Through Senate*, CNNPOLITICS, Dec. 19, 2019.

66. For 2017, see U.S. SENATE, Exec. Calendar, Dec. 23, 2017; sources cited *supra* notes 32-44, 62-64. For 2018, see 165 CONG. REC. D3 (daily ed. Jan. 3, 2019); JUDICIAL VACANCIES, Confirmation List, Emergencies (2018), *supra* note 7.

67. Trump has nominated four Central and Southern District of California nominees of color in addition to California Ninth Circuit Judges Lee and Bumatay, but the panel has afforded merely one of those nominees a hearing. *See* sources cited *supra* notes 42, 44. Trump has also nominated six additional district court nominees, but the committee has granted none a hearing. I rely in the text accompanying this note and in the remainder of this paragraph on sources cited *supra* notes 34-37, 44.

68. The California senators' retention of blue slips for all four of Trump's California Ninth Circuit nominees and return of slips for all thirteen of his California Central and Southern District Court

In short, Trump rapidly exacted four appeals court jurists' appointment from putative "trades" while seeming to delay or renege on most district choices.⁶⁹

III.

IMPLICATIONS

The nomination and confirmation processes' assessment reveals that critical ideas which Trump and the chamber employ manifest numerous deleterious ramifications. These processes currently result in one appeals court and seventy-four trial court vacancies, forty-five of which implicate emergencies; substantial percentages in all categories emanate from states which Democrats represent, while minuscule nominees and confirmees are minority individuals, perspectives which California exemplifies.⁷⁰ Indeed, until late October 2019, the district figures had been worse than the eighty-six trial-level open positions at Trump's inauguration.⁷¹ The phenomena have caused a substantial number of adverse consequences. They pressure district jurists and courts—which must swiftly, inexpensively, and fairly resolve numerous cases—litigants and counsel.⁷² Trial judges finally decide ample civil lawsuits, and criminal matters realize precedence under the Speedy Trial Act, while the four districts in California receive filings which are practically sixty-three percent higher than the countrywide average, the Eastern District resolves caseloads which are twice this average and the Central District addresses civil dockets that are "nearly double the national average."⁷³

nominees demonstrate that Trump proposed the California Ninth Circuit nominees and the senators proffered most of the California district court nominees. *See infra* notes 113-15.

69. For "trades" and "bipartisan" courts, see sources cited Tobias, *supra* note 25, at 94-95 nn.74-77; *infra* notes 98-106, 112-15. Trump also seemingly taunted California's senators as well as other Democratic Senate leaders, who represent Illinois and New York, by slowly renaming nominees on whom the President and all senators had agreed. Tobias, *supra*, at 93; sources cited *supra* notes 34-37, 44.

70. *See supra* notes 32-44 and accompanying text.

71. District court judicial emergency vacancies, which comprised thirty-three nationally and one in California at Trump's inauguration, still remain considerably worse across the United States and substantially worse in California. *See supra* notes 17, 70 and accompanying text. Thirteen district court nominees captured confirmation at each of the August and December 2019 recesses. 165 CONG. REC. D933 (daily ed. July 30, 2019) (confirming four nominees); 165 CONG. REC. D939 (daily ed. July 31, 2019) (confirming nine nominees); 165 CONG. REC. S7,135 (daily ed. Dec. 18, 2019) (confirming one nominee); 165 CONG. REC. D1,409-10 (daily ed. Dec. 19, 2019) (confirming twelve nominees); Hailey Fuchs, *As Democrats Debated Without Mentioning Federal Judges, the Senate Confirmed 13 More Trump Nominees*, WASH. POST, Aug. 1, 2019; de Vogue, Barrett & Berman, *supra* note 65 (confirming thirteen judges in December).

72. FED. R. CIV. P. 1; Patrick Johnston, *Raising Prayers to the Level of Rule: The Example of Federal Rules of Civil Procedure 1*, 75 B. U. L. REV. 1325 (1995). District judges are the only jurists whom most parties face; protracted vacancies deprive courts and litigants of judicial resources which they need.

