2020

Keep the Federal Courts Great

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KEEP THE FEDERAL COURTS GREAT

CARL TOBIAS*

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INTRODUCTION

Ever since Donald Trump began running for President, he has incessantly vowed to “make the federal judiciary great again” by deliberately seating conservative, young, and capable judicial nominees, a project which Republican senators and their leader, Mitch McConnell (R-KY), have decidedly embraced and now vigorously implement. The chief executive and McConnell now constantly remind the American people of their monumental success in nominating and confirming aspirants to the federal courts. The Senate has expeditiously and aggressively confirmed two very conservative, young, and competent Supreme Court Justices and fifty-three analogous circuit jurists, all of whom Trump nominated and vigorously supported throughout the confirmation process. The thirteen appeals courts across the United States currently face no vacancies among 179 appellate court positions, the fewest since President Ronald Reagan’s Administration.

However, these endeavors have imposed considerable expense on the federal courts, particularly at the district court level, and throughout the nation. For instance, the bench must confront sixty-five empty district posts in 677 positions, forty-one of which comprise “judicial emergencies.” President Trump and the Republican Senate majority depend substantially on numerous measures that undercut the nomination and confirmation processes and numbers of venerable rules and conventions—which contemporary executive branches and upper chambers have dutifully honored and which have clearly and consistently supported the appointment of well-qualified, mainstream jurists. Because the federal courts were actually great before Trump captured the presidency and Republicans captured a Senate majority and their conduct has subverted the judiciary and undermined public confidence in the tribunals, the government’s tripartite branches, and the rule of law, the numerous appointments initiatives of the chief executive and the Senate to supposedly enhance the courts deserve comprehensive assessment.

Part I briefly recounts the history of the judicial selection process. Part II scrutinizes how candidate Trump aggressively focused attention on the federal courts—especially the United States Supreme Court and the thirteen appellate courts—by promising their improvement to help win his election in 2016 and cultivate public support for his presidency and reelection this November as well as how practically all Republican senators supported Trump’s judicial selection initiatives. For example, candidate Trump insistenty pledged that his administration would certainly make the bench great again—even though the judiciary has perennially been the crown jewel of American democracy and the envy of the world—by consistently recommending numerous conservative appeals court nominees and collaborating with Republican senators to confirm those individuals. Indeed, this administration and the 115th and 116th Senates have shattered virtually all records for confirming young appellate court judges who possess extremely conservative ideological viewpoints, specifically on critical matters, including executive power, the modern administrative state, and the “culture wars,” such as voting rights, discrimination, and reproductive
freedom. These developments have occurred despite the neglect by the chief executive and the Senate of the multiplying trial court openings, the cascading emergency vacancies, and the plummeting confirmations of diverse nominees. The ramifications of Trump Administration and Republican Senate majority judicial selection are tellingly most palpable and deleterious in “blue” states, which Democratic senators represent.

The President also jettisons, changes, or dilutes efficacious rules and customs which had long facilitated modern judicial selection. For instance, the administration negligibly consults senators from states that do encounter vacancies, notwithstanding those politicians’ greater familiarity with accomplished counsel who practice in their jurisdictions. The White House as well completely eschews official American Bar Association (“ABA”) participation in selection while nominally considering myriad effective ABA investigations and candidate ratings, on which every President since Dwight Eisenhower, besides George W. Bush, had previously relied. President Trump concomitantly institutes little effort to identify, analyze, nominate, and confirm ethnic minorities or lesbian, gay, bisexual, transgender, or queer (“LGBTQ”) individuals, although enhanced diversity significantly improves the bench. Fully one third of his nominees have essentially compiled anti-LGBTQ records. Moreover, President Trump castigates jurists who invalidate his political endeavors as “so-called” and “Obama” judges, while he caustically accuses jurists of threatening national security with their opinions and insists that judges defer to professional expertise which Trump claims is lodged in the executive branch.

The Republican Senate majority, for its part, has eliminated court of appeals blue slips without convincing support for the dramatic alteration, which had permitted Republican senators from jurisdictions with appellate court openings to halt myriad nominees during the administration of President Barack Obama. Senate Judiciary Committee hearings now lack adequate rigor because the panel majority does not stringently canvass most bar association input before votes or encourage robust interrogation or discussion of nominees. Those changes allow most of the controversial nominees to attain party-line committee and confirmation ballots.

Part III reviews the implications of judicial selection actions which President Trump and the Republican Senate majority have undertaken. This Part concludes that the White House and the upper chamber have definitely created records for appointing conservative, young, well qualified appellate court jurists but continue to underemphasize district court and emergency vacancies as well as minority nominations and confirmations. President Trump and Senator McConnell correspondingly remind the public that they have appointed numerous exceptionally conservative, young, and capable judges and capitalize on these successes to further their political agendas. However, both the chief executive and the Majority Leader systematically disregard their failures to place jurists in substantial trial court and emergency openings and to confirm minority judges, particularly in blue states. This Republican inaction undermines
presidential discharge of constitutional responsibility to nominate and confirm jurists, senatorial fulfillment of constitutional responsibility to advise and consent, and satisfaction of the judiciary’s critical responsibility to expeditiously, inexpensively, and fairly decide voluminous caseloads. President Trump also continues railing at manifold jurists for dutifully overturning White House efforts to govern in ways that the chief executive believes will greatly improve his presidential reelection efforts. Those phenomena additionally politicize the federal courts and sharply undercut citizen respect for the presidency, the Senate, the judiciary, the nomination and confirmation processes, and the rule of law.

Because these factors can undermine the judicial selection procedures, Part IV posits numerous suggestions, which could rectify or ameliorate the substantial problems that Trump and the Republican Senate majority have created. The President and the Republican chamber need to revitalize true, dynamic “regular order.” This development could include efforts by President Trump and the Senate members to reinstate certain efficacious devices—namely, meticulous executive branch consultation of home state legislators respecting nominees, who might fill district court vacancies in their jurisdictions, and constructive ABA participation in selection—while comprehensively and cautiously refraining from activities that could distinctly eviscerate public regard for the branches of government and the selection processes. The chamber in turn must dutifully restore appellate court blue slips, thorough, rigorous committee hearings and discussions, and robust confirmation debates.

Republicans and Democrats should remember that 2020 comprises a presidential election year in which nominations and confirmations traditionally slow and can halt early in anticipation of a modified chamber and possibly a different chief executive. For instance, the GOP chamber members stopped President Obama’s efforts to appoint appellate court jurists following mid-June 2012, as Republican senators did not agree to conduct floor debates or confirmation votes. Four years later, the GOP majority neglected to approve a single court of appeals judge after January or any district court jurist following July 6. Because 2020 constitutes a presidential election year, it should be a propitious occasion for Republican and Democratic lawmakers to strongly consider the 2020 adoption of bipartisan courts, which become effective over 2021, as neither party will be certain which may capture the presidency and the chamber and, therefore, would capitalize on the reform. A bipartisan judiciary would allow the party that lacks White House control to submit a percentage of nominees in specific jurisdictions across the country. This action might be combined with legislation authorizing sixty-five new district court and five new appellate court positions, as recommended by the Judicial Conference of the United States and premised substantially on relatively conservative approximations of current case and work loads for federal appellate courts and district courts. Tethering bipartisan courts and myriad new slots would extend both parties incentives to cooperate; increase bench diversity vis-à-vis ethnicity,
Another constructive approach could be altering the filibuster, which has been integral to the “confirmation wars” that have affirmatively plagued the judicial selection process for decades. This may encompass restoring sixty votes, rather than a majority, for cloture, which Senator Lindsey Graham (R-SC), the attorney who currently chairs the active Senate Judiciary Committee, provocatively remarked that he would favor, were the Senate to dutifully reinstitute a sixty-vote threshold to invoke cloture regarding nominees during 2021. Closely related would be allowing filibusters only in “exceptional circumstances,” such as when nominees lack sufficient intelligence, ethics, independence, or judicial temperament to be excellent jurists, an idea that performed comparatively efficaciously in 2005.

If President Trump and the chamber eschew those suggestions to revive—and completely implement—distinctive regular order and establish federal court ideological balance again, Democrats can attempt to effectuate comparatively dramatic legitimate practices, which improve the White House nomination and Senate confirmation processes’ rigor while ensuring the appointment of highly qualified, moderate nominees. These might include Democratic Caucus retention of each district court blue slip, if (1) President Trump nominates candidates who lack sufficient qualifications, especially mainstream ideological perspectives and consummate ability, or (2) the Republican President and the GOP Senate majority neglect to restore appellate court slips, adequately consult more Democratic politicians from home states about vacant appellate court and district court positions, or closely examine their submissions for those openings or American Bar Association evaluations and ratings of individuals whom the White House nominates.

After this year, Republican and Democratic Senate and House members necessarily must seriously contemplate and carefully initiate promising, longer-term reforms of the judicial selection process. Permanent effectuation of a bipartisan judiciary and the institution of lasting filibuster change would be significant. If Democrats hope to extensively revitalize dynamic regular order and court of appeals ideological balance, they may need to directly recapture the White House and a majority in the chamber while capitalizing on numerous mechanisms—namely majority cloture ballots, two hours of post-cloture debate for trial level nominees, majority confirmation votes for judicial nominees, and a blue slip court of appeals exception—which the Republican chamber majority now deploys.

I. MODERN SELECTION PROBLEMS

The rise and development of the complications that plague modern federal judicial selection merit limited assessment in this Article. Other writers have
cogently surveyed the relevant history,1 and the present situation enjoys greatest pertinence. One salient concern has been the permanent vacancies dilemma, which results from expanded federal court jurisdiction, litigation, and judgehips.2 The second critical aspect, the current difficulty, is political and can be ascribed to contrasting presidential and Senate party control beginning around 1980.

A. Persistent Vacancies

Lawmakers significantly enlarged federal court jurisdiction throughout the 1960s,3 recognizing greater numbers of civil causes of action while criminalizing substantially more activity.4 These parameters consequently increased district court filings and concomitant appeals. Congress addressed the rising cases by enhancing the quantity of judicial slots.5 In the fifteen years ahead of 1995, confirmation periods mounted.6 For example, appeals court nominations devoured a year and confirmations needed three months, and both parameters significantly grew.7 Conditions worsened after this. For instance, circuit nominations required twenty months over 1997, the first year of President

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1 See generally, e.g., MILLER CTR. COMM’N ON THE SELECTION OF FED. JUDGES, IMPROVING THE PROCESS FOR APPOINTING FEDERAL JUDGES (1996) [hereinafter MILLER REPORT]; Gordon Bermant, Jeffrey A. Hennemuth & A. Fletcher Mangum, Judicial Vacancies: An Examination of the Problem and Possible Solutions, 14 MISS. C. L. REV. 319 (1994).

2 The persistent vacancies problem deserves considerably less assessment. Delay inheres in the nomination and confirmation processes and defies felicitous solution. Moreover, other writers have thoroughly assessed the concept. See Bermant, Hennemuth & Mangum, supra note 1; Comm. on Fed. Courts, Remedyng the Permanent Vacancy Problem in the Federal Judiciary: The Problem of Judicial Vacancies and its Causes, 42 REC. ASS’N BAR N.Y.C. 374 (1987).


7 See Bermant, Hennemuth & Mangum, supra note 1, at 323, 329-32 (contending that 1970-1992 appellate court vacancy rate was twice as high as before).
Bill Clinton’s second term, and 2001, the beginning year of President George W. Bush’s opening term.8

The multiple stages of the nomination and confirmation processes and the surfeit of participants make considerable delay inherent.9 Presidents meticulously consult legislators who represent states which experience vacancies, pursuing guidance about candidates. Some politicians employ merit selection panels that review applications, interview prospects and suggest preeminent submissions. The Federal Bureau of Investigation (“FBI”) does probing “background checks.” The American Bar Association has comprehensively evaluated and ranked candidates and nominees since the 1950s.10 The Department of Justice (“DOJ”) routinely helps the White House scrutinize candidates and thoroughly prepares individuals whom Presidents nominate for chamber analysis. The Senate Judiciary Committee assesses nominees, schedules hearings, discusses candidates, and votes; those individuals whom the panel reports may have floor debates when necessary before confirmation ballots.

B. The Contemporary Dilemma

Article II envisions that senators can moderate ill-advised White House choices and politicization of the appointments process, each of which have long attended federal judicial selection.11 However, partisanship substantially expanded in the wake of President Richard Nixon’s promises to reinstitute “law and order” throughout the United States and confirm plentiful “strict constructionists”12 for the federal bench as well as the profound fight which surrounded Judge Robert Bork’s Supreme Court nomination by President Reagan.13 Politicization soared, while divided government and the hope that the

9 See Bermant, Hennemuth & Mangum, supra note 1, at 321-22; Sheldon Goldman, Obama and the Federal Judiciary: Great Expectations but Will He Have a Dickens of a Time Living up to Them?, FORUM, Apr. 2019, at 9-12.
10 See generally AM. BAR ASS’N, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS (1988).
12 GOLDMAN, supra note 11, at 198; see also DAVID M. O’BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 20 (1988).
party lacking White House control might regain it and confirm judges fueled delay.

Rather slow nominations may explain judicial appointments’ chronic dearth. In early 1997 and 2001, Presidents Clinton and George W. Bush respectively made comparatively small numbers of appellate court suggestions and the opposition party criticized a number of nominees.14 Legislators who recommended aspirants to the White House concomitantly stalled the pace.15 President Bush’s minimal consultation slowed nomination,16 and the tardy Republican processing of President Clinton’s submissions appeared to drive paybacks.17 The Senate Judiciary Committee had some responsibility, as the panel slowly perused, convened hearings for, and voted on the manifold candidates.18 Over both 1997 and 2001, few jurists captured approval because of deficient resources conjoined with ideological opposition.19 Other pressing Senate business and the requirement of unanimous consent, which enables one member to halt appointments ballots, delayed numerous confirmation votes.20

15 Republican senators demanded that the Democratic President allow them to provide input, and some even proposed candidates. See Neil A. Lewis, Clinton Has a Chance to Shape the Courts, N.Y. TIMES, Feb. 9, 1997, at 30; see also 143 CONG. REC. 4,254 (1997) (statement of Sen. Biden).
18 See Carl Tobias, Choosing Federal Judges in the Second Clinton Administration, 24 HASTINGS CONST. L.Q. 741, 744 (1996) (documenting that panel convened one appellate court nominee hearing each month that Senate was in session); see also 143 CONG. REC. 4,254 (Mar. 19, 1997) (statement of Sen. Biden) (claiming that Democrats conducted two appellate court nomination hearings each month during 1987 to 1994).
In recent administrations, these phenomena became substantially worse. During President Obama’s tenure, Republican obstruction reached novel levels, a situation that was plainly demonstrated by the unprecedented rejection of D.C. Circuit Chief Judge Merrick Garland, President Obama’s distinguished Supreme Court nominee.21 Once Republicans assumed a chamber majority in 2015 and pledged to duly effectuate regular order again, they confirmed merely twenty Obama nominees, the fewest appellate and district court judges who received appointment since Harry Truman’s presidency, which left more than 100 open judgeships following President Trump’s inauguration.22 Given how the GOP treated Obama nominees, it was predictable that Democrats might appear uncollegial by, for example, seeking cloture and roll call ballots on practically all Trump submissions.

II. TRUMP ADMINISTRATION JUDICIAL SELECTION

A. Nomination Process

Throughout the presidential election campaign, candidate Trump strongly pledged to nominate and confirm young, accomplished, extremely ideologically conservative jurists. The chief executive honored these promises by securing the confirmations of Supreme Court Justices Neil Gorsuch and Brett Kavanaugh, as well as manifold analogous circuit, and comparatively few, similar district court nominees.23 President Trump broke appeals court records by marshaling twelve appointees his first year in office, nineteen confirmees the subsequent year, and


twenty more appointees in 2019, eclipsing nearly all modern Presidents’ nomination success.24

President Trump does invoke certain previously well-respected strictures and conventions, even as his administration frequently ignores, changes, or downplays additional effective rules and customs. For instance, President Trump, as every contemporary President, assigned chief appointments responsibilities to his first White House Counsel, Donald McGahn, accorded a number of closely related duties to the Department of Justice, granted much responsibility for trial level vacancies to home state lawmakers, and emphasized court of appeals vacancies.25

When proffering appellate court aspirants, the White House Counsel Office accentuates conservative perspectives and youth by, for example, deploying numerous ideologically conservative litmus tests and depending primarily on the “short list” of twenty-one potential Supreme Court prospects whom the Federalist Society and the Heritage Foundation compiled in 2016, as elaborated by a September 2020 list.26 These propositions still apply today because the

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Federalist Society’s Executive Vice President, Leonard Leo, continues to assist President Trump with judicial selection. No earlier President has vested such massive authority in a nongovernmental entity, although the political organization did also furnish President George W. Bush considerable assistance. President Trump clearly stresses the appeals courts—as they comprise tribunals of last resort for approximately ninety-nine percent of cases, articulