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Filling the Federal District Court Vacancies

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FILLING THE FEDERAL DISTRICT COURT VACANCIES

*Carl Tobias**

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INTRODUCTION

President Donald Trump's major success has been confirming judges for the thirteen federal appellate courts. The President shattered records by appointing a dozen circuit jurists in his administration's first year, eighteen judges over the course of 2018, and twenty additional judges throughout his third year. Indeed, by June 2019, the appeals courts experienced four vacancies in 179 judgeships and today, only one position remains empty. This achievement is critical, as these tribunals are the courts of last resort for nearly every appeal, and ap-

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pellate court opinions articulate greater policy than district court rulings and cover multiple states.

However, that accomplishment does entail costs. In the haste of President Trump to quickly nominate, and the Republican Senate majority to expeditiously confirm, many able, ideologically conservative, young appeals court jurists, the President and the Senate neglect myriad open posts in the district courts. The district courts now realize seventy-three vacancies in 677 positions, forty-five of which are considered “judicial emergencies” due to remaining protracted and immense filings. District court jurists are the federal justice system’s “workhorses” and resolve most litigation, and the numerous openings place substantial pressures on the district courts. Thus, the judicial selection process under President Trump requires analysis.

The first section of this article canvasses the origin and evolution of the problem described, showing that it constitutes permanent and modern concerns, the latter of which needs emphasis. The second section scrutinizes the judicial appointment procedures implemented by President Trump and the Republican Senate majority. This section detects that the President stresses rapid appointment of young, conservative appeals court judges but downplays filling trial-level vacancies. The White House also eschews venerable judicial selection conventions—including the vigorous consultation of senators from jurisdictions with openings and comprehensive American Bar Association (ABA) candidate evaluations and ratings—upon which contemporary Presidents have relied. The section then assesses the confirmation process, ascertaining that since the Trump Administration’s outset, the Judiciary Committee has deemphasized various longstanding customs, especially the “blue slip” policy (which stops nominee processing unless in-state politicians approve choices) and the careful arrangement of hearings, which earlier committees had steadfastly applied. The Grand Old Party (GOP) Senate majority leadership similarly, albeit less frequently, violates traditions regarding floor debates.

The third section of this article reviews the particular consequences imposed by salient non-traditional White House and Senate practices, finding that a significantly greater number of district court vacancies existed throughout most of the Trump presidency than at the time of his inauguration. Concerted emphasis on the rapid appointment of conservative appeals court members and stark departures from long-standing selection precedents have apparently undercut presidential discharge of the constitutional responsibilities to nominate and confirm excellent jurists and the constitutional senatorial duty to furnish advice and consent. Moreover, the prolonged nature and substan-

tial quantity of district court openings seemingly undermine the judiciary's crucial responsibility for promptly, inexpensively and equitably deciding cases. The GOP's stress on ideology and its unproductive partisanship can make jurists resemble the chief executive and Congress and could politicize the judiciary, thus subverting public confidence in the federal bench.

The fourth section proffers suggestions for the future. In the near future, President Trump must assertively consult home state lawmakers and once again rely upon ABA examinations and ratings from which contemporary Presidents, senators, jurists as well as the Democratic and Republican political parties have derived copious benefits. The Senate should analogously revitalize constructive devices related to confirmations—principally blue slips and comprehensive, robust panel hearings and discussions, and rigorous upper chamber debates. Over the long-term, Republicans and Democrats should carefully address the “confirmation wars” through a comprehensive approach, which includes the creation of bipartisan courts, notably with the passage of judgeship legislation.

I.

MODERN JUDICIAL SELECTION PROBLEMS

One important aspect of the present complications that involve selection has been the permanent vacancies difficulty, which results from enlarged federal court jurisdiction, suits and judgeships.¹ The other crucial attribute, the contemporary dilemma, is essentially political and can be ascribed to contrasting White House and Senate political party control that started forty years ago, while the current situation has greater pertinence and warrants somewhat more investigation in this piece.²

1. The permanent vacancies complication merits less treatment than the contemporary difficulty, because considerable delay is inherent, defies felicitous solution and has been analyzed elsewhere. *See, e.g.*, Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 *MISS. C. L. REV.* 319 (1994); *Remedying the Permanent Vacancy Problem in the Federal Judiciary – The Problem of Judicial Vacancies and Its Causes*, 42 *REC. ASS'N B. CITY N.Y.* 374 (1987).

2. The history of federal judicial selection deserves comparatively limited evaluation in this article, partly because numerous other commentators have analyzed the relevant background. *See, e.g.*, Bermant et al., *supra* note 1, at 320–21; Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice, Federal Judicial Selection, 1789-1861*, 100 *IOWA L. REV.* 55 (2015); MILLER CENTER COMMISSION ON THE SELECTION OF FEDERAL JUDGES, *Improving the Process for Appointing Federal Judges* (1996) [hereinafter MILLER REPORT].

A. *Persistent Vacancies*

Lawmakers began expanding federal court jurisdiction in the 1960s and have continued to do so,³ establishing many civil causes of action while federalizing additional criminal activity, parameters which increase district court litigation and concomitant appeals.⁴ Congress addressed escalating caseloads by enlarging the number of judicial seats.⁵ From 1979 to 1992, appointments periods mounted.⁶ Prior to 1980, court of appeals nominations demanded twelve months and appellate confirmations required three months, and both later rose.⁷ Appellate court nomination periods subsequently consumed twenty months and confirmations reached six between 1997, the initial year of President Bill Clinton's final term, and 2001, the opening year of President George W. Bush's first term.⁸

The convoluted stages and the many participants in the nomination and confirmation processes mean that some delay is inevitable.⁹ Presidents consult home state elected officials, pursuing advice on submissions. Certain elected officials fashion and rely on merit selection panels that survey candidates while tendering prominent suggestions. The Federal Bureau of Investigation (FBI) does probing

3. MILLER REPORT, *supra* note 2, 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).

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

5. 28 U.S.C. §§ 44, 133 (2012); see S.1385, 113th Cong. (2013); *Judicial Vacancies*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies> (last updated Jan. 8, 2020).

6. The nomination process commences on the date that a judge assumes senior status or retires and concludes when the President sends the Senate a nomination for the vacancy. The confirmation process commences when the President sends the Senate the nomination and concludes when the Senate confirms the nominee. Bermant et al., *supra* note 1, at 329–32. See generally JUDICIAL CONF. OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 103 (1995).

7. The increase in time required for the president to nominate is not statistically significant. However, the increase in time required for Senate confirmation is statistically significant. Bermant et al., *supra* note 1, at 323, 329–32 (asserting that 1970-92 appellate court vacancy rates were two times higher than previously). See generally Thomas Sargentich, *Report of the Task Force on Federal Judicial Selection of Citizens for Independent Courts*, 51 ADMIN. L. REV. 1031, 1032, 1044 (1999).

8. *E.g.*, Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 904–08 (2005); Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J. L. & PUB. POL'Y 1035 (2009). Both of these years resembled Obama's first and final two years.

9. Bermant et al., *supra* note 1, at 322; Sheldon Goldman, *Obama and the Federal Judiciary: Great Expectations but Will He Have a Dickens of a Time Living Up to Them?*, 7 FORUM 1 (2009).

“background checks.” The ABA examines and rates counsel.¹⁰ The Department of Justice (DOJ) regularly helps screen individuals while preparing nominees for Senate assessment. The Senate Judiciary Committee analyzes prospects, schedules candidate hearings, discusses them and votes; nominees whom the committee reports might receive chamber debates, when needed, preceding confirmation ballots.

B. *The Contemporary Dilemma*

Article II of the United States Constitution contemplates that senators may temper unwise presidential selection, while partisanship has long suffused appointments.¹¹ However, politicization first significantly expanded when President Richard Nixon consistently suggested that he would deliver “law and order” by appointing “strict constructionists,”¹² then profoundly increased after United States Court of Appeals for the District of Columbia Circuit Judge Robert Bork’s massive Supreme Court fight.¹³ Partisanship subsequently soared, while divided government and the fervent hope that the political party which lacked executive branch control might recapture it and confirm jurists fostered delay.

Relatively slow nominations may explain the dearth of appointments. In early 1997 and 2001, President Clinton and President George W. Bush respectively submitted relatively few appellate court picks and the political party which did not enjoy White House control criticized some of them.¹⁴ Lawmakers who proffered candidates also stymied the pace.¹⁵ Bush’s minimal consultation of home state politi-

10. MILLER REPORT, *supra* note 2; *see* ABA, STANDING COMM. ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS (1983).

11. THE FEDERALIST NO. 76, at 513 (Alexander Hamilton) (J. Cooke ed., 1961); *see* MICHAEL GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 28 (2000); SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 6 (1997).

12. GOLDMAN, *supra* note 11, at 207; DAVID O’BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY TASK FORCE ON JUDICIAL SELECTION 20 (1988).

13. *E.g.*, MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER’S ACCOUNT OF AMERICA’S REJECTION OF ROBERT BORK’S NOMINATION TO THE SUPREME COURT 11–12 (1992); JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 18–19 (2007).

14. White House, Office of the Press Sec’y, President Clinton Nominates 22 to the Federal Bench, Jan. 7, 1997; Remarks Announcing Nominations for the Federal Judiciary, 37 WEEKLY COMP. PRES. DOC. 724 (May 9, 2001).

15. Republican senators insisted on contributing input, and many even suggested prospects. Neil A. Lewis, *Clinton Has a Chance to Shape the Courts*, N.Y. TIMES, Feb. 9, 1997, at 30; *see* 143 CONG. REC. S2538–41 (daily ed. Mar. 19, 1997) (statement of Sen. Biden); *infra* note 36.

cians further stalled nomination,¹⁶ and limited GOP processing of Clinton aspirants might have prompted Democrats to slow the nomination and confirmation processes partly as payback for Republicans' delayed processing of Clinton nominees.¹⁷ The Senate Judiciary Committee shared responsibility for the lack of appointments, because the panel slowly assessed, convened hearings for, and voted on nominees;¹⁸ and over 1997 and 2001, few nominees captured appointment due to Senate resource deficiencies conjoined with ideological resistance.¹⁹ Pressing Senate work on matters that were unrelated to judicial selection and the need for senators' unanimous consent delayed numerous chamber floor votes, allowing at least one senator to halt confirmation ballots entirely.²⁰

These phenomena have worsened over the course of recent administrations. During President Barack Obama's tenure, GOP recalcitrance scaled new heights, a condition demonstrated by the unprecedented refusal to process D.C. Circuit Chief Judge Merrick Garland, Obama's distinguished Supreme Court nominee.²¹ When Republicans regained a Senate majority in 2015 and vowed to dutifully effectuate chamber "regular order" again, they confirmed merely

16. David L. Greene & Thomas Healy, *Bush Sends Judge List to Senate*, BALT. SUN (May 10, 2001), <https://www.baltimoresun.com/news/bs-xpm-2001-05-10-0105100112-story.html>; see Elliot E. Slotnick, *Appellate Judicial Selection During the Bush Administration: Business as Usual or a Nuclear Winter?*, 48 ARIZ. L. REV. 225, 234 (2006).

17. Paul A. Gigot, *How Feinstein is Repaying Bush on Judges*, WALL STREET J. (May 9, 2001), <https://www.wsj.com/articles/SB989369905566856183>; Neil A. Lewis, *Party Leaders Clash over Pace of Filing Judgeships*, N.Y. TIMES, May 10, 2001, at A33.

18. Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L. Q. 741, 742 (1997) (finding that the panel convened one appellate court nominee hearing each month that the chamber was in session); Biden statement, *supra* note 15 (claiming that Democrats conducted two hearings each month that the Senate was in session during 1987-94).

19. Tobias, *supra* note 18; Neil A. Lewis, *Bush and Democrats in Senate Trade Blame for Judge Shortage*, N.Y. TIMES, May 4, 2002, at A9.

20. Jennifer Bendery, *Republicans Still Find Ways to Stall Judicial Nominees Despite Filibuster Reform*, HUFFINGTON POST (Feb. 10, 2014), https://www.huffingtonpost.com/2014/02/08/republicans-judicial-nominees_n_4748528.html?ncid=engmodshpmg00000006; *infra* notes 61, 110.

21. 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); Ruth Marcus, *Trump's Dangerous Plot to Weaponize the Supreme Court*, WASH. POST (Mar. 30, 2018), https://www.washingtonpost.com/opinions/trumps-dangerous-plot-to-weaponize-the-supreme-court/2018/03/30/60b53a04-343d-11e8-94fa-32d48460b955_story.html; see generally, Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089 (2017).

twenty Obama nominees, the fewest judges who have received appointment since Harry Truman was President, which left 103 appellate court and district court slots open at President Trump's inauguration.²² Given the GOP majority's treatment of Obama picks, it was foreseeable that Democrats would engage in somewhat analogous delay—for example, by mandating cloture votes and roll call ballots for virtually all Trump nominees.

II.

JUDICIAL SELECTION UNDER THE TRUMP ADMINISTRATION

A. *Nomination Process*

Throughout the 2016 presidential campaign, then-candidate Trump strongly promised to nominate and seat young, exceptionally ideological conservatives. His administration delivered on this pledge by confirming Supreme Court Justices Neil Gorsuch and Brett Kavanaugh as well as many ideologically similar court of appeals and comparatively fewer ideologically extreme and young district court nominees.²³ President Trump established appellate court appointments records during his first year with twelve confirmations, eighteen confirmations the next, and twenty confirmations across 2019, surpassing modern predecessors' appointments success.²⁴

22. *Confirmation Listings*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/confirmation-listing> (last updated Feb. 26, 2020); 163 CONG. REC. S8022–24 (daily ed. Dec. 14, 2017) (statements of Sens. Feinstein, Leahy and Warren); see Carl Tobias, *The Republican Senate and Regular Order*, 101 IOWA L. REV. ONLINE 12 (2016) (Republicans incessantly asserted that they were restoring regular order, the system which putatively governed before the Democratic Senate majority ostensibly eroded it, but the GOP majority did not restore regular order).

23. See Rorie Spill Solberg & Eric N. Waltenburg, *Are Trump's Judicial Nominees Really Being Confirmed at a Record Pace? The Answer Is Complicated.*, WASH. POST, (June 14, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/14/are-trumps-judicial-nominees-really-being-confirmed-at-a-record-pace-the-answer-is-complicated/>; *Judicial Confirmations for December 2019*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2019/12/confirmations> (last updated Dec. 1, 2019); *Judicial Confirmations for December 2018*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/12/confirmations> (last updated Dec. 1, 2018); *Judicial Confirmations for December 2017*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/12/confirmations> (last updated Dec. 1, 2017) (supporting the fact that Trump is nominating relatively fewer district court judges than appellate court judges).

24. President John Kennedy confirmed eleven appellate court judges in his first year. REP. OF THE S. JUDICIARY MINORITY MEMBERS, REVIEW OF REPUBLICAN EFFORTS TO STACK FEDERAL COURTS 14, (2018). George W. Bush appointed six circuit jurists, and Obama confirmed three. *Judicial Confirmations for January 2017*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial->

Trump depends on a few previously well-regarded judicial selection conventions, even as his White House ignores or underemphasizes other effective traditions. For instance, Trump, like every contemporary President before him, afforded lead responsibility for judicial selection to the White House Counsel, granted numerous related appointments duties to the Department of Justice, placed considerable responsibility for addressing district court openings with home state politicians, and prioritized filling appeals court vacancies.²⁵

When tendering appellate court picks, the initial White House Counsel Don McGahn accentuated youth and conservative perspectives by deploying litmus tests, such as the nominees' concerns about complications which they attributed to the modern administrative state; he also depended primarily on the "short list" of twenty-one possible Supreme Court prospects whom the Federalist Society and the Heritage Foundation assembled.²⁶ These strategies continue to

vacancies/2017/12/confirmations (last updated Dec. 1, 2017); *Judicial Confirmations for January 2010*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2010/01/confirmations/html> (last updated Jan. 1, 2010); *Judicial Confirmations in the 107th*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2001/12/confirmations/pdf> (last updated Dec. 7, 2001); *see supra*, note 23 (confirming twenty additional Trump court of appeals nominees across 2019); 166 CONG. REC. S979 (daily ed. Feb. 11, 2020) (confirming Eleventh Circuit Judge Andrew Brasher as the fifty-first Trump appellate court appointee); Yurvaj Joshi, *Neil Gorsuch's Legacy is Already Devastating*, SLATE (Apr. 4, 2018), <https://slate.com/news-and-politics/2018/04/neil-gorsuchs-legacy-is-already-devastating.html> (Trump submitted a "torrent of [sixty-nine] judicial nominations").

25. Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2240 (2013); Philip Rucker et al., *'He's Not Weak, Is He?': Inside Trump's Quest to Alter the Judiciary*, WASH. POST, (Dec. 19, 2017), https://www.washingtonpost.com/politics/hes-not-weak-is-he-inside-trumps-quest-to-alter-the-judiciary/2017/12/19/b653e568-e4de-11e7-833f-155031558ff4_story.html; Charlie Savage, *Counsel Quietly Trying to Corral Trump While Pushing G.O.P.'s Agenda*, N.Y. TIMES (Jan. 26, 2018), https://www.nytimes.com/2018/01/26/us/politics/trump-white-house-counsel-mcgahn.html?rref=collection%2Fbyline%2Fcharlie-savage&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=search&contentPlacement=1&pgtype=collection [https://perma.cc/3RBV-KBY6]; Michael 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> (replacing McGahn with Pat Cipollone as the second White House Counsel).

26. Jeremy Peters, *Trump's New Judicial Litmus Test: Shrinking 'the Administrative State'*, N.Y. TIMES (March 26, 2018), <https://www.nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html>; Rebecca Ruiz et al., *Trump Stamps G.O.P. Imprint on the Courts*, N.Y. TIMES, Mar. 15, 2020, at A1; 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>; *see infra* note 77 and accompanying text. *See generally* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY

govern the selection process because the Federalist Society's Executive Vice President, Leonard Leo, has been advising Trump on judicial appointments since he became a presidential candidate.²⁷ No previous American chief executive has ceded such mammoth responsibility to a non-governmental institution, although the political group may have supplied President George W. Bush considerable help.²⁸ Trump prioritizes the appellate courts because they comprise tribunals of last resort for practically all cases, enunciate substantially greater policy than district courts and release opinions which cover multiple jurisdictions.²⁹ Virtually all Trump court of appeals confirmees are extremely conservative, young and capable.

However, this White House violates, ignores or downplays long-accepted conventions regarding judicial selection. An essential custom which the Trump Administration has ignored is aggressively consulting politicians who represent home states that experience vacancies, an effective convention which modern administrations have followed; this is a principal reason for blue slips, a policy which during Obama's presidency allowed home state legislators to prevent hearings on candidates until both senators dutifully returned slips. Democratic senators asserted that McGahn, Trump's first White House Counsel, practiced little or no active consultation respecting court of appeals vacancies in their jurisdictions, and McGahn directly retorted that con-

AND THE CONSERVATIVE COUNTERREVOLUTION (2015) (comprehensively analyzing the Federalist Society and its effect on American law, legal institutions and society).

27. Jeffrey Toobin, *The Conservative Pipelines to the Supreme Court*, NEW YORKER (Apr. 17, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court>; Zoe Tillman, *After Eight Years on the Sidelines, This Conservative Group Is Reshaping the Courts Under Trump*, BUZZFEED NEWS (Nov. 20, 2017), <https://www.buzzfeednews.com/article/zoetillman/after-eight-years-on-the-sidelines-this-conservative-group>; see Madison Adler, *Leonard Leo to Keep Judicial Advocacy Focus in New Venture*, U.S. LAW WEEK (Jan. 7, 2020, 6:31 PM), <https://news.bloomberglaw.com/us-law-week/leonard-leo-to-keep-judicial-advocacy-focus-in-new-venture> (Leo resigning as Society Executive Vice President but remaining Co-Chair of its executive committee and judicial selection adviser to Trump); Peters, *supra* note 26 (assessing Leonard Leo's impact on judicial selection).

28. Jason DeParle, *Debating the Subtle Sway of the Federalist Society*, N.Y. TIMES (Aug. 1, 2005), <https://www.nytimes.com/2005/08/01/politics/politicsspecial1/debating-the-subtle-sway-of-the-federalist.html>; see generally Neil A. Lewis, *Conservative Lawyers Voice Abundant Joy*, N.Y. TIMES, Nov. 13, 2004, at A13. *But see* Donald McGahn, Keynote Remarks at Federalist Society's National Lawyers Convention (Nov. 17, 2017), <https://www.c-span.org/video/?437462-8/2017-national-lawyers-convention-white-house-counsel-mcgahn> (denying that Trump outsourced judicial selection to the Federalist Society because it was "insourced" to McGahn).

29. See Solberg & Waltenburg, *supra* note 23; Tobias, *supra* note 25, at 2240–41; 163 CONG. REC. S8022–24 (statement of Sen. Feinstein).

sultation did not appear in the Constitution.³⁰ Wisconsin Democratic Senator Tammy Baldwin accused President Trump of proffering a Wisconsin Seventh Circuit nominee who lacked the required votes of a bipartisan merit selection panel, which had rigorously evaluated, interviewed and suggested judicial prospects to Wisconsin senators for over thirty years, while Senator Bob Casey (D-PA) proposed several accomplished, mainstream choices for White House review, but he later intimated that Trump only nominally considered them and marshaled someone else who became the nominee.³¹ A related illustration of the White House's approach was provided by Senator John Kennedy (R-LA), who alleged in a Louisiana Fifth Circuit nominee's

30. 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>; Jennifer Brooks & Stephen Montemayor, *David Stras Gets Long-Delayed Senate Hearing for Federal Judgeship*, STAR TRIBUNE (Jan. 5, 2018, 2:44 PM), <http://www.startribune.com/minnesota-justice-david-stras-set-for-senate-confirmation-hearing-wednesday/460755193>; Melissa Nann Burke, *Larsen's Hearing for Federal Bench Set for Next Week*, DETROIT NEWS (Aug. 31, 2017, 9:56 AM), <https://www.detroitnews.com/story/news/politics/2017/08/31/larsen-federal-judicial-hearing-set/105143430>; Zoe Tillman, *How Trump is Trying to Remake His Least Favorite Court*, BUZZFEED NEWS (Mar. 16, 2018), <https://www.buzzfeednews.com/article/zoe-tillman/heres-who-the-white-house-pitched-for-the-federal-appeals>; McGahn Remarks, *supra* note 28. *But see* Robert Barnes & Ed O'Keefe, *Senate Republicans Likely to Change Custom That Allows Democrats to Block Judicial Choices*, WASH. POST (May 25, 2017), https://www.washingtonpost.com/politics/courts_law/senate-republicans-consider-changing-custom-that-allows-democrats-to-block-judicial-choices/2017/05/25/d49ea61a-40b1-11e7-9869-bac8b446820a_story.html (Leo's assertion that McGahn consulted home state senators more than any other White House Counsel).

31. For developments involving Wisconsin, see *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Jan. 24, 2018), <https://www.judiciary.senate.gov/meetings/01/24/2018/nominations>; Todd Ruger, *Grassley Moves on Judicial Nominee Over Baldwin's Objection*, ROLL CALL (Jan. 24, 2018), <https://www.rollcall.com/news/politics/grassley-moves-judicial-nominee-baldwins-objection>; 164 CONG. REC. S2607 (daily ed. May 10, 2018) (confirming Michael Brennan); Tobias, *supra* note 25, at 2256 (discussing the Wisconsin bipartisan merit selection commission which all Wisconsin senators had successfully employed for more than thirty years). For developments involving Pennsylvania, see *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (June 6, 2018), <https://www.judiciary.senate.gov/meetings/06/06/2018/nominations> (Republican Judiciary Committee Chair permitting hearing, despite Senator Casey's retaining slip for a Trump Third Circuit nominee and respecting Senator Toomey's slip for an Obama Third Circuit nominee); Jonathan Tamari, *Pat Toomey Used Senate Tradition to Block an Obama Pa. Judicial Pick. GOP Leaders Won't Give Bob Casey the Same Deference*, PHILA. INQUIRER (July 7, 2018), <https://www.inquirer.com/philly/news/politics/pat-toomey-used-senate-tradition-to-block-an-obama-judicial-pick-from-pa-gop-leaders-wont-give-bob-casey-the-same-deference-20180717.html>.

hearing that McGahn had effectively informed him that Kyle Duncan would be the nominee.³²

Another central deviation from longstanding precedent is Trump's decision to exclude the American Bar Association from judicial selection. Every president since Dwight Eisenhower, save George W. Bush, had comprehensively incorporated ABA examinations and ratings when naming candidates, and President Obama directly refrained from selecting nominees who drew "not qualified" rankings.³³ However, President Trump has marshaled nine nominees who received this mark, and three appellate court and four district court nominees went on to rather easily capture appointment.³⁴ McGahn putatively was so critical of the ABA's discharge of its judicial appointments process responsibilities that he intimated nominees might eschew cooperation with the bar's investigative activities.³⁵

32. For Counsel's analogous interactions with the New Jersey, Ohio, Oregon and Washington senators, see Carl Tobias, *Curing the Federal Court Vacancy Crisis*, 53 WAKE FOREST L. REV. 883, 892–93 (2018) (same regarding Trump, Obama and Bush elevations); Kaplan, *supra* note 30. For Kennedy, see *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Nov. 29, 2017), <https://www.judiciary.senate.gov/meetings/11/29/2017/nominations>; Todd Ruger, *Senate Republicans Steamroll Judicial Process*, ROLL CALL (Jan. 18, 2018), <https://www.rollcall.com/news/policy/the-senates-consent-machine>; Sam Stein, *GOP Pushes Back as Trump's Lawyer Tries to Stack the Bench*, DAILY BEAST (Dec. 18, 2017), <https://www.thedailybeast.com/trump-nominees-humiliation-puts-spotlight-on-white-house-counsel-don-mcgahn>.

33. 163 CONG. REC. S8022–24 (Statement of Sen. Feinstein); 163 CONG. REC. S8042 (daily ed. Dec. 14, 2017) (statement of Sen. Durbin).

34. Standing Comm. on the Fed. Judiciary, Am. Bar Ass'n, Ratings of Article III and Article IV Judicial Nominees 115th Congress, <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Web%20rating%20Chart%20Trump%20115.pdf> (last updated Dec. 13, 2018); 163 CONG. REC. S8022–24 (statement of Sen. Feinstein) (asserting that the Senate confirmed the last judge with a "not qualified" rating in 1989). GOP senators contested Steven Grasz's ABA rating, as the ABA is a liberal political group. *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Nov. 1, 2017), <https://www.judiciary.senate.gov/meetings/11/01/2017/nominations>; *Executive Business Meeting: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Dec. 7, 2017), <https://www.judiciary.senate.gov/meetings/12/07/2017/executive-business-meeting-1>; 163 CONG. REC. S7288 (daily ed. Nov. 16, 2017) (statement of Sen. Sasse); 163 CONG. REC. S7965 (daily ed. Dec. 12, 2017) (confirming Steven Grasz); 164 CONG. REC. S5590 (daily ed. Aug. 1, 2018) (confirming Holly Teeter); 164 CONG. REC. S5981 (daily ed. Aug. 28, 2018) (confirming Charles Goodwin); 164 CONG. REC. S7405 (daily ed. Dec. 11, 2018) (confirming Jonathan Kobes); 165 CONG. REC. S6442 (daily ed. Oct. 24, 2019) (confirming Justin Walker); *id.* at S6842 (daily ed. Dec. 4, 2019) (confirming Sarah Pitlyk); *id.* at S6986 (daily ed. Dec. 11, 2019) (confirming Lawrence Van Dyke); *infra* notes 50, 59, 103 and accompanying text.

35. Adam Liptak, *White House Ends Bar Association's Role in Vetting Judges*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/us/politics/white-house-american-bar-association-judges.html>; see Savage, *supra* note 26 (stating

The chief executive deploys comparatively traditional procedures when he nominates district court suggestions. For instance, President Trump, like recent presidents, depends on recommendations from home state officials and premises many nominations on competence vis-à-vis ability to resolve substantial caseloads.³⁶ Significant numbers of President Trump's submissions are preeminent choices, who earn strong ABA ratings.³⁷ However, three district court nominees withdrew, and the ABA rated three more not qualified, either because the nominees failed to provide complete information or due to the administration's failure to fully vet them or sufficiently prepare them for hearings, while Trump admonished Senator Kennedy and his Republican colleagues to vote against nominees whom they considered unqualified.³⁸ The appellate court focus also means that seventy-three district court positions, forty-five of which involve emergencies, remain open, even though district jurists have responsibility for finally resolving immense filings.

The executive ignores or underemphasizes numbers of effective measures. The principal difficulty with Trump's district court selection actions is his complete failure to prioritize the many vacancies, a substantial percentage of which implicate judicial emergencies, in the haste to appoint ideologically young, conservative judges for every

ABA's independent guardrail role is eroding). Sen. Mike Lee (R-UT) recently reiterated the proposition that the White House should admonish candidates to eschew cooperation with the ABA. *Nominations: Hearing Before the S. Comm. on the Judiciary*, 116th Cong., (Oct. 30, 2019), <https://www.judiciary.senate.gov/meetings/10/30/2019/nominations>.

36. 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), <https://www.politico.com/story/2017/10/17/trump-judges-nominees-court-picks-243834>.

37. Texas District Court appointees Walter Counts and Karen Gren Scholer are instructive examples. *See ABA Ratings*, *supra* note 34.

38. Jennifer Bendery, *Trump Pick Drops Out After Embarrassing Hearing*, HUFFINGTON POST (Dec. 18, 2017), https://www.huffpost.com/entry/donald-trump-judicial-nominee-matthew-petersen_n_5a37ec14e4b0ff955ad51e82; Tom McCarthy, *Judge Not: Five Judicial Nominees Trump Withdrew – and Four Pending*, GUARDIAN (Mar. 10, 2019), <https://www.theguardian.com/law/2019/mar/10/judge-not-five-judicial-nominees-trump-withdrew-and-four-pending>; Rucker et al., *supra* note 25; *see* Press Release, White House, President Donald J. Trump Announces Renomination of 21 Judicial Nominees (Jan. 5, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-renomination-21-judicial-nominees/>. *But see* Zoe Tillman, *Trump Had a Good Year Confirming Judges, But He's Still a Long Way from Reshaping the Courts*, BUZZFEED NEWS (Dec. 27, 2017), <https://www.buzzfeednews.com/article/zoetillman/trump-had-a-good-year-getting-judges-confirmed-but-hes>.

appeals court opening.³⁹ Emergencies have profoundly increased since Republicans recaptured the Senate.⁴⁰ President Trump correspondingly proffers fewer nominees in jurisdictions with Democratic senators, although most face plenty of emergencies.⁴¹ Indeed, California encounters vacancies in seventeen district court posts, while New York experiences openings in seven district court seats; all seventeen of the California vacancies and four in New York constitute emergencies, but Trump neglected to recommend a sole candidate for twenty-three openings until April 2018 or a single California position before October of that year, while the administration has confirmed only fifteen jurists for the myriad vacancies and merely seven for district court openings.⁴²

39. The Administrative Office of the U.S. Courts, which is the federal courts' administrative arm, premises emergencies on protracted length and substantial caseloads. *Judicial Vacancy List for April 2020*, U.S. Cts., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2020/04/vacancies> (last updated Apr. 1, 2020) (the one appellate court vacancy is an emergency, and forty-five of seventy-three district court vacancies are judicial emergencies; overall district court vacancies constitute ten percent of the total district judgeships and the single appellate court opening comprises fewer than one percent); Savage, *supra* note 26.

40. Judicial emergencies skyrocketed from one dozen to as many as eighty-six. *Id.* But see Press Release, White House, President Donald J. Trump Announces Nomination of Indiana Attorney James Sweeney to Fill Judicial Emergency (Nov. 1, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-nomination-indiana-attorney-james-sweeney-fill-judicial-emergency/>; Press Release, White House, President Donald J. Trump Announces Tenth Wave of Judicial Nominees (Jan. 23, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-tenth-wave-judicial-nominees/> [hereinafter Tenth Wave]; see *infra* notes 45–46.

41. See *Current Judicial Vacancies*, U.S. Cts., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> (last updated Mar. 24, 2020) (showing a large majority of open judicial seats in states with Democratic senators); *Judicial Emergencies*, U.S. Cts., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies> (last updated Mar. 24, 2020) (showing that states such as California, New Jersey, and Washington—all with Democratic senators—predominate in judicial emergency status). But see Press Release, White House, President Donald J. Trump Announces Ninth Wave of Judicial Nominees and Tenth Wave of United States Attorney Nominees (Dec. 20, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-ninth-wave-judicial-nominees-tenth-wave-united-states-attorney-nominees/> [hereinafter Ninth Wave] (nominating greater numbers of nominees from “blue” states).

42. Data verify “red” state priority. *Current Judicial Vacancies*, *supra* note 41; see Press Release, White House, President Donald J. Trump Announces Thirteenth Wave of Judicial Nominees and Seventh Wave of United States Marshal Nominees (Apr. 26, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-thirteenth-wave-judicial-nominees-seventh-wave-united-states-marshal-nominees/> [hereinafter Thirteenth Wave] (sending a New York Second Circuit nominee); Press Release, White House, President Donald J. Trump Announces Fourteenth Wave of Judicial Nominees, Thirteenth Wave of United States Attorney Nominees, and

Eighth Wave of United States Marshal Nominees (May 10, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-fourteenth-wave-judicial-nominees-thirteenth-wave-united-states-attorney-nominees-eighth-wave-united-states-marshall-nominees/> [hereinafter Fourteenth Wave] (sending seven New York district nominees); Press Release, White House, President Donald J. Trump Announces Eighteenth Wave of Judicial Nominees, Eighteenth Wave of United States Attorney Nominees, and Thirteenth Wave of United States Marshal Nominees (Oct. 10, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-eighteenth-wave-judicial-nominees-eighteenth-wave-united-states-attorney-nominees-thirteenth-wave-united-states-marshall-nominees/> [hereinafter Eighteenth Wave] (sending two New York Second Circuit nominees, three California Ninth Circuit nominees and three California district nominees); Press Release, White House, President Donald J. Trump Announces Intent to Nominate Judicial Nominees (Jan. 30, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judicial-nominees-2/> (renaming California nominees but nominating Patrick Bumatay to the Southern District and Daniel Bress to the Ninth Circuit); Press Release, White House, President Donald J. Trump Announces Intent to Nominate Judicial Nominees (Jan. 22, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judicial-nominees/> (first renominee package); Press Release, White House, President Donald J. Trump Announces Judicial Nominations (Apr. 8, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominations/> (third renominee package); Press Release, White House, President Donald Trump Announces Judicial Nominees (Sept. 12, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-5/> [hereinafter Sept. 12, 2019 Press Release] (sending an additional California district nominee); President Donald J. Trump Announces Judicial Nominees and United States Marshal Nominee (Sept. 20, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-united-states-marshall-nominee-5/> [hereinafter Sept. 20, 2019 Press Release] (renominating Bumatay to the Ninth Circuit when Judge Carlos Bea announced that he would assume senior status and four additional California district nominees); Press Release, White House, President Donald Trump Announces Judicial Nominees (Nov. 6, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-8/> [hereinafter Nov. 6, 2019 Press Release] (announcing two additional New York district nominees); Press Release, White House, Eight Nominations and One Withdrawal Sent to the Senate (Dec. 2, 2019), <https://www.whitehouse.gov/presidential-actions/eight-nominations-one-withdrawal-sent-senate-2/> (sending two nominees to the Senate); Press Release, White House, Four Nominations Sent to the Senate (Feb. 27, 2020), <https://www.whitehouse.gov/presidential-actions/four-nominations-sent-senate-3/> (renominating one of two nominees but neglecting to renominate the second as of Apr. 27, 2020); Press Release, White House, Twelve Nominations Sent to the Senate (May 21, 2019), <https://www.whitehouse.gov/presidential-actions/twelve-nominations-sent-senate-3/>; *Judicial Confirmations for January 2020*, U.S. Cts., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2019/01/confirmations> (last updated Mar. 24, 2020); *Judicial Confirmations for January 2020*, U.S. Cts., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2020/01/confirmations> (last updated Jan. 1, 2020) (four New York Second Circuit nominees and four California Ninth Circuit nominees approved; in states with two GOP senators, confirming 103 judges and nominating 113 nominees; in states with two Democratic senators, confirming forty-two judges and nominating fifty-eight nominees).

Another constructive route which Trump downplayed was improving minority judicial representation, especially in contrast to Democrats.⁴³ For example, he apparently implemented only nominal efforts to pursue, identify and seat ethnic minorities or lesbian, gay, bisexual, transgender or queer (LGBTQ) judicial prospects by, for instance, choosing diverse staff for appointments endeavors or urging politicians to submit numbers of minority choices.⁴⁴ Out of 240 nominees, merely two identify as LGBTQ and only thirty-six candidates are persons of color,⁴⁵ while among the president's 191 confirmees,

43. See Carl Tobias, *President Donald Trump and Federal Bench Diversity*, 74 WASH. & LEE L. REV. ONLINE 400, 410 (2018); Carl Tobias, *President Donald Trump's War on Federal Judicial Diversity*, 54 WAKE FOREST L. REV. 531, 547 (2019) [hereinafter Tobias, *Trump's War on Diversity*]; Michael Nelson & Rachel Hinkle, *Trump Appoints Lots of White Men To Be Federal Judges*, WASH. POST (Mar. 13, 2018) <https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/12/trump-appoints-lots-of-white-men-to-be-federal-judges-heres-why-it-matters/>; Richard Wolf, *Trump's 87 Judge Picks Are 92% White*, USA TODAY (Feb. 13, 2018) <https://www.usatoday.com/story/news/politics/2018/02/13/trumps-87-picks-federal-judges-92-white-just-one-black-and-one-hispanic-nominee/333088002/>.

44. LGBTQ means openly disclosed sexual preference, which some may have not divulged. LGBTQ individuals are considered "minorities" throughout this piece. See sources cited *infra* note 59.

45. Patrick Bumatay identifies as gay and Mary Rowland identifies as lesbian. The initial ten appointees, *infra* note 46, Bumatay, Diane Gujarati, Anuraag Singhal, Shireen Matthews, Steve Kim and Iris Lan are Asian Americans, Barbara Lagoa, Fernando Rodriguez, David Morales, Rodolfo Ruiz, Raúl Arias-Marxuach, Silvia Carreño-Coll, Fernando L. Amelle-Rocha, Sandy Leal and Franklin Valderrama are Latino/as; Terry Moorer, Rodney Smith, Rossie Alston, Milton Younge, Jason Pulliam, Ada Brown, Stephanie Dawkins Davis, Robert Molloy and Bernard Jones are African American; Richard Myers is Jamaican and Hala Jarbou is Chaldean. Press Release, White House, President Donald J. Trump Announces Seventh Wave of Judicial Candidates (Sept. 7, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-seventh-wave-judicial-candidates/> [hereinafter Seventh Wave]; Ninth Wave, *supra* note 41; Tenth Wave, *supra* note 40; Thirteenth Wave, *supra* note 42; Press Release, White House, President Donald J. Trump Announces Judicial Nominees, a United States Attorney Nominee, and United States Marshal Nominees (Mar. 1, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-united-states-attorney-nominee-united-states-marshal-nominees/>; Press Release, White House, President Donald J. Trump Announces Judicial Nominees (Mar. 8, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees/>; Aug. 14, 2019 Press Release, *supra* note 42; Sept. 12, 2019 Press Release, *supra* note 42; Sept. 20, 2019 Press Release, *supra* note 42; Press Release, White House, President Donald J. Trump Announces Judicial Nominees (Oct. 2, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-6/> [hereinafter Oct. 2, 2019 Press Release]; Nov. 6, 2019 Press Release, *supra* note 42; Press Release, White House, Fifteen Nominees and Two Withdrawals Sent to the Senate (Feb. 12, 2020), <https://www.whitehouse.gov/presidential-actions/fifteen-nominations-two-withdrawals-sent-senate/>; Press Release, White House, Eight Nominees and One Withdrawal Sent to the Senate (Mar. 18, 2020), <https://www.whitehouse.gov/presidential-actions/eight-nominations-one-withdrawal-sent-senate-3/>.

only two identify as LGBTQ and only twenty-eight are people of color.⁴⁶

B. Confirmation Process

The Republican Senate majority confirmation system directly mirrors the deleterious elements of the Trump Administration nomination regime by jettisoning, amending or undermining lengthy customs or by abolishing, changing or diluting ideas which have operated effectively for decades. This is exemplified by Republicans' selective revisions in (1) the 100-year-old practice for blue slips—which permit Judiciary Committee hearings only when senators proffer slips—and (2) panel hearings.

In fall 2017, Chuck Grassley (R-IA), who served as Chair of the Senate Judiciary Committee across the past two Congresses, announced that he would develop an exception to the blue slip policy for appellate court nominees by scheduling panel hearings on judicial candidates who lacked slips presented by any home state member, particularly when those senators opposed nominees for “political or ideological” reasons.⁴⁷ This was a significant departure from the blue

46. Bumatay identifies as gay and Rowland identifies as a lesbian. The people of color are Amul Thapar, James Ho, John Nalbandian, Neomi Rao, Michael Park, Kenneth Lee, Karen Gren Scholer, Jill Otake, Martha Pacold, Nicholas Ranjan, Singhal, Lagoa, Rodriguez, Moorner, Morales, Ruiz, Arias-Marxuach, Smith, Alston, Younge, Pulliam, Brown, Myers, Dawkins Davis, Jones, Molloy and Carreno-Coll. Press Release, White House, President Donald J. Trump Announces Intent to Nominate Judge Amul R. Thapar for the Sixth Circuit (Mar. 21, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judge-amul-r-thapar-u-s-court-appeals-sixth-circuit/>; Press Release, White House, President Donald J. Trump Announces Eighth Wave of Judicial Candidates (Sept. 28, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-eighth-wave-judicial-candidates/>; Seventh Wave, *supra* note 45; *Judicial Confirmations for March 2020*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2020/03/confirmations> (last updated March 24, 2020); *Judicial Confirmations for December 2019*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2019/12/confirmations> (last updated Dec. 1, 2018); *Judicial Confirmations for December 2018*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/12/confirmations> (last updated Dec. 1, 2018); *Judicial Confirmations for December 2017*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/12/confirmations> (last updated Dec. 1, 2017).

47. 163 CONG. REC. S7174 (daily ed. Nov. 13, 2017) (statement of Sen. Grassley); 163 CONG. REC. S7285 (daily ed. Nov. 16, 2017); see *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Nov. 29, 2017) (statement of Sen. Grassley), <https://www.judiciary.senate.gov/meetings/11/29/2017/nominations>; Memorandum from the Senate Judiciary Comm. Majority to the Members of the News Media (Nov. 2, 2017), <https://www.judiciary.senate.gov/imo/media/doc/His>

slip tradition, which required blue slips from *both* home state senators—a tradition that Republican *and* Democratic senators closely followed throughout all eight years of Obama’s time in office, which constituted the most recent, applicable precedent.⁴⁸

That situation continued to deteriorate when Grassley provided a January 2018 hearing for the Wisconsin Seventh Circuit nominee Michael Brennan whom Trump proposed—even though the White House had engaged in nominal consultation with Senator Baldwin and the nominee lacked the required number of votes from the venerable Wisconsin bipartisan state merit selection panel—especially because Grassley minimally supported allowing the Chair (himself) ample discretion to determine whether the chief executive had “adequately consulted” about the nominee.⁴⁹ Grassley resolutely continued this approach by setting a committee hearing in May for Oregon Ninth Circuit nominee Ryan Bounds, although McGahn had consulted little with Oregon Democratic Senators Ron Wyden and Jeff Merkley and the nominee ostensibly withheld considerable pertinent material from the Oregon bipartisan merit selection vetting commission.⁵⁰

Grassley expressly acknowledged that blue slips were intended to ensure that Presidents consult home state politicians while protecting

tory%20of%20the%20Blue%20Slip.pdf; Carl Hulse, *Judge’s Death Gives Trump a Chance To Remake a Vexing Court*, N.Y. TIMES (Apr. 7, 2018), <https://www.nytimes.com/2018/04/07/us/politics/trump-reinhardt-ninth-circuit.html>.

48. Grassley strictly followed that blue slip policy when he served as Chair in Obama’s final half term, as did Patrick Leahy (D-VT) during the initial six years. *See Executive Business Meeting of the S. Comm. on the Judiciary*, 115th Cong. (Feb. 15, 2018) (statements of Sens. Grassley and Leahy), <https://www.judiciary.senate.gov/meetings/02/15/2018/executive-business-meeting>.

49. Under Wisconsin merit selection panel rules, the candidate needed a specific number of votes to secure a commission recommendation to the senators, which Brennan lacked, but Sen. Ron Johnson (R) forwarded his name to Trump who nominated and confirmed Brennan anyway over the strong objection of Sen. Baldwin. S. Judiciary Comm., *Executive Business Meeting of the S. Comm. on the Judiciary*, 115th Cong. (Feb. 15, 2018), <https://www.judiciary.senate.gov/meetings/02/15/2018/executive-business-meeting>; *see supra* note 31, *infra* text accompanying note 79.

50. Maxine Bernstein, *Oregon’s U.S. Senators Say Federal Prosecutor Ryan Bounds Unsuitable for 9th Circuit Vacancy*, OREGONIAN (Feb. 12, 2018), https://www.oregonlive.com/portland/2018/02/oregons_us_senators_say_federa.html; Jimmy Hoover, *9th Circ. Pick Forces Grassley to Choose: Trump or Tradition?*, LAW360 (Mar. 29, 2018), <https://www.law360.com/articles/1025855; Nominations: Hearing Before the S. Comm. on the Judiciary>, 115th Cong. (May 9, 2018), <https://www.judiciary.senate.gov/meetings/05/09/2018/nominations>; *Executive Business Meeting Before the S. Comm. on the Judiciary*, 115th Cong. (June 7, 2018), <https://www.judiciary.senate.gov/meetings/06/07/2018/executive-business-meeting> (11-10 panel approval); 164 CONG. REC. S5098 (daily ed. July 19, 2018) (withdrawing the nomination); *see* Bernstein, *supra* note 50 (assessing the four candidates, including Bounds, whom the panel recommended and senators’ reasons for opposing Bounds).

senators' prerogatives involving judicial selection and the essential interest in selection of the electorate they diligently represent. Indeed, Senator Grassley clearly respected slips for district court prospects, as does Senator Lindsey Graham (R-SC), the new Chair.⁵¹ However, GOP senators had persistently relied on slips to exclude able, moderate circuit nominees during Obama's tenure, many for political or ideological reasons, the very bases which Grassley explicitly deemed illegitimate.⁵²

Grassley also changed the effective traditions and rules which had governed panel hearings. The Chair arranged ten sessions in which two circuit, and frequently three or four district, court nominees testified at one time without minority party approval; this radically contrasted with Democrats' scheduling merely three analogous nominee committee hearings throughout the eight Obama years and even then only under peculiar conditions and with specific Republican permission.⁵³ Most notorious was the Republican Senate majority's scheduling of a major hearing for two controversial Trump Administration appellate choices, four district nominees and the ABA repre-

51. See sources cited *supra* note 47. Graham, who became Chair in January 2019, vowed to follow Grassley's blue slip policy. *Executive Business Meeting Before the S. Comm. on the Judiciary*, 116th Cong. (Feb. 7, 2019), <https://www.judiciary.senate.gov/meetings/02/07/2019/executive-business-meeting>. Grassley has signaled that he would like to become the Chair again in 2021, if Republicans retain a Senate majority. Jordain Carney, *Grassley to Take Back Judiciary Gavel If GOP Keeps Senate in 2020*, THE 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>; 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>.

52. See *supra* text accompanying note 42. Many GOP senators even offered no reasons for retaining blue slips. See *supra* note 22.

53. 163 CONG. REC. S8022–24 (statement of Sen. Feinstein); Joshi, *supra* note 24; see *supra* note 18 (prior history). For example, Obama nominated North Carolina Fourth Circuit Judges Albert Diaz and James Wynn on the same day, and the Senate assessed the nominees together in the confirmation process. Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2174–76 (2011). Graham conducted February 13, March 13, September 25, October 16, and October 30, 2019 hearings in which two circuit nominees testified. See, e.g., *Nominations: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (Feb. 13, 2019), <https://www.judiciary.senate.gov/meetings/02/13/2019/nominations>; *Nominations: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (Mar. 13, 2019), <https://www.judiciary.senate.gov/meetings/nominations-hearing>; *Nominations: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (Sept. 25, 2019), <https://www.judiciary.senate.gov/meetings/09/25/2019/nominations>; *Nominations: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (Oct. 16, 2019), <https://www.judiciary.senate.gov/meetings/10/16/2019/nominations>; *Nominations: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (Oct. 30, 2019), <https://www.judiciary.senate.gov/meetings/10/30/2019/nominations>.

sentative, who deftly explained the vociferously-contested “not qualified” rating which the ABA had assigned a Trump court of appeals nominee.⁵⁴ In fact, the panel session was so crowded that members had no time for questioning the district court nominees, which may have represented another strategy that the Republican Senate majority invoked to prevent Democrats from comprehensively scrutinizing nominees.⁵⁵

Many hearings appeared rushed, while they lacked the careful questioning appropriate for nominees who could actually enjoy life tenure.⁵⁶ For most nominees, senators had only five minutes to present questions. Certain nominees seemed to avoid providing substantive answers to senators’ questions by delaying, repeating multiple queries and deflecting or evasively responding to questions which members posited. Illuminating was the lack of cooperation which multiple Texas district court nominees displayed.⁵⁷ Other nominees were reluc-

54. *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Nov. 15, 2017), <https://www.judiciary.senate.gov/meetings/11/15/2017/nominations> [hereinafter *November 15 Hearing*]; *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Sept. 6, 2017), <https://www.judiciary.senate.gov/meetings/08/08/2017/nominations> (similarly packed); *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Oct. 24, 2018), <https://www.judiciary.senate.gov/meetings/10/24/2018/nominations> [hereinafter *October 24 Hearing*] (conducting hearing for two Ninth Circuit nominees after the Senate had recessed to campaign); *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Aug. 1, 2018), <https://www.judiciary.senate.gov/meetings/08/01/2018/nominations> (conducting hearing for a New York Second Circuit nominee and six New York district nominees while the Kavanaugh nomination was pending).

55. They merely had time for introductions. *November 15 Hearing*, *supra* note 54; see 163 CONG. REC. S8022–24 (statement of Sen. Feinstein) (stating committee conducted five appellate court nominee hearings over November, a month that included a one-week recess).

56. See *supra* text accompanying note 29; 163 CONG. REC. S8022–24 (statement of Sen. Feinstein). For lack of care, see 163 CONG. REC. S8022–24 (statement of Sen. Feinstein). For a very recent example, see *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Dec. 4, 2019), <https://www.judiciary.senate.gov/meetings/12/04/2019/nominations> (conducting hearing for one appellate court nominee and five district court nominees on the same day that the Senate conducted floor votes on six district court nominees, so members had practically no time for questioning the district court nominees).

57. E.g., *Executive Business Meeting Before the S. Comm. on the Judiciary*, 115th Cong. (Jan. 18, 2018), <https://www.judiciary.senate.gov/meetings/01/18/2018/executive-business-meeting> (Matthew J. Kacsmaryk); *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Apr. 25, 2018), <https://www.judiciary.senate.gov/meetings/04/25/2018/nominations> (Michael Truncale); *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (June 6, 2018), <https://www.judiciary.senate.gov/meetings/06/06/2018/nominations> (David Morales); see 163 CONG. REC. S8022–24 (statement of Sen. Feinstein). But see 163 CONG. REC. S8025 (daily ed. Dec. 14, 2017) (statement of Sen. Cornyn) (praising the strong judicial qualifications of many Texas district nominees).

tant to directly state whether, once confirmed, they would recuse themselves on matters related to issues (such as discrimination, civil rights, and health care) that the nominees had litigated as practicing attorneys or about which they had articulated clearly-held views.⁵⁸ These considerations meant that it was unsurprising that a third of Trump nominees had compiled anti-LGBTQ records.⁵⁹

The discussions which preceded committee reporting of most nominees also lacked much valuable context or content. Senators negligibly addressed questions raised by other senators, even those which implicated qualifications that are crucial for life-tenured federal judges who must analyze essential issues.

A significant deviation from “regular order” was Chair Grassley’s detrimental choice to not await conclusion of American Bar Association evaluations and ratings *before* conducting panel discussions and votes, despite incessant requests from Judiciary Committee Ranking Member Dianne Feinstein (D-CA) that he wait until the ABA’s nominee materials arrived. Grassley responded that he would not permit what numerous GOP senators characterize as an external “political group” to dictate committee scheduling.⁶⁰ It, therefore, was

58. *Nominations: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (Feb. 5, 2019), <https://www.judiciary.senate.gov/meetings/02/05/2019/nominations> (Neomi Rao); *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Apr. 11, 2018), <https://www.judiciary.senate.gov/meetings/04/11/2018/nominations-1> (Wendy Vitter); *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (July 11, 2018), <https://www.judiciary.senate.gov/meetings/07/11/2018/nominations> (Stephen Clark); see 28 U.S.C. § 455 (2012) (recusal law); Josh Gerstein, *Trump-Appointed Judge Won't Recuse from Dossier Case*, POLITICO, Feb. 16, 2018, <https://www.politico.com/story/2018/02/16/trump-dossier-judge-recuse-416844>; Joshi, *supra* note 24 (judges’ potential conflicts).

59. *Stacking the Courts: The Fight Against Trump’s Extremist Judicial Nominees*, LAMBDA LEGAL, <https://www.lambdalegal.org/judicial-nominees> (last updated Jan. 31, 2019); see Eleanor Clift, *What Trump’s Judicial Nominees Have in Common: They Really Don’t Want LGBTQ People to Have Rights*, THE DAILY BEAST, Mar. 12, 2018, <https://www.thedailybeast.com/what-trumps-judicial-nominees-have-in-common-they-really-dont-want-lgbtq-people-to-have-rights>; Dave Phillips, *New Rule for Transgender Troops: Stick to Your Birth Sex, or Leave*, N.Y. TIMES, Mar. 13, 2019, <https://www.nytimes.com/2019/03/13/us/transgender-troops-ban.html>. These factors meant that hearings could become comparatively meaningless exercises in which participants exchanged relatively few substantive ideas.

60. *Aug. 1, 2018 Hearing*, *supra* note 54 (two district court nominees received no ABA ratings before the hearing and four nominees had ratings posted the day of the hearing); Michael Macagnone, *DC Court Picks Face Panel Ahead of ABA Report*, LAW360 (June 28, 2017), <https://www.law360.com/articles/939442/dc-court-picks-face-senate-panel-ahead-of-aba-report>; see sources cited *supra* note 34; Tobias, *supra* note 22 (regular order); Elliot Mincberg, *4 Steps to Restore Thorough Senate Vetting of Judicial Nominees*, THE HILL (Dec. 26, 2017, 1:30 PM), <https://thehill.com/opinion/judiciary/366490-4-steps-to-restore-thorough-bipartisan-senate-vetting-of-judicial-nominees>; (urging that hearings be conducted after receipt of ABA reports). *But*

predictable that the more controversial selections received party-line ballots and that no Republican committee member voted against a single nominee across 2017.⁶¹

After the committee marshaled approval of nominees and they came to the floor, similar, albeit less troubling, dimensions frustrated meaningful nominee review: the Democratic minority demanded cloture and roll call votes for virtually all nominees, even for accomplished, mainstream individuals who went on to smoothly win confirmation; the GOP possessed the Senate majority; and the 2013 release of the “nuclear option” meant that nominees were confirmed with a simple majority ballot.⁶² Particularly egregious was the compression of four appeals court nominees’ debates and chamber votes into less than a 2017 week following minimal prior notice and even ramming six appellate confirmations through in one week in 2018 after de minimis notice.⁶³ The many nominees, their massive records and the tardy notice left Democrats as the minority party without sufficient resources to dutifully prepare.⁶⁴ More relevant to this article was

see 163 CONG. REC. S8022–24 (statement of Sen. Feinstein) (touting ABA input’s value); *supra* notes 26–28 (analyzing the role of Federalist Society, another external political entity).

61. *See, e.g., Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Nov. 1, 2017), <https://www.judiciary.senate.gov/meetings/11/01/2017/nominations> (approving Eighth Circuit nominee Gras); S. Judiciary Comm., *Executive Business Meeting of the S. Comm. on the Judiciary*, 115th Cong. (Feb. 15, 2018), <https://www.judiciary.senate.gov/meetings/02/15/2018/executive-business-meeting> (approving Seventh Circuit nominee Brennan); *infra* note 83 (lone negative Republican panel vote).

62. The nuclear option is a practice that allows a majority vote to amend the Senate rules, rather than a larger margin, as the Senate rules require. 159 CONG. REC. S8418 (daily ed. Nov. 21, 2013) (nuclear option); Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L. J. 121, 131 (2015). In 2017, the Republican Senate majority margin was 51-49 and currently is 53-47.

63. Feinstein said 2017 notice came Thursday evening as senators recessed. *Executive Business Meeting Before the S. Comm. on the Judiciary*, 115th Cong. (Nov. 2, 2017), <https://www.judiciary.senate.gov/meetings/11/02/2017/executive-business-meeting>; *Schedule for Tuesday, October 31, 2017*, SENATE DEMOCRATS: THE FLOOR (Oct. 30, 2017, 7:40 PM), <https://www.democrats.senate.gov/2017/10/30/schedule-for-tuesday-october-31-2017>. For 2018, see *Schedule for Pro Formas and Monday, May 7, 2018*, 8,022 SENATE DEMOCRATS (Apr. 26, 2018, 5:38 PM), <https://www.democrats.senate.gov/2018/04/26/schedule-for-pro-formas-and-monday-may-7-2018>.

64. Feinstein proffered these notions. *Executive Business Meeting*, *supra* note 63; Ruger, *supra* note 32. The most appellate court judges whom Bush appointed in one week were three in June 2004 and June 2005. *Judicial Confirmations — 109th Congress*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2005/12/confirmations/pdf> (last updated Dec. 1, 2005); *Judicial Confirmations — 108th Congress*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2004/08/confirmations/pdf>

similar compression of district court nominee ballots immediately before Senate recesses. For example, from December 3 through December 5, 2019, eight trial-level prospects secured appointment; between July 30 and 31, 2019, thirteen nominees captured appointment; in October 2018, twelve individuals secured appointment after limited debate; and in August of that year seven possibilities captured appointment, most on voice vote.⁶⁵

The quality of floor debates which preceded confirmation ballots resembled that of Judiciary Committee discussions of nominees; some

(last updated Aug. 1, 2004). The most appellate court jurists whom Obama appointed were five in December 2010, when the Senate recessed at the Congress' end and the nominees had waited protracted periods; the most judges whom Obama appointed in other weeks were two. *Judicial Confirmations for January 2018*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/01/confirmations> (last updated Jan. 1, 2018); *Judicial Confirmations for January 2017*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/01/confirmations> (last updated Jan. 1, 2017); *Judicial Confirmations for January 2016*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2016/01/confirmations> (last updated Jan. 1, 2016); *Judicial Confirmations for January 2015*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2015/01/confirmations/html> (last updated Jan. 1, 2015); *Judicial Confirmations for January 2014*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2014/01/confirmations/html> (last updated Jan. 1, 2014); *Judicial Confirmations for January 2013*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2013/01/confirmations/html> (last updated Jan. 1, 2013); *Judicial Confirmations for January 2012*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2012/01/confirmations/html> (last updated Jan. 1, 2012); *Judicial Confirmations for January 2011*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2011/01/confirmations/html> (last updated Jan. 1, 2011); *Judicial Confirmations for January 2010*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2010/01/confirmations/html> (last updated Jan. 1, 2010); *Judicial Confirmations — 110th Congress*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2009/01/confirmations/pdf> (last updated Jan. 1, 2009).

65. 165 CONG. REC. D1313 (daily ed. Dec. 3, 2019), 165 CONG. REC. D1320 (daily ed. Dec. 4, 2019) & 165 CONG. REC. D1328 (daily ed. Dec. 5, 2019) (none earned voice votes); 165 CONG. REC. D932-33 (daily digest July 30, 2019) & 165 CONG. REC. D939 (daily digest July 31, 2019) (three earned voice votes); 164 CONG. REC. D1133 (daily digest Oct. 11, 2018) (half earned voice votes); 164 CONG. REC. D959 (daily digest Aug. 25, 2018) (six of seven earned voice votes); see Jordain Carney, *Senate Confirms Eight Trump Court Picks in Three Days*, THE HILL (Dec. 5, 2019, 4:20 PM), <https://thehill.com/homenews/senate/473271-senate-confirms-eight-trump-court-picks-in-three-day>. These efforts had impacts that were rather comparable to appointing court of appeals nominees. See sources cited *supra* notes 63–64. Stacking circuit approvals also devours resources that could be devoted to confirming district judges. U.S. SENATE, 116TH CONG., EXECUTIVE CALENDAR NO. 237 (2020), https://www.senate.gov/legislative/LIS/executive_calendar/2020/03_255_2020.pdf (ten district court nominees remain on the Senate floor awaiting votes).

were even less instructive than the panel exchanges.⁶⁶ Senate Democrats required cloture votes for practically all choices, while much of the thirty hours granted for debate after cloture concerned issues that were not actually related to specific candidates and, even when particular lawmakers discussed them, few members were in attendance to hear the floor remarks because other Senate business enjoyed higher priority.⁶⁷ Republican senators apparently decided that the rule which affords thirty hours of post-cloture debate regarding district nominees was so ineffective for assessing nominees' qualifications or so effective for the opposition party to analyze these qualifications that the Republican chamber majority summarily decreased the number of hours to two.⁶⁸

The Senate Republican majority, like President Trump's White House, has prioritized appellate court over district court appointments; consideration of nominees from jurisdictions represented by Republican senators; appointment of extremely conservative white males; and filling non-emergency openings. Yet many of these phenomena derive primarily from the nominating system.⁶⁹ These shared priorities helped Trump shatter the record for most court of appeals nominees confirmed in a President's first year. However, the priorities also left more than twenty district court nominees without final ballots and a substantial number of appellate court and district court openings at the completion of 2017. Moreover, relatively few nominees received approval in states represented by Democrats, two minority nominees won confirmation and the number of emergency vacancies dramatically increased.⁷⁰ The priorities remained unchanged and concomi-

66. See *supra* notes 60–61 and accompanying text.

67. For instance, during most of the chamber debates on the four district court 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).

68. 165 CONG. REC. S2220 (daily ed. Apr. 3, 2019); *Executive Business Meeting Before the S. Comm. on Rules & Admin.*, 116th Cong. (Feb. 13, 2019), <https://www.rules.senate.gov/hearings/full-committee-business-meeting> (approving S. Res. 50); Burgess Everett & Marianne Levine, *McConnell Preps New Nuclear Option to Speed Trump Judges*, POLITICO (Mar. 6, 2019, 5:05 AM), <https://www.politico.com/story/2019/03/06/trump-mcconnell-judges-1205722>; Carl Hulse, *G.O.P. Ready to 'Nuke' Senate Democrats Again Over Nominee Delays*, N.Y. TIMES (Feb. 20, 2019), <https://www.nytimes.com/2019/02/20/us/politics/senate-nuclear-option-trump.html>.

69. See *supra* notes 22–25, 27 and accompanying text.

70. U.S. SENATE, 115TH CONG., EXECUTIVE CALENDAR NO. 188 (2017), https://www.senate.gov/legislative/LIS/executive_calendar/2017/12_23_2017.pdf; *supra* notes 39–46, *infra* notes 74, 84 and accompanying text.

tantly allowed Trump to set the record for most court of appeals judges appointed over a chief executive's second and third years, but they continued to have problematic effects on district court appointments. At the end of 2018, a paltry number of choices realized approval in jurisdictions with Democratic senators, the President confirmed few minority nominees and emergencies were very high, while at 2019's conclusion, the statistics had minimally improved.⁷¹

C. *Explanations for Nomination and Confirmation Problems*

It is difficult to precisely identify why multiple complications permeate the district court nomination and confirmation regimes, mainly because the chief executive and the Senate supply comparatively little information about nominations and confirmations.⁷² However, explanations might be drawn from the previous account.

A critical reason for problems with trial level nominees is that the administration emphasizes seating myriad conservatives in appellate court vacancies to the near exclusion of most other important activity, namely district court confirmations. Trump expressly asks White House Counsel to assign circuit openings massive significance, while the President and the Counsel rely heavily on Federalist Society ideas, even when the President does not completely outsource selection to this external political group.⁷³

The Trump Administration correspondingly seems to (1) deemphasize open district court positions and grant more responsibility for those nominations to home state politicians, (2) downplay the many vacancies in jurisdictions represented by Democratic senators, (3) undervalue minority representation on the federal courts and (4) ignore judicial emergencies which plague numerous courts. This limited attention is misguided because (1) district court jurists are the federal

71. 165 CONG. REC. D3 (daily ed. Jan. 3, 2019). At 2019's conclusion, more blue state and minority nominees captured appointment, while emergencies decreased somewhat. 165 CONG. REC. D8 (daily ed. Jan. 6, 2020); see sources cited *supra* note 46. Compare *Judicial Emergencies for January 2019*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2019/01/emergencies> (last updated Jan. 1, 2019), with *Judicial Emergencies for January 2020*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2020/01/emergencies> (last updated Jan. 1, 2020).

72. Participants' privacy needs may support limiting information. See Tobias, *supra* note 21, at 1103. But see Press Release, White House, Doing What He Said He Would: President Trump's Transparent, Principled and Consistent Process for Choosing a Supreme Court Nominee (Jan. 31, 2017), [whitehouse.gov/briefings-statements/said-president-trumps-transparent-principled-consistent-process-choosing-supreme-court-nominee/](https://www.whitehouse.gov/briefings-statements/said-president-trumps-transparent-principled-consistent-process-choosing-supreme-court-nominee/) [<https://perma.cc/RFR6-5SSM>].

73. See *supra* notes 26–27 and accompanying text.

judiciary's workhorses and finally resolve plentiful cases, (2) senators' party affiliation should certainly not affect the distribution of court judicial resources and concomitantly justice's quality, (3) minority jurists furnish numbers of benefits and (4) the emergency designation clearly applies in the most egregious situations.⁷⁴ The appellate court emphasis may also reveal why particular district court nominees lacked the required qualifications: the Justice Department and the White House Counsel deployed insufficient evaluations and dedicated comparatively minimal resources to district court candidate scrutiny and nominee preparation for committee hearings. The DOJ and Counsel also decidedly ignored most ABA candidate evaluations and ratings previous, and even subsequent, to nominations.⁷⁵

In fairness, the President experienced the significant start-up costs of assembling a government after eight years of Democratic White House control. Trump had not served in the public sphere or run for elected office before he captured the presidency. He also campaigned on a promise to "drain the swamp" and radically discombobulate traditional politics, salient elements which the President's unconventional management style and chaotic administration infighting purportedly magnified.⁷⁶ Trump also lacked comprehension of the rule of law, federal courts, separation of powers, and judicial selection, evidenced by (1) his searing criticisms of numerous federal appellate court and district court jurists who wrote opinions which frustrated Trump's political endeavors and (2) constant initiatives to appoint many judges who could reliably support presidential actions, notably constructing a border wall absent congressionally-appropriated funding or disrupting the contemporary administrative state.⁷⁷

74. See *supra* notes 36, 39–42, *infra* notes 88–91 and accompanying text.

75. For how emphasis on appellate court vacancies showed why certain district nominees were weak, see *supra* note 38; see also *supra* note 34 (appellate court not qualified ABA ratings). For Justice Department and White House Counsel Office inadequacies, see *supra* notes 33–35, 38.

76. See generally ANONYMOUS, A WARNING (2019); DAVID FRUM, TRUMPOCRACY (2018); BOB WOODWARD, FEAR: TRUMP IN THE WHITE HOUSE (2018). Newspapers cover this every day. E.g., Mark Landler & Julie Hirschfield Davis, *After Another Week of Chaos, Trump Repairs to Palm Beach. No One Knows What Comes Next.*, N.Y. TIMES (Mar. 23, 2018), <https://www.nytimes.com/2018/03/23/us/politics/trump-chaos-trade-russia-national-security.html>; Ashley, Parker et al., *Trump Chooses Impulse Over Strategy As Crises Mount*, WASH. POST (Apr. 12, 2018), https://www.washingtonpost.com/politics/trump-chooses-impulse-over-strategy-as-crises-mount/2018/04/11/884e33c2-3d9d-11e8-974f-aacd97698cef_story.html.

77. Olivia Paschal, *President Trump's Speech Declaring a National Emergency*, THE ATLANTIC (Feb. 15, 2019), <https://www.theatlantic.com/politics/archive/2019/02/trumps-declaration-national-emergency-full-text/582928/>; Gillian Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3 (2017); Jen-

Those complications were multiplied by the telling need to speedily fill the protracted Supreme Court vacancy that resulted from Justice Antonin Scalia's death and the 103 lower court posts that remained open upon Trump's inauguration, both of which had been orchestrated by Republican Senate Majority Leader, Mitch McConnell (KY) and his colleagues.⁷⁸

Numerous analogous concerns—especially the seemingly crucial necessity for the Trump Administration and the Republican Senate majority to promptly confirm the maximum possible number of conservative, young appellate court judges—explain the many complications in the selection regime. At the panel level, the weakening of the Senate's blue slip policy epitomizes these difficulties. In Grassley's haste to rapidly appoint numerous conservative appellate court jurists, he undercut this measure which had long operated effectively. Grassley instituted an exception to the blue slip policy for court of appeals nominees by granting the Chair of the Judiciary Committee substantial discretion to ascertain in case-by-case application of subjective criteria whether the White House had adequately consulted politicians from home states.⁷⁹ Grassley's reasoning was unconvincing. Nominal precedent supported distinguishing appellate court slips from district court slips, because Republican and Democratic politicians concur that appeals court vacancies are more consequential, the judges are fewer, and their rulings cover several jurisdictions and certainly articulate greater policy, even though Grassley and Graham did correctly retain slips for district courts.⁸⁰

Perhaps less troubling was the rushed setting of panel hearings, discussions and votes, which could analogously have been motivated

nifer Bendery, *Trump Has No Idea Why He Gets To Fill So Many Empty Court Seats*, HUFFINGTON POST (Mar. 29, 2018), https://www.huffpost.com/entry/trump-federal-judges-obama-republicans_n_5abd47c4e4b0a47437a98594; Peters, *supra* note 26; Rucker et al., *supra* note 25; Tillman, *supra* note 30; 163 CONG. REC. S8022–24 (statements of Sens. Feinstein, Leahy, Warren).

78. Michael Cohen, *Mitch McConnell, Republican Nihilist*, N.Y. REV. BOOKS (Feb. 25, 2019), <https://www.nybooks.com/daily/2019/02/25/mitch-mcconnell-republican-nihilist/>; Charles Homans, *Mitch McConnell Got Everything He Wanted, But At What Cost*, N.Y. TIMES (Jan. 27, 2019), <https://www.nytimes.com/2019/01/22/magazine/mcconnell-senate-trump.html>; see generally MITCH MCCONNELL, *THE LONG GAME* (2015); Hulse, *supra* note 48; Rucker et al., *supra* note 25.

79. See *supra* notes 47–52 and accompanying text.

80. See *supra* note 51 (Grassley and Graham retaining blue slips for district courts); *Executive Business Meeting Before the S. Comm. on the Judiciary*, 115th Cong. (Feb. 15, 2018), <https://www.judiciary.senate.gov/meetings/02/15/2018/executive-business-meeting> (statements of Sens. Crapo, Feinstein, & Leahy); *supra* notes 24–29, 51. For assignments of circuit judgeships to states, see Tobias, *supra* note 53, at 2171–74; *infra* note 123.

by the supposed need to quickly process myriad young, conservative appellate court judges.⁸¹ Similar concepts apply to Grassley's eschewing employment of ABA nominee evaluations and ratings prior to committee ballots and McConnell's decision to stack final votes respecting substantial numbers of appeals court and trial level prospects.⁸² Nevertheless, GOP members' utter failure to cast one no vote against a single court pick on a 2017 panel ballot and more than a lone negative confirmation vote show that panel hearings, discussions and votes can actually be less essential than Grassley's blue slip construct, hurried chamber processing and GOP Senate majority rubberstamping more generally.⁸³

III. CONSEQUENCES

The descriptive assessment of the nomination and confirmation processes reveals the ways in which the ideas employed by President Trump and the Republican Senate majority have caused numerous deleterious ramifications for the judiciary, litigants, counsel and ultimately for the branches of the federal government and society. A valuable measure of these ramifications is the list of present federal court openings: one appellate court and seventy-three district court vacancies, forty-five involving emergencies; more district court vacancies and judicial emergencies in jurisdictions represented by Democrats; and a troubling dearth of minority confirmees.⁸⁴ At the time of President Trump's inauguration, there were 103 vacancies—forty-two constituting emergencies—and the statistics had grown worse until late 2019 even while currently-serving active judges' predisposition to leave active status by retiring or assuming senior status has putatively been slowing.⁸⁵

81. See *supra* text accompanying notes 53–59, 61. Committee hearings, discussions and votes do clearly warrant improvement.

82. See *supra* notes 63–66. The panel needs ABA input before votes and the chamber requires decreased stacking of nominees.

83. Lockstep voting suggests that the application of putatively more effective practices may not improve the confirmation process or alleviate the vacancy crisis. See *supra* note 61 and accompanying text (no negative GOP panel vote); 163 CONG. REC. S7351 (daily ed. Nov. 28, 2017) (Sen. Kennedy's lone negative GOP final vote).

84. See *supra* notes 39–46 and accompanying text.

85. The statistics for judicial emergencies still remain worse, while the statistics for district court vacancies had remained worse until December 2019. Tillman, *supra* note 38; see Russell Wheeler, *Trump's 1st State of the Union: Is He Really Reshaping the Federal Judiciary?*, BROOKINGS INST. (Jan. 25, 2018), <https://www.brookings.edu/blog/fixgov/2018/01/25/trumps-1st-state-of-the-union-is-he-really-reshaping-the-federal-judiciary/>. See March 2020, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2020/03/emergencies> (last updated

The phenomena recounted in the paragraph above impose detrimental effects. The statistics increase pressures on current district court jurists—who are the only judges many federal court litigants encounter—to swiftly, inexpensively and equitably resolve civil and criminal suits and correspondingly on parties and numbers of Democratic lawmakers in jurisdictions that experience openings.⁸⁶ Trial-level jurists comprise the justice system’s workhorses, because they finally decide most civil lawsuits and criminal filings realize precedence under the Speedy Trial Act.⁸⁷ Moreover, numerous protracted unfilled slots undermine minority party home state politicians, who could receive blame for the lengthy vacancies, and deprive the electorate and litigants of court judicial resources which they need and senators of patronage.

Salient parameters—especially the substantial numbers of district court openings and judicial emergencies and the comparatively few minority appointees—accentuate the critical necessity to place more judges who are diverse in empty seats. White House neglect of minority representation has problematic effects. The federal courts should be an essential locus for justice, but currently people of color, especially African Americans, Latino/as and Native Americans, are overrepresented as defendants in the criminal justice system and underrepresented within the judiciary. This limited attention to the improvement of diversity is a lost opportunity for enhancing the quality of justice which federal courts deliver and myriad litigants need.

Greater minority representation affords significant benefits. Many persons of color, women and LGBTQ jurists supply “outsider”

Mar. 24, 2020). *Compare Judicial Vacancies*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies> (last updated Mar. 24, 2020), with *Judicial Emergencies for February 2017*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/02/emergencies> (last updated Feb. 1, 2017).

86. FED. R. CIV. P. 1; see Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B. U. L. REV. 1325 (1995) (suggesting that Federal Rule of Civil Procedure 1’s admonition that the civil rules be “construed, administered, and employed to secure the just, speedy and inexpensive determination of every action and proceeding” may be aspirational, given the pressures that vacancies and substantial dockets impose on district judges).

87. Kevin Diaz, *Senate Approves Federal Judge—Growing Backlog Eased Slightly in Unanimous Vote*, Hous. Chron., Apr. 14, 2015, at B1; Joe Palazzolo, *In Federal Courts, The Civil Cases Pile Up*, WALL STREET J. (Apr. 6, 2015, 2:09 PM), <https://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746>; see Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL STREET J. (July 23, 2011), <https://www.wsj.com/articles/SB10001424052748703749504576172714184601654>.

views⁸⁸ and different, constructive perspectives about numbers of crucial issues regarding abortion, criminal procedure and other daunting questions, which federal judges treat.⁸⁹ The presence of these judges in the courtroom would limit pre-existing ethnic, gender and sexual orientation prejudices that otherwise undermine justice.⁹⁰ Judges, who mirror the U.S. in diversity and perspective, would also increase citizen respect for the justice system by showing that ample people of color, women and LGBTQ individuals serve professionally as jurists, some of whom could better appreciate conditions which prompt numerous minorities to appear in federal court.⁹¹

Specific reasons for not addressing diversity, which may have formerly possessed a semblance of plausibility, are unpersuasive today. For instance, the many accomplished conservative LGBTQ individuals, people of color and women—encompassing a number of Trump judicial confirmees and nominees—dynamically rebut the condescending notions that appointing copious LGBTQ, minority and female nominees will erode merit because the pool is very small or the nation lacks sufficient conservative aspirants.⁹² LGBTQ individuals, people of color and women confirmed thus far demonstrate that

88. See 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).

89. See Jennifer Peresie, Note, *Female Judges Matter: Gender and Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1765 (2005) (“Two other studies provided some evidence that the presence of female judges on federal appellate panels affected case outcomes.”). *But see* Stephen Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504, 526 (2011) (detecting little difference in decisionmaking by female federal judges).

90. See, e.g., GREGORY B. WALTERS, OFFICE OF THE CIRCUIT EXECUTIVE, NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS & ETHNIC FAIRNESS: FINAL REPORT (1997); FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990).

91. See Sylvia Lazos, *Only Skin Deep?: The Cost of Partisan Politics on the Diversity of the Federal Bench*, 83 IND. L. J. 1423, 1442 (2008) (“A representative judiciary provides important symbolic and political meaning, has more legitimacy, demonstrates to the American public that the system is equitable and free of discrimination, and is better able to achieve its goals of fairness and justice.”).

92. Instructive examples of Trump confirmees are Rowland, Thapar, Ho, Nalbandian, Park, Bumatay, Lagoa, Gren Scholer, Otake, Moorer, Rodriguez, Arias-Marx-uach, Smith and Molloy. Tobias, *Trump’s War on Diversity*, *supra* note 43; *see supra* notes 45–46 and accompanying text. Trump nominated and confirmed many other accomplished, conservative women, encompassing Seventh Circuit Judge Amy Coney Barrett and Sixth Circuit Judge Joan Larsen. See Press Release, White House, Nine Nominations Sent to the Senate Today (May 8, 2017), <https://www.whitehouse.gov/presidential-actions/nine-nominations-sent-senate-today-2/>; 163 CONG. REC. S6908 (daily ed. Oct. 31, 2017) (Barrett); 163 CONG. REC. S6944 (daily ed. Nov. 1, 2017) (Larsen).

Trump has readily available plentiful strong candidates who deftly afford conservative perspectives and merit. The White House need only capitalize on this salient potential.

Some of the administration's actions which presidential discharge of constitutional responsibilities to nominate and confirm accomplished jurists, particularly in the district courts, include: (1) canvassing home state elected officials' submissions for nominees, (2) de minimis transparency and rigor with home state politicians, (3) exclusion of ABA investigations, evaluations and ratings, (4) dependence on truncated or inefficacious mechanisms and (5) proclivity for stressing rapid confirmation of young, conservative appellate court judges. The Republican Senate majority's propensity to rapidly appoint numbers of similar judges—particularly through modifying appeals court blue slips, eschewing or cabining other valuable procedures, namely searching inquiries during panel hearings, and rubberstamping White House choices—undermines senators' meaningful fulfillment of the constitutional duties to advise and consent.

The excessive number and prolonged nature of openings, specifically for district courts, might inflict enormous pressure on jurists and stall lawsuit disposition, impeding federal bench endeavors to realize its prominent responsibility to swiftly, economically and fairly resolve cases. When the appellate courts, and especially the trial courts, lack sufficient judicial resources for protracted times, this situation can impose ample corrosive effects. Incessant, explicit overemphasis on ideology when approving appellate court and district court jurists means that the tribunals could actually resemble the political branches. Judges who secure confirmation through overtly partisan and supremely politicized selection practices correspondingly seem extremely partisan and staunchly political, which may undercut public confidence in the bench.⁹³

93. *Executive Business Meeting Before the S. Comm. on the Judiciary*, 116th Cong. (Mar. 7, 2019), <https://www.judiciary.senate.gov/meetings/03/07/2019/executive-business-meeting> [hereinafter *Mar. 7, 2019 Committee Meeting*]; see Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices As Advocates*, 94 NOTRE DAME L. REV. 1161, 1195 (2019) (observing how oral argument at the Supreme Court has changed in response to increased “partisan polarization in the political branches and society at large.”); Orrin Hatch, *Protect the Senate’s Important “Advice and Consent” Role*, THE HILL (Apr. 11, 2014, 8:00 AM), <https://thehill.com/opinion/op-ed/203226-protect-the-senates-important-advice-and-consent-role>. This could even undercut public trust in judges’ decisions. PEOPLE FOR THE AMERICAN WAY, *Confirmed Judges, Confirmed Fears* (2019); Rebecca Ruiz et al., *Trump Stamps G.O.P. Imprint on the Courts*, N.Y. TIMES, Mar. 15, 2020, at A1. Appointees’ comparatively brief service complicates discerning how Trump confirmees affect judicial decisionmaking, collegiality and competence.

The loss and erosion of important traditions, especially White House consultation of home state politicians and court of appeals blue slips, can make the institutions of the presidency, the Senate and even the judiciary appear to be in critical decline, as those customs are essentially the “glue” that binds the institutions.⁹⁴ Finally, the complications assessed could erode public regard for, and trust in, all three branches of American democracy.

In sum, President Trump has enjoyed considerable success in nominating appeals court and district court prospects, while his administration set the record for confirming appellate court nominees, many of whom are very conservative, young and preminent. Nonetheless, the White House terminated, modified or downplayed constructive alternatives which have recently fostered very capable jurists’ nominations and confirmations. The country and the tribunals presently confront seventy-three district court vacancies, forty-five of which implicate emergencies; district court openings were higher than at Trump’s inauguration until December and judicial emergencies remain somewhat larger now. The concluding section of this article, therefore, analyzes reforms which can enhance trial level appointments.

IV.

SUGGESTIONS FOR THE FUTURE

As the review of the confirmation and nomination processes’ modern situation demonstrates, certain ideas need remediation and others could warrant amelioration, even while a few concepts used have performed rather well. Accordingly, this section provides both short-term and permanent constructs and several dramatic techniques, which might help rectify the district court vacancy crisis by improving the nomination and confirmation procedures.

A. *Short-Term Suggestions*

The Trump Administration may capitalize on a number of effective long-standing remedies. The Trump White House already employs some of them. One is elevating accomplished, centrist magistrate judges whom the Article III jurists serving in the ninety-four district courts appoint for eight-year terms. That measure is practical and efficient, because the nominees have compiled accessible, comprehensive records and offer substantial, distinguished relevant

94. See 163 CONG. REC. S8042 (statement of Sen. Durbin); 163 CONG. REC. S8022–24 (statement of Sen. Leahy); Ruger, *supra* note 32.

expertise.⁹⁵ The elevation of Judges Rowland and Moorer to district courts exemplify this approach.⁹⁶

A related pragmatic strategy would be naming once again a few of the twenty competent, moderate and conservative Obama district court nominees who acquired committee reports without dissent yet lacked Senate confirmation ballots.⁹⁷ This avenue will promote faster confirmation, because many renamed nominees must only secure panel and floor votes.⁹⁸ Trump has now deployed renomination with fifteen Obama designees, most of whom were confirmed; he can improve minority representation and fill numerous protracted district court openings by re-nominating other candidates, including Inga Bernstein, Julien Neals and Florence Pan.⁹⁹

The President also might contemplate implementing, emphasizing, reviving or improving numbers of effective judicial selection activities that he ignores or deemphasizes. One would be meticulously consulting home state politicians about nominees, which constitutes a major reason for the blue slip policy.¹⁰⁰ Assertive consultation of lawmakers, especially those senators who depend on accomplished selection commissions to propose superb individuals, expedites nominations and confirmations. A useful instance was marshaling the nomination of three excellent, mainstream Northern District of Illinois prospects—Rowland, Pacold and Steven Seeger—whom both Demo-

95. 28 U.S.C. § 631 (2012). For elevating to federal appellate courts district court judges whom the chamber has already confirmed, see Elisha Savchak et al., *Taking It To the Next Level: The Elevation of District Judges To the U.S. Courts of Appeals*, 50 AM. J. POL. SCI. 478 (2006); Carl Tobias, *Curing the Federal Court Vacancy Crisis*, 53 WAKE FOREST L. REV. 883, 910 (2018) (same regarding Trump, Obama and Bush elevations); Carl Tobias, *Combating the Ninth Circuit Judicial Vacancy Crisis*, 73 WASH. & LEE L. REV. ONLINE 688, 715–18 (2017) (same regarding possible Trump Ninth Circuit elevations).

96. See sources cited *supra* notes 34, 46; *infra* note 109.

97. The nominees were not confirmed in 2016, because the Republican Senate majority refused to conduct confirmation votes. Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9, 18–19 (2017).

98. Most home state senators will return blue slips, as they did return them earlier when the individuals were unsuccessful district nominees. See *id.* For those nominees who need another hearing, their prior panel, FBI and ABA reviews should only require updating.

99. Examples of others whom Trump confirmed are Judges David Nye, Scott Palk, Donald Coggins, Counts and Gren Scholer. Tobias, *supra* note 32, at 21–22; see *id.* (recounting twenty-eight other Obama 2016 nominees, including Gujarati, who lacked committee approval, whom Trump might renominate); *Judicial Confirmations for December 2018*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/12/confirmations> (last updated Dec. 1, 2018).

100. See *supra* notes 31–32 and accompanying text.

cratic senators powerfully supported and the Judiciary panel swiftly processed.¹⁰¹ Therefore, the maximum effective consultation will not invariably yield the strongest Republican or Democratic preferences but may speed nominations and might resolve disputes that could erode the process and interparty cooperation.¹⁰²

The administration should concomitantly reconsider the mistaken decision to prioritize young, conservative appellate court judges' confirmation, which is the primary reason for the seventy-three district court vacancies, forty-five of which constitute judicial emergencies, and instead seriously consider numerous practices that will sharply reduce the district court openings. For example, the President's selection team may apply a regime which concentrates on the needs of *all* courts. One valuable approach might be prioritizing nominations that would relieve the forty-five judicial emergencies.¹⁰³ The White House can emphasize the many district court vacancies and the tribunals with relatively large percentages of openings and rather significant numbers of judges, including districts across California and New York.¹⁰⁴ Stressing most California and New York district courts—as well as Illinois, Massachusetts, New Jersey and Washington tribunals—will

101. They received a promptly scheduled, smooth panel hearing and vote. Press Release, White House, 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 (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/>; *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Aug. 22, 2018), <https://www.judiciary.senate.gov/meetings/08/22/2018/nominations> (White House Counsel carefully consulted senators and Grassley quickly set hearing) (statements of Sens. Durbin and Grassley); *Executive Business Meeting Before the S. Comm. on the Judiciary*, 115th Cong. (Oct. 11, 2018), <https://www.judiciary.senate.gov/meetings/10/11/2018/executive-business-meeting> (panel approvals); 165 CONG. REC. S5228, 5,230 (daily ed. July 31, 2019) (confirming Rowland and Pacold); 165 CONG. REC. S5434 (daily ed. Sept. 11, 2019) (confirming Seeger). *But see* sources cited *supra* note 42 (Trump only renamed the three Northern District of Illinois nominees, seven New York district nominees and four Obama nominees whom Trump had renamed on April 8 but only sent to the Senate on May 21, even though he had renamed fifty-five other nominees whose nominations expired on January 2, 2019 during that month).

102. *See supra* notes 31–32, 49 and accompanying text (discussing disputes between the Oregon and Wisconsin senators and the White House over nominees for those states); Kaplan, *supra* note 30 (discussing similar disputes between the Ohio and Washington senators and the White House over nominees for those states).

103. *See supra* notes 39–42, 72, 84–85.

104. *See supra* notes 39–42, 74, 84–85. California presently experiences seventeen district court vacancies, all of which comprise judicial emergencies; New York currently experiences seven district court vacancies, most of which are judicial emergencies.

correspondingly address the lack of nominees from jurisdictions represented by Democrats.¹⁰⁵ The chief executive might accord home state officers expanded responsibility for discovering, recruiting, canvassing and proffering numbers of superb candidates whom the President concomitantly nominates.¹⁰⁶

The White House should reassess its misguided decision to exclude the American Bar Association from official responsibility for delivering nominee investigations with rankings. Presidents since the 1950s, excepting George W. Bush and Trump, have directly invoked the ABA's considerable experience, mammoth network of impressive examiners and cautious, informative ratings.¹⁰⁷ Deployment of ABA evaluations and rankings during candidate pre-nomination inquiries may concomitantly limit the embarrassment suffered by quite a few Trump aspirants who garner not qualified ratings.¹⁰⁸ The ultimate confirmation of multiple people who drew this ranking suggests that the ABA does helpfully alert participants in the selection process to ostensible concerns about nominees.¹⁰⁹ Should the President insist on eschewing a formal bar association role, White House Counsel might at least allow certain designees and nominees to coordinate with the

105. Illinois presently experiences four district court vacancies and Washington currently encounters five district, all of which are emergencies, Illinois encounters five, while New Jersey experiences six openings, all of which are judicial emergencies and for which Trump has yet to nominate a single candidate. *See supra* notes 42, 74, 84. Sparsely populated jurisdictions, including Alaska, Idaho, Montana and Nebraska, which have few authorized judgeships, also merit emphasis, as one vacancy can be a large percentage. *See* 28 U.S.C. § 133 (2012).

106. The President has seemingly deferred to numerous home state senators, particularly on district vacancies. *See supra* notes 36–38 and accompanying text.

107. *See supra* note 33 and accompanying text. *But see supra* note 34.

108. *See supra* note 38. The chief executive may decline to nominate the candidate or the candidate might decide to withdraw privately.

109. *See supra* note 34. When the ABA rated Goodwin and Teeter not qualified, chief judges where each now maintain chambers expressed support. *See Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Dec. 20, 2017), <https://www.judiciary.senate.gov/meetings/12/13/2017/nominations> (statement of Charles Barnes Goodwin, nominee); *Executive Business Meeting Before the S. Comm. on the Judiciary*, 115th Cong. (Jan. 18, 2018), <https://www.judiciary.senate.gov/meetings/01/18/2018/executive-business-meeting> (statement of Holly Lou Teeter, nominee); *supra* note 34 (Goodwin & Teeter confirmations); *see* Peter Hancock, *Senate Panel Advances Johnson County Attorney for Federal Judgeship in Kansas*, LAWRENCE J.-WORLD (Nov. 9, 2017, 12:46 PM), <https://www2.ljworld.com/news/2017/nov/09/senate-panel-advances-teeter-federal-judgeship-kan/>; Justin Wingerter, *Oklahoma City Federal Judge Defends His Work Ethic Before Senate Committee*, OKLAHOMAN (Dec. 13, 2017), <https://oklahoman.com/article/5575779/oklahoma-city-federal-judge-defends-his-work-ethic-before-senate-committee>. *But see supra* notes 61, 83 and accompanying text (Republican Senate majority lockstep voting in Judiciary Committee and on the floor and rubberstamping of conservative, young nominees may also explain ultimate confirmation).

ABA when the organization undertakes comprehensive investigations of candidates and preparation of ratings.¹¹⁰

Moreover, the chief executive must implement actions that will expand federal court diversity, because greater minority representation furnishes numerous benefits.¹¹¹ The White House should prioritize diversity while conveying to selection participants and citizens that Trump believes improving minority representation has abundant significance. The White House Counsel ought to lead this effort by actively communicating the view that a potential nominee's diversity is as important a priority as his or her conservatism. The appropriate focus of that importuning will be the Counsel Office, the Justice Department, the Judiciary Committee and lawmakers from states which experience unoccupied posts.

The White House Counsel should articulate thorough recommendations which augment diversity. For instance, Counsel Office employees and others who collaborate on appointments need to include minority staff in decision-making while also committing sufficient resources to provide salutary discharge of the responsibility for enhancing diversity. Individuals and entities participating in the nomination process must identify, examine and send numerous talented people of color, women and LGBTQ selections by contacting individuals, legislators and diverse interest groups, including the Federalist Society, that know of accomplished possibilities. The White House Counsel should persuade lawmakers from states with vacancies to seek out, evaluate and propose conservative nominees. The Counsel Office next must survey, interview and proffer these choices, asking that Trump seriously evaluate naming the individuals. The President may lead by example with the persons' concomitant nominations, urging senators to productively support and promptly canvass them.

The White House and the Senate must comprehensively explore plenty of short-term solutions that might improve the processes for nominating and confirming jurists. Trump may want to assiduously consult home state officers and reimplement ABA participation from both of which numerous White Houses, Senates, judges as well as the Democratic and Republican political parties have derived essential benefits. Senators might revitalize prominent constructive procedures,

110. *See supra* note 35 (first Counsel intimating that nominees not coordinate with the ABA); *see supra* note 34 (Sen. Lee arguing that White House should not allow nominees to cooperate with the ABA because it is a partisan political group which ABA's assignment of a not qualified rating to a strong Ninth Circuit nominee illustrates).

111. *See supra* notes 88–91 and accompanying text.

notably honoring blue slips for appellate courts and for district courts, thorough, rigorous hearings and floor debates and concepts which have successfully promoted expanded minority judicial representation.

B. *Longer-Term Suggestions*

The review undertaken demonstrates that the confirmation wars ahead of Trump's inauguration have persisted since his election, illuminated by the Democrats' rare concurrence on confirmation votes and the Republicans' triggering of the nuclear option for Supreme Court and district court nominees.¹¹² Many parameters show it is past time to consider endeavors which permanently improve flagging judicial appointments strictures: the minuscule number of confirmations throughout President Obama's last half term, the selection process' downward spiral manifested by unproductive paybacks and systematic politicization that culminated with the Republican Senate majority's refusal to consider Judge Merrick Garland, the strikingly limited cooperation between the Republican and Democratic parties so early in Trump's presidency and the seemingly diminished prospects for rectifying the complications. The Trump Administration's corresponding deletion, alteration or underemphasis of relatively effective selection concepts substantially accentuates the practices' steady decline.

2020 is a promising season to effectuate longer-term reforms. Because 2020 is an election year—and neither political party can be sure who will capture the White House and the Senate in November and capitalize on the possible modifications—this year will be replete with uncertainties and opportunities for compromise and concomitant potential agreement on reforms. As a result, 2020 is a propitious time to adopt several longer-term constructs when the parties should favor permanent solutions, while the President and the Senate must honor fundamental constitutional appointments duties with meaningful collaboration that prescribes effective remedies.¹¹³ The best time for acting is now, before the 2020 elections, as lack of clarity about the elections' outcomes presents more incentives for Republicans and Democrats to concur.

112. Tobias, *supra* note 21, at 1107; *see* sources cited *supra* notes 61–62, 68; John Gramlich, *Federal Judicial Picks Have Become More Contentious, and Trump's Are No Exception*, PEW RESEARCH 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/>.

113. For longer-term concepts that may address the confirmation wars, *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 25, at 2255–65.

President Trump and lawmakers can agree to drastically change the existing system through invocation of a bipartisan judiciary that would enable the party without administration control to submit a percentage of nominees.¹¹⁴ Senators from multiple jurisdictions have implemented similar efforts in the past. Since the 1970s, New York's senators have agreed to allow the senator whose party lacked the executive to stipulate one in a few district picks.¹¹⁵ Pennsylvania offers a modern example. Senators Casey (D) and Pat Toomey (R) use bipartisan selection panels, which have canvassed and recommended individuals since 2011,¹¹⁶ with the lawmaker whose party does not hold the White House sending one in four trial-level nominees.¹¹⁷ Senators from other states have employed similar schemes.¹¹⁸

The selection procedures used by senators in certain states are a good starting point from which senators from states with vacancies and the President should negotiate a framework which governs judicial selection across the board.¹¹⁹ The percentages of selections submitted by the party not in the White House, the number of candidates that it could muster for every vacancy, and whether prospects ought to

114. Michael 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, 2056 (2016).

115. The New York senators first allowed one of four and most recently permitted one of three under Senators Alfonse D'Amato (R) and Daniel Patrick Moynihan (D). 143 CONG. REC. S2538 (daily ed. Mar. 19, 1997) (statement of Sen. Biden); see Stephan Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 298–99 (1999).

116. Press Release, Sen. Pat Toomey, Senators Casey and Toomey Continue Bipartisan Agreement on District Court Vacancies (Mar. 10, 2017), <https://www.toomey.senate.gov/?p=news&id=1896>; P. J. D'Annunzio, *Pa. Senators Pledge Continued Cooperation on Judges*, LEGAL INTELLIGENCER (Mar. 17, 2017), <https://www.law.com/thelegalintelligencer/almID/1202781471929/Pa-Senators-Pledge-Continued-Cooperation-on-Judicial-Picks/?mcode=1395262324557&curindex=1&back=NLJ>; S. Judiciary Comm., *Hearing on Nominees*, Oct. 16, 2019 (statement of Sen. Toomey).

117. See sources cited *supra* note 114. Illinois employed an analogous regime when the delegation was split, and Democratic Senators Durbin and Tammy Duckworth retain the approach. Press Release, Sen. Dick Durbin, Durbin: White House Nominates Two to Fill Federal Judicial Vacancies in Northern District (Aug. 5, 2014), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-white-house-nominates-two-to-fill-federal-judicial-vacancies-in-northern-district>; see *supra* note 101 and accompanying text.

118. Tobias, *supra* note 95, at 916.

119. See sources cited *supra* note 114 (providing specific guidance for establishing a bipartisan judiciary). But see 143 CONG. REC. S2538 (daily ed. March 19, 1997) (statement of Sen. Biden) (expressing concern about a similar Republican proposal during the Clinton Administration).

be ranked should be essential components of an agreement.¹²⁰ In split delegations, pertinent considerations include whether the state's Republican or Democrat parties or the state's executive branch will initiate candidate rankings and how to navigate crucial differences between the lawmakers and the President. Allowing the senators to concur and forwarding one choice at a time until the White House could agree can be helpful, because the ideas reflect contemporary practice and constitutional phraseology.¹²¹

A related question would be what courts are eligible. For instance, a few tribunals, especially the U.S. District Court for the D.C. District, can require omission, as the District of Columbia has no senators and Presidents conventionally lead this appointments system.¹²² Because court of appeals openings can arise infrequently while the tribunals comprise a few states, the bipartisan judiciary may apply well to courts of appeals that encompass numerous members.¹²³ Nevertheless, perceptions that seating the jurists is very political, complicated and critical—as circuit rulings govern multiple jurisdictions and espouse significantly more policy and concomitantly have greater impacts—suggest that appellate courts' deletion would be appropriate.

Congress ought to combine the bipartisan judiciary with legislation that authorizes sixty-five new trial court, and only five court of appeals, positions.¹²⁴ This would implement U.S. Judicial Conference

120. The regimes that senators currently apply suggest that opposition members can suggest one in three or four district court nominees. Using 2020, in states with two Democrats, they pick; in those with two GOP members, the senior Democratic officer selects; and in states with split delegations, the Democrat picks. All legislators then must work with the President.

121. See *supra* notes 16–18 (following similar procedures), *infra* note 128 (procedures honor the process that the Constitution envisions). The lawmakers also should choose several picks and rank the selections proposed to enhance flexibility and expedite selection by obviating the need to restart the selection process when the President and senators cannot reach agreement.

122. Tribunals with a bipartisan judiciary may be matters for negotiation or be left to the party lacking the presidency. Small districts can merit exclusion, as they rarely have openings. See *supra* note 105 (one vacancy can be a large percentage in a small district).

123. Even the Ninth Circuit, the largest appellate court, experiences openings every 2 decades in Alaska, Hawaii, Idaho, and Montana. Congress requires that each circuit's states must have at least one active member of the appellate court. 28 U.S.C. § 44(c) (2018); see *Executive Business Meeting Before the S. Comm. on the Judiciary*, 115th Cong. (Feb. 15, 2018), <https://www.judiciary.senate.gov/meetings/02/15/2018/executive-business-meeting> (statements of Sens. Crapo, Feinstein, & Leahy) (discussing a multi-state dispute over whether California or Idaho was entitled to a particular Ninth Circuit seat, a controversy that illuminates the type of disputes that may complicate employing a bipartisan judiciary for circuits).

124. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS 26 (2019), https://www.uscourts.gov/sites/default/files/2019-03_proceedings_0.pdf;

recommendations for the Senate and House, derived by the federal courts' policymaking arm from conservative estimates, which implicate work and caseloads that will best allocate the judicial resources necessary to deliver litigants justice.¹²⁵ These measures would become effective over 2021, thereby affording neither party benefits when first initiated while confining the ability to game the regime.¹²⁶

Combining a bipartisan judiciary and seventy additional appellate court and district court posts would offer many advantages. Bipartisan courts and new judgeships can improve the process, while according trial courts some desperately-needed judicial resources and both parties incentives to cooperate and confirm jurists, who provide diverse expertise, ideology, ethnicity, gender, and sexual preference. Adoption in 2020, with implementation coming during 2021, will reduce both parties' opportunities to derive multiple unfair benefits, even though authorizing and implementing a bipartisan judiciary would necessitate considerable care. For example, Joe Biden, when he was serving as a Delaware senator, criticized a related proposal because it was untraditional and the Constitution states that the President nominates, and with Senate advice and consent appoints, jurists.¹²⁷ However, Biden's proposition similarly describes the unprecedented politicized gridlock which the selection process has manifested since 2009, while a bipartisan judiciary which respects the Constitution might be prescribed.¹²⁸

Tobias, *supra* note 62, at 140. If the selection process does not improve, more judgeships will not enhance the process or rectify the vacancy crisis.

125. JUDICIAL CONF. REPORT, *supra* note 124; see S. 1385, 113th Cong. § 1 (2013-2014), <https://www.congress.gov/bill/113th-congress/senate-bill/1385/text> (most recent comprehensive judgeships legislation).

126. When the political parties concur *before* elections, it is more difficult for either party to game the system. Presidential election years are more felicitous than midterm election years, because the President can be on the ballot and may be more willing to cooperate.

127. Senator Biden was referencing "trades" between Republican senators and President Clinton that the GOP members suggested. 143 CONG. REC. S2538 (daily ed. Mar. 19, 1997) (statement of Sen. Biden). Georgia Republican senators and Obama appeared to use trades when they were unable to agree on nominees for Georgia vacancies. Dan Malloy, *The Delegation of Georgians in D.C.*, ATLANTA J.-CONST., July 20, 2014, at 14A; see sources cited *supra* note 32; *infra* notes 138-41; *supra* note 30 (McGahn's analogous perspective on consultation).

128. The Constitution does not proscribe these ideas, on which Trump and Congress may concur. The ideas might politicize selection more or deny political winners spoils. However, they could enhance selection, the confirmation wars need to cease and litigant and court needs should be paramount. For contrasting perspectives on what "unprecedented" means in the judicial selection context, see Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 103 (2017); Michael J. Gerhardt, *Practice Makes Precedent*, 131 HARV. L. REV. F. 32, 43-45 (2017).

Effectuating this notion appears complex, but Congress can felicitously solve most dilemmas that might arise.¹²⁹

Another possible long-term reform would be changing the filibuster that has been important to the confirmation wars. The device traditionally safeguarded the minority party's rights, yet various abuses show that this construct deserves additional refinement.¹³⁰ For instance, filibusters could be selectively employed against nominees who clearly lack the intelligence, ethics, temperament, diligence, or independence to perform as exceptional federal jurists. This goal would be secured through permitting filibusters only in "extraordinary circumstances," a rubric that was implemented somewhat successfully in 2005, and comprehensively defining extraordinary circumstances.¹³¹ These activities may promote reinstatement of sixty votes for cloture, a determination that would reverse the nuclear option's 2013 detonation and perhaps spur better party collaboration.¹³²

129. Congress has addressed more complex issues, namely how to treat substantial, increasingly complex dockets with limited resources, by authorizing new judgeships, but the last comprehensive statute passed in 1990. *See* Federal Judgeship Act of 1990, Pub. L. No. 101-650, §§ 201–206, 104 Stat. 5089, 5089–5104 (1990). The earlier ideas address many issues that a bipartisan judiciary might create. For more specific recommendations regarding bipartisan courts, see Tobias, *supra* note 114.

130. Filibuster abuse provoked the nuclear option's explosion, which limited filibuster invocation by mandating a majority vote for cloture, while 2015-16 Republican senators denial to Obama nominees of final votes was abusive, as might be Democratic senators 2017-18 virtually automatic denial of unanimous consent, which devoured thirty hours of floor debate time. *See* sources cited *supra* notes 21–22, 62, 68.

131. *Text of Senate Compromise on Nominations of Judges*, N.Y. TIMES (May 24, 2005), <http://www.nytimes.com/2005/05/24/politics/text-of-senate-compromise-on-nominations-of-judges.html>; see Michael Gerhardt & Richard Painter, "Extraordinary Circumstances": *The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform*, 46 U. RICH. L. REV. 969, 970–72 (2012). A few senators said that nominee ideological perspectives and the number of tribunal cases and judges were not extraordinary circumstances in a controversy over D.C. Circuit vacancies. *Executive Business Meeting Before the S. Comm. on the Judiciary*, 116th Cong. (Mar. 7, 2019), <https://www.judiciary.senate.gov/meetings/03/07/2019/executive-business-meeting>; see Tobias, *supra* note 62, at 125–28 (analyzing disagreement among senators as to what constituted extraordinary circumstances).

132. Graham has suggested this proposition, but that it apply in 2021. *Executive Business Meeting Before the S. Comm. on the Judiciary*, 116th Cong. (Feb. 7, 2019), <https://www.judiciary.senate.gov/meetings/02/07/2019/executive-business-meeting>. Republicans hold the Senate, so the party might reject the alterations, but filibuster change may be one aspect of a global solution, which also requires two hours of post-cloture debate for district nominees. *But see* Everett & Levine, *supra* note 68 (Schumer offered two-hour debates on district nominees in return for honoring circuit slips, but the GOP majority rejected this). The GOP will not retain the majority forever and could agree to this trade. Tobias, *supra* note 62, at 140. An effective 2007-08 custom was chamber votes on all strong, mainstream district nominees before recesses. Tobias, *supra* note 22, at 31; see sources cited *supra* note 65 (similar 2018 and 2019 notion). The Senate may also employ other conventions to reinstate regular order.

C. *More Dramatic Reforms*

Should the ideas assessed earlier prove unworkable, because the Republican President and Senate majority staunchly persist in eviscerating meaningful Democratic involvement with selection, the latter party can seriously evaluate, and contemplate implementing, relatively dramatic actions. Continued presidential failure to meticulously consult home state politicians and chamber refusal to honor blue slips for appeals court nominees exemplify GOP proclivity to subvert and dilute longstanding, effective Senate customs. A more recent threat which Republicans activated was deployment of the nuclear option that modified post-cloture debates respecting district court nominees through acute reduction of the thirty hours currently available to two, thus eroding a salient convention.¹³³

One promising approach ironically derives from blue slips, even though Republicans have directly undermined their power regarding appellate court vacancies.¹³⁴ Individual Democrats might retain blue slips on nominees proposed for district court openings in their respective states, until the President submits nominees who could prove more acceptable to the senators.¹³⁵ The Democratic caucus also can pledge to return no slips on administration candidates proffered for home state district court vacancies pending Republican agreement to honor court of appeals slips.¹³⁶ The leverage derived from collective action regarding the many empty district court posts combined with the minuscule number of appellate court vacancies could persuade the GOP to acquiesce on circuits.¹³⁷

A solution related to the proposal that Democratic senators be more assertive with Trump respecting district court openings is the

133. See sources cited *supra* note 68.

134. I rely in this paragraph and below on the ideas of Christopher Kang, who spearheaded considerable Obama White House judicial selection. Jeremy Stahl, *Republicans Are Abolishing Judicial Appointments Norms Again*, SLATE (Feb. 22, 2019), <https://slate.com/news-and-politics/2019/02/trump-judicial-appointments-mcconnell-democrats-chris-kang.html>.

135. Kang finds that Democratic senators have been less assertive in championing their preferred candidates with Trump than Republicans were with Obama. *Id.* (cooperating has not proved effective).

136. *Id.*; see sources cited *supra* notes 21–22, 52 (the Republican Senate majority denied Supreme Court nominee Garland and four Obama circuit nominees any 2016 review and three appellate nominees final votes); *supra* note 132 (GOP rejection of proposal similar to the suggestion in the text).

137. Stahl, *supra* note 134; *Judicial Vacancies*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies> (last updated Jan. 8, 2020) (there is now one circuit vacancy and there may soon be none).

policy of agreeing to “trades.”¹³⁸ For example, the makeup of the California trial-level nominee package and multiple similar New York appellate court and district court packages suggests that the President and both sets of Democratic politicians recommended some nominees.¹³⁹ More particularly, Senator Feinstein characterized the district court nominees submitted as a relatively fair compromise, while Trump apparently proffered most New York appeals court selections and the politicians seemingly picked many district court nominees.¹⁴⁰ The four senators appeared to be relatively pleased with most district court nominees, and they returned all except one district court blue slip.¹⁴¹ Nonetheless, “horsetrading” jurists might have a negative connotation. For instance, the critical nature of life-tenured appointments could mean that they should not be the subject of deals like certain executive appointments or legislation. Moreover, Trump only renominated in early April 2019 many New York district court prospects who had secured hearings and committee reports in 2018, while he confirmed merely a single New York trial level nominee before December 2019 and the Senate has yet to confirm any California district court nominee, even as the President has appointed four extremely conservative Second and Ninth Circuit judges in New York and California respectively.¹⁴²

Analogous problems can suffuse the idea of “boycotting” panel hearings and committee votes or Senate debates and chamber ballots. For example, minority party legislators were absent from a hearing

138. See sources cited *supra* note 127; see also sources cited *supra* notes 135–37.
139. See sources cited *supra* note 42.

140. Press Release, Senate Comm. on the Judiciary, Feinstein, Harris on Ninth Circuit Nominees (Jan. 30, 2019), <https://www.judiciary.senate.gov/press/dem/releases/feinstein-harris-on-ninth-circuit-nominees>. Two New York Second Circuit appointees and four California Ninth Circuit appointees are extremely conservative and young, and the other two New York confirmees are George W. Bush district appointees who seem less conservative. *Mar. 7, 2019 Committee Meeting*, *supra* note 93 (using Judge Sullivan as example of consultation working). The New York Eastern and Southern District nominees as well as the California Central and Southern District nominees are more centrist than the New York Second, and the California Ninth, Circuit nominees.

141. Press Release, White House, Eight Nominations and Three Withdrawals Sent to the Senate (Sept. 19, 2019), <https://www.whitehouse.gov/presidential-actions/eight-nominations-three-withdrawals-sent-senate/>. (concerning the withdrawal of Northern District of New York nominee Thomas Marcelle purportedly because Sen. Gillibrand did not return her blue slip); Robert Gavin & Mike Goodwin, *Gillibrand Blocked Judge’s 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>.

142. For horsetrading, see Tobias, *supra* note 29, at 2260 n.126; sources cited *supra* note 127; see also sources cited *supra* note 42 (Trump delayed renomination). Thus, trades should be reserved for desperate circumstances.

which Grassley convened after the Senate had recessed in October 2018 for campaigning.¹⁴³ The attempts of particular Democratic senators and their caucus to assemble workable compromises were not effective because individual Republican legislators and their caucus appeared more concerned about capitalizing on the erosion of nearly all chamber traditions.¹⁴⁴ Therefore, although boycotting could illuminate and publicize the corrosive effects of the downward spiraling appointments process, which GOP Senate obstruction clearly propels, the adverse impacts of boycotting can surpass their benefits and prove counterproductive.¹⁴⁵ Accordingly, boycotts should be a last resort.

CONCLUSION

President Trump and the Republican Senate majority have not only continued but exacerbated the unproductive district court nominee selection and confirmation dynamics which propel the increasingly destructive judicial confirmation wars. Thus, the administration must cooperate with both parties' senators to end or ameliorate the vacancy crisis, which has restricted initiatives of federal district courts and judges to enhance case resolution, for the good of litigants, the bench, the President, the Senate and the country.

143. Grassley claimed that Feinstein agreed to the hearing which Democrats contended violated the rules. *October 24 Hearing*, *supra* note 54; *Executive Business Meeting Before the S. Comm. on the Judiciary*, 116th Cong. (Feb. 28, 2019), <https://www.judiciary.senate.gov/meetings/02/28/2019/executive-business-meeting> (Graham intimated that Democrats boycotted the meeting). Some committee rules and customs, such as holding over and voting on nominees, require minority participation.

144. Examples are the confirmations of appellate court nominees to vacancies in a substantial number of states, even though Democratic senators retained blue slips. *See* sources cited *supra* notes 30–32, 47–50; *see also* 165 CONG. REC. S1467 (daily ed. Feb. 26, 2019) (statements of Sen. Murray and Sen. McConnell) (confirming for the first time in a century a circuit nominee over two home state senators' opposition); sources cited *supra* notes 42, 140 (senators' avid opposition to three California Ninth Circuit nominees whom the Senate confirmed).

145. Kang admits that this is possible and that the Republican Senate majority could respond to it and the other dramatic ideas by eliminating blue slips, but he evinces little concern, because Democrats will benefit in the longer term. Stahl, *supra* note 134; *see* Colby Itkowitz, 'Shame': Democrats Slam Republicans Over Trump Judicial Nominee's Support for Overturning Obamacare, WASH. POST (Mar. 5, 2019) <https://www.washingtonpost.com/politics/2019/03/05/shame-democrats-slam-republicans-over-judicial-nominees-support-overturning-obamacare/>.