73. Gary Fields & John Emshwiller, *As Criminal Laws Proliferate, More Ensnared*, WALL ST. J., July 23, 2011; Joe Palazzolo, *In Federal Courts, Civil Cases Pile Up*, WALL ST. J., Apr. 6, 2015; JUDICIAL VACANCIES, EMERGENCIES (2020), *supra* note 7; *see* U.S. District Courts - Civil & Criminal Federal Court Management Statistics (Dec. 31, 2018) (Eastern District of California addresses caseloads

Certain phenomena—seventy-four district court vacancies, seventeen across California, rampant emergencies and few minority confirmees—show the necessity to approve considerably more jurists who should provide diversity. Among the seventeen nominees whom Trump proposed, none were African American. People of color and LGBTQ individuals essentially are overrepresented in the criminal justice process and lack significant judicial representation. California has perennially been very diverse, which suggests that minority court representation warrants expansion. Lack of attention to diversity is a lost opportunity for enhancing justice. Greater representation furnishes benefits. Numerous persons of color, women, and LGBTQ jurists contribute different, informative views⁷⁴ that effectively analyze manifold complex questions related to abortion, criminal law, and other daunting issues which federal courts address.⁷⁵ The judges confine ethnic, gender, and sexual orientation biases that frequently undercut justice.⁷⁶ Tribunals which reflect the United States distinctly improve public regard for courts by saliently

which are twice the national average); Letter from Virginia A. Phillips, Chief U.S. District Judge, Central District of California, to Pat Cipollone, White House Counsel, Sens. Graham, Feinstein & Harris, Oct. 29, 2019 (stating Central District faces civil cases that are nearly twice the national average and urging the White House and the Senate to expedite the nomination and confirmation of well qualified judges to fill the nine Central District emergency vacancies); Letter from Central District of California Chief Judge Virginia Phillips to Ninth Circuit Chief Judge Sidney Thomas, Apr. 6, 2020 (seeking an emergency exception to the Speedy Trial Act deadlines to relieve crushing backlogs that the district court anticipates once the Covid-19 pandemic subsides); Judicial Council of the Ninth Circuit, Order, In re Approval of the Judicial Emergency Declared in the Central District of California (2020) (approving the request); Letter from Eastern District of California Chief Judge Kimberly Mueller to Ninth Circuit Chief Judge Sidney Thomas, Apr. 8, 2020 (seeking an emergency exception for reasons similar to those in the Central District request); Judicial Council of the Ninth Circuit Order, In re Approval of the Judicial Emergency Declared in the Eastern District of California (2020) (approving the request); United States District Court Southern District of California, Order of Chief Judge No. 18, Suspension of Jury Trials and Other Proceedings During the Covid-19 Public Emergency, Mar. 17, 2020 (adopting an emergency declaration for reasons similar to the Central and Eastern District requests); Judicial Council of the Ninth Circuit Order, In re Approval of the Judicial Emergency Declared in the Southern District of California (2020) (approving the emergency declaration and extending it for one year); Letter from Lawrence J. O’Neill, Chief Judge, Eastern District of California, to Pat Cipollone, White House Counsel, Sens. Feinstein & Harris, Oct. 18, 2019 (documenting that “each District Judge here maintains a caseload that has been at the highest level in the Nation for more than two decades” and imploring White House and Senate to rapidly fill two emergency vacancies).

74. Theresa Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 610-17 (2003); John McCain & Jeff Flake, *Federal Judge Diane Humetewa*, 40 HUMAN RIGHTS 22 (2015).

75. Jennifer Peresie, Note, *Female Judges Matter: Gender and Decisionmaking in the Federal Appellate Courts*, 114 YALE L. J. 1759 (2005). *But see* Stephen Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504 (2011) (suggesting that female federal appellate court judges’ decisionmaking minimally differs from that of their male colleagues).

76. *See, e.g.*, NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS AND ETHNIC FAIRNESS: FINAL REPORT (1997); FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990).

demonstrating that abundant people of color, women, and LGBTQ candidates serve efficaciously as jurists.⁷⁷

No persuasive reason supports the failure to increase diversity on the federal judiciary. For example, many conservative, accomplished individuals of color, women and LGBTQ persons—notably Trump confirmees Lee, Bumatay, Terry Moorer, and Rodolfo Ruiz, together with the highly qualified, mainstream California Central and Southern District nominees Kim, Leal and Matthews, each of whom still waits for a hearing—refute the idea that appointing copious ethnic minority, female, and LGBTQ nominees limits merit.⁷⁸ This White House’s confirmees and nominees to date indicate that plenty of superb candidates offer merit *and* conservatism. Trump need merely realize this potential.

His eliminating and downplaying crucial rules and customs with quick approval of substantial conservative, young appellate judges undermine discharge of the President’s constitutional responsibilities to nominate and confirm accomplished, mainstream trial level jurists. Fast confirmation of analogous choices by deemphasizing appeals court blue slips and violating or cabining additional profitable constructs undercuts senators’ fulfillment of constitutional responsibilities to provide advice and consent. The significant quantity and prolonged character of district openings impede the judiciary’s efforts to swiftly, inexpensively, and equitably resolve plentiful litigation.⁷⁹

In sum, Trump has nominated a plethora of candidates and seated many circuit jurists, who are extremely conservative, young, and competent, but the President and the Senate clearly perverted and diluted cogent strategies, which left seventy-four district vacancies nationwide. California faces a massive seventeen openings, all of which implicate emergencies. Trump has yet to confirm any trial court judge in the state, while he appointed no California aspirant for the Ninth Circuit ahead of May 2019. Thus, the last portion surveys remedies which can decidedly reduce the jurisdiction’s ample district openings.

77. Sylvia Lazos, *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.

78. Tobias, *supra* note 9, at 909 (Trump’s provision of additional well qualified, conservative judges and nominees); sources cited *supra* notes 42-44, *infra* note 87.

79. See sources cited *supra* notes 71-73. Constant ideological overemphasis in the judicial selection process can make the federal judiciary resemble the political branches and undermine public trust in the federal judiciary, the U.S. Senate and the executive branch. S. Judiciary Comm., *Exec. Business Mtg.*, Mar. 7, 2019; Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices As Advocates*, 94 NOTRE DAME L. REV. 1161 (2019); PEOPLE FOR THE AM. WAY, *Confirmed Judges Confirmed Fears* (2019); Smith, *supra* note 17; McCarthy, *supra* note 18.

IV.
SUGGESTIONS FOR THE FUTURE

Trump must capitalize on effective procedures, some of which he invokes. One was renominating to district court vacancies four accomplished prospects whose nominations expired in early January 2019 but were renewed later that month.⁸⁰ This idea was efficient; the nominees did have intensive Judiciary Committee, Federal Bureau of Investigation and American Bar Association scrutiny, which requires merely cryptic updating, and easily detected, comprehensive records, while the prospects must only secure chamber floor debates and confirmation votes.⁸¹ The solution is efficacious. California indubitably needs each district member to increase justice. Fairness also commands that nominees receive prompt assessment, every constituent of the Trump-home state legislator “trade” be respected, and his constant political maneuvers and correspondingly senator party affiliation not drive court resource dissemination.⁸²

Trump should analogously rename certain additional preeminent, conservative and moderate, district court nominees whom Obama had tapped and the panel had reported but lacked confirmation during 2015-16.⁸³ This might allow comparatively speedy appointment, because those nominees have to win merely committee and chamber ballots.⁸⁴ Trump has in fact renamed fifteen of the nominees; a majority have secured confirmation and other capable nominees whom Obama proposed, such as Mark Young, a Central District nominee, would promote minority representation or fill district vacancies.⁸⁵

A somewhat related concept which the Trump Administration employs is elevating numerous prominent state court jurists and well-qualified, centrist magistrate judges whom Article III jurists serving in the district courts appoint

80. In January, Trump renominated the same three individuals whom he had nominated in October 2018 to the Central District of California and Bumatay to the Southern District of California; however, Trump subsequently renominated Bumatay to the Ninth Circuit when Judge Bea announced that he intended to assume senior status and nominated Todd Robinson for the Southern District vacancy to which Trump had nominated Bumatay in January. *See supra* notes 35-37.

81. No Trump district court renominees whom Obama had first nominated, including Texas District Court Judges Counts and Gren Scholer, who received hearings in the prior Congress, needed to have additional sessions. Tobias, *supra* note 9, at 911.

82. *See* sources cited *supra* notes 25, 35-37, 64, *infra* notes 112-14. Presidents and senators must honor their sides of deals or trades will not function properly. Burgess Everett & Marianne Levine, *Josh Hawley Rattles Republicans As He Derails GOP Judge*, POLITICO, June 12, 2019.

83. Tobias, *supra* note 29, at 18; S. Judiciary Comm., *Exec. Business Mtg.*, June 20, 2019 (approving Obama nominees whom Trump renamed).

84. Tobias, *supra* note 29, at 18-19; *see supra* note 81 (nominee committee, FBI and ABA assessments merely require updating).

85. Young, an Obama Central District nominee, and four additional Obama nominees secured 2015-16 committee approval; Diane Gujarati, an Obama Eastern District of New York nominee, and a Trump renominee, and twenty-seven additional 2016 nominees did not secure committee approval that year. Tobias, *supra* note 29, at 21-22. This measure is pragmatic, efficient and fair; all of the nominees have waited numerous years, and the mechanism may facilitate appointments.

for eight-year terms. The construct is pragmatic and equitable, because these nominees compile accessible, complete records, and supply impressive pertinent expertise.⁸⁶ Illustrations comprise District Judges Gren Scholer and Moorner, who are excellent, diverse Trump confirtees.⁸⁷

The President needs to revitalize or significantly improve manifold effective procedures which he omits and downplays. Critically, he should engage in assiduous consultation of home state politicians, as the White House Counsel appeared to ignore with California Ninth Circuit appointments but seemed to practice when Trump renamed the 2018 Central District nominees and more recently last autumn when Trump nominated ten additional California trial level nominees; meaningful consultation distinctly facilitates most nominations and confirmations and is blue slips' major purpose.⁸⁸ Especially relevant for this piece was his directly renaming and smoothly nominating so many exceptional, consensus aspirants for the Central and Southern Districts.⁸⁹ Therefore, presidential cultivation of senators will not invariably yield the parties' strongest preferences but would spark more nominations and may resolve disagreements that could erode the process and salient interparty cooperation.⁹⁰ Those particular attributes show the exigency to resume collaborative discussions regarding (1) immediate appointment of the first three 2018 Central District nominees whom Trump resent the Senate in January 2019, (2) expeditious confirmation of accomplished, moderate nominees mustered last autumn for ten Central and Southern District vacancies that had lacked nominees and (3) swift nomination and confirmation of talented, mainstream prospects for the two Eastern, and two Central, District openings which remain.

Trump must dutifully rethink his penchant for quickly approving substantial numbers of young, impressive conservative appellate judges—which constitutes the definitive reason why seventy-four district court vacancies and California's seventeen persist—and carefully review actions to decrease the myriad vacant trial level slots. For instance, Trump can prioritize abundant nominees who might rectify a number of California emergencies.⁹¹ He may

86. 28 U.S.C. § 631 (2012); Tobias, *supra* note 9, at 910 (assessing the venerable practice of elevation from state and federal courts); *see supra* notes 35-36, 38 and accompanying text (Los Angeles County Superior Court Judges Aenlle-Rocha and Blumenfeld are experienced state court jurists, who received a hearing last November but await committee and confirmation votes).

87. Gren Scholer had been, and Young was, a state judge; Moorner had been a federal Magistrate Judge. *See sources cited supra* notes 36, 42-44, 83-85.

88. *See sources cited supra* notes 24-26, 35-37, 45-50.

89. *See sources cited supra* notes 26, 35-37.

90. *See sources cited supra* notes 24-25, 33-35, 47-48 (analyzing judicial selection disputes between the White House Counsel and the Democratic senators who represent California and numerous other states).

91. *See sources cited supra* notes 33-34, 63-67.

insistently stress the large number of district openings across California,⁹² and this might help remedy the paucity of blue state confirmees and nominees.⁹³

Trump ought to continue enlarging diversity; representation invokes benefits that his diverse California Ninth Circuit appointees, Lee and Bumatay, and his minority Central and Southern District of California nominees epitomize and the jurisdiction clearly deserves.⁹⁴ The President may increase representation and convey to all citizens and selection participants that he favors expanded diversity. The White House Counsel should astutely lead considerable federal government activity, communicating that representation has preference analogous to conservatism. The importuning's emphasis will be his staff, the Department of Justice, the Judiciary panel, and GOP legislators. The senators in California, who elevate diversity by pursuing and submitting numerous talented, conservative minority attorneys, ought to keep analyzing these concepts when vacancies occur and encourage colleagues to vigorously support the 2019 renominated and nominated choices, who are waiting on review.⁹⁵ White House Counsel next might interview and proffer candidates, whom senators tender for all four presently empty court seats and new openings which materialize, asking that Trump seriously evaluate naming the prospects. He then may nominate the aspirants while convincing politicians to powerfully support and promptly canvass them and the many nominees who currently await confirmation.

In short, the President and the Senate must explore near-term ideas which might decidedly eliminate numbers of California vacancies and may temper the protracted confirmation wars. The latter are exemplified by (1) Trump's restricting home state consultation and delaying renomination of several district nominees, plus selection of plentiful other trial level nominees; (2) Democrats' rarely concurring on Senate votes absent cloture and demanding plenty of roll call ballots; and (3) the Republican Senate Judiciary Committee Chairs'

92. *Id.* California experiences seventeen vacancies. New York encounters seven, New Jersey experiences six, Washington addresses five, and Illinois confronts four. Many of the Illinois and New York vacancies are emergencies, while all of the Washington and New Jersey openings constitute emergencies and none of those two states' vacancies currently has a nominee. Two Democratic senators represent each of these states. JUDICIAL VACANCIES (2020), *supra* note 7.

93. The President should continue following home state lawmaker proposals of excellent submissions. The highly qualified California nominees might arguably reduce the need of Trump and senators for expert ABA evaluations and ratings. *See* sources cited *supra* notes 27-31, 57-58.

94. Trump and the California senators deserve credit for helping insure that practically all of the seventeen California vacancies have recently realized nominees and that six of seventeen nominees are people of color. However, only Lee and Bumatay have received confirmation. Therefore, the short-term emphasis of the White House, the California senators and the chamber should be on expeditiously confirming the four ethnic minority nominees, all but one of whom lack hearings, and on considering the suggestions below for the four current openings and when new vacancies arise. One striking example of why participants in judicial selection should devote greater attention to diversity is that Trump has yet to nominate a single African American for any of the four California Ninth Circuit vacancies or any of the seventeen California district openings. *See supra* notes 44, 74-76 and accompanying text.

95. For the California and other senators' concerted efforts and more ideas to expand diversity, see Carl Tobias, *Appointing Lesbian, Gay, Bisexual, Transgender and Queer Judges in the Trump Administration*, 96 WASH. U. L. REV. ONLINE 11, 16, 20-22 (2018); Tobias, *supra* note 20, at 2256.

amending circuit slips and the GOP chamber dramatically reducing floor debates' rigor with acutely truncated hours for district picks.⁹⁶ Many concerns suggest that 2020 is past time for effectuating strictures which permanently improve the flagging rules and conventions.⁹⁷

Trump and the Senate might change the present system with a bipartisan judiciary that allows the political party which lacks the chief executive to afford small percentages of designees.⁹⁸ New York senators initially crafted this approach.⁹⁹ Pennsylvania supplies a modern example.¹⁰⁰ What California recently developed also can be perceived as a bipartisan court regime. For instance, Trump apparently denominated four California Ninth Circuit nominees and the legislators suggested most of the trial level candidates. The nomination practices operated rather efficaciously, but slowly, although the confirmation procedures for appellate court submissions and district court prospects functioned less suitably; Trump partly ameliorated the final complication with his January 30, 2019 renomination of four talented, mainstream district choices and later nomination of ten more possibilities, even though thirteen candidates await Senate confirmation and four California vacancies lack nominees.¹⁰¹

Lawmakers should yoke bipartisan courts to legislation that authorizes substantially more California district level jurists.¹⁰² This will institute astute Judicial Conference recommendations assembled for lawmakers, which the federal court policymaking arm derives from jurists' conservative work and case

96. Tobias, *supra* note 23, at 1107; see John Gramlich, *Judicial Picks Have Become More Contentious, and Trump's Are No Exception*, PEW RESEARCH CTR., Mar. 7, 2018; see also sources cited *supra* notes 24-25, 37, 45-48, 59, 62, 66-67.

97. Longer-term ideas warrant 2020 adoption, as limited clarity regarding which party will capture the White House and Senate elections provides incentives to agree. For more longer-term ideas, see Michael Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 298-311 (2012); Tobias, *supra* note 20, at 2255-65.

98. Michael J. Gerhardt, *Judicial Selection As War*, 36 U.C. DAVIS L. REV. 667, 688 (2003); Carl Tobias, *Fixing the Federal Judicial Selection Process*, 65 EMORY L. J. ONLINE 2051 (2016).

99. The New York senator whose party lacked the White House recommended one in three or four picks. Tobias, *supra* note 9, at 915 n.182.

100. California, New York and Illinois senators apply comparatively similar regimes. *Id.* at 916; see sources cited *supra* notes 35-37, 44, 69 (agreeing on four California, eight New York, and three Illinois, district court nominees whom Trump renamed in January and April 2019, four additional New York nominees whom Trump announced in late 2019 and early 2020 but only one of whom he has formally nominated in 2020, three additional Illinois district nominees whom Trump nominated in early 2020 and ten additional California Central and Southern District nominees whom Trump nominated in autumn 2019).

101. See sources cited *supra* notes 35-37, 69, 98 (renaming several Central District of California court nominees and providing more specific ideas regarding bipartisan courts and trades, including senators and Trump each proposing a few when California vacancies lack nominees). *But see supra* note 40 (sending to the Senate ten subsequent Central and Southern District Court nominees).

102. U.S. JUDICIAL CONF., REPORT OF THE PROCEEDINGS OF THE U.S. JUDICIAL CONF. 26-27 (2019); Tobias, *supra* note 59, at 140.

load estimates that would increase judicial resources for courts.¹⁰³ Those actions should become effective in 2021.¹⁰⁴ Linking a bipartisan judiciary with twenty-two new California district positions will yield sound benefits. They would furnish each party incentives to coordinate; jurists, who may tender diverse experience, ideology, ethnicity, gender and sexual preference; and courts resources. Adoption before November 2020 with implementation the subsequent year will constrict either party's unfair advantage, but institution might necessitate care,¹⁰⁵ as execution may be relatively complex.¹⁰⁶

Should these proposals falter because Republicans now impair Democrats' salutary national judicial appointments endeavors,¹⁰⁷ the minority could apply rather drastic relief. Numbers of promising ideas emanate from blue slips, despite restrictions pertaining to courts of appeals.¹⁰⁸ Democrats might choose to retain slips on all district court prospects from home states, until Trump picks aspirants whom they favor. The California senators asked that the President rename several nominees first proposed in 2018, which he soon did, but the legislators had concerns regarding numerous additional vacancies that lacked occupants until last fall which they insisted people whom both recommended fill.¹⁰⁹ Democrats may concomitantly retain slips for all district court nominees pending Republican agreement on honoring manifold court of appeals slips.¹¹⁰ Collective action's powerful leverage with seventy-four district court vacancies, and merely one court of appeals opening could encourage the GOP majority to acquiesce.¹¹¹

103. REPORT, *supra* note 102; see S1385, 113th Cong. (2013) (providing the most recent comprehensive judgeships legislation).

104. See *supra* note 97. When Republicans and Democrats agree *prior to* elections, neither knows who will ultimately benefit.

105. Tobias, *supra* note 9, at 917-18 (addressing particular issues that may arise were Congress to prescribe and implement a bipartisan judiciary).

106. Congress can treat numerous complications. *Id.* at 918. Some conventions, including confirmation votes on many accomplished, consensus district court nominees at recesses, may help to revive regular order. Tobias, *supra* note 24, at 31; *supra* note 71.

107. Slowly renominating the several 2018 Central District nominees, tardily consulting on, and nominating candidates for, fourteen additional California district court openings, rejecting circuit slips and slashing post-cloture district nominee debate time show that the GOP undercut Democrats' work plus numerous rules and conventions that govern the selection process.

108. See sources cited *supra* notes 45-48. I rely substantially below on ideas propounded by Christopher Kang, who spearheaded much Obama Administration judicial selection. Jeremy Stahl, *GOP Abolishing Judicial Appointments Norms Again*, SLATE, Feb. 22, 2019.

109. Kang contends that Democrats less aggressively champion their picks with Trump than Republicans did with Obama. *Id.*

110. *Id.*; see sources cited *supra* notes 24-25, 45-48 (Republican Senate majority denied Judge Garland any consideration and seven Obama appellate court nominees 2016 confirmation votes); Everett & Levine, *supra* note 62 (Democrats offered honoring appellate court slips for two-hour post-cloture district debates but Republicans rejected). Of course, merely a single circuit vacancy now exists nationwide.

111. Stahl, *supra* note 106; JUDICIAL VACANCIES (2020), *supra* note 7; see *id.* (Judge Bea's recent announcement of his intent to assume senior status created a California Ninth Circuit future vacancy, which demonstrates that this idea has certain salience, but the one circuit opening nationally suggests that it enjoys less salience than when more vacancies existed).

A related potential solution is trades.¹¹² For example, the California nominee packages show that Trump and the lawmakers proffered several prospects.¹¹³ He confirmed four appellate court jurists opposed by the legislators, who suggested most trial court nominees.¹¹⁴ However, this form of “judgetrading” might have detrimental impacts, and the court of appeals picks lacked blue slips but captured prompt appointment, while Trump had failed to send the chamber one prospect for a significant number of residual district vacancies until mid-October 2019, and he only renamed the 2018 district court nominees in late January 2019 and the White House has yet to confirm any jurist for that level.¹¹⁵ Similar problems can attend “boycotting” Senate work that may clarify and publicize GOP obstruction’s harmful effects, although boycotts can indicate surrender and the difficulties created may nullify their benefits.¹¹⁶

CONCLUSION

President Trump and the Republican Senate have profoundly exacerbated the confirmation wars’ adverse implications. California has been an essential front, which illuminates the systemwide miasma, epitomized by his delayed renaming of 2018 nominees for multiple vacancies in the state and remarkably dilatory marshaling of consensus nominees for the many remaining district court openings which lacked nominees. Therefore, the White House and the chamber should productively address the desperate straits with rapid confirmation of the initial dynamic, mainstream nominees and prompt consideration of superb, moderate nominees for plentiful additional vacancies, thus supplying a constructive roadmap for bipartisan appointments nationwide.

112. See sources cited *supra* notes 35-37, 69, 98.

113. Trades, the bipartisan judiciary concept and the above paragraph’s ideas overlap. See sources cited *supra* notes 98-109.

114. Collins and Lee seem to be extremely conservative, while Bress and Bumatay appear to be quite conservative. See sources cited *supra* notes 36-37, 68-69 (California district court nominees, who seem to be more moderate, demonstrate that consultation works).

115. See sources cited *supra* notes 37, 48, 68-69; Tobias, *supra* note 20, at 2260 (judgetrading); Everett & Levine, *supra* note 82 (providing a comparatively recent example of judgetrading). The Senate has yet to confirm a single California district court nominee, so they will be confirmed after many other nominees, if at all. Thus, trades should be reserved for dire situations.

116. Therefore, boycotts should be a last resort. See Stahl, *supra* note 108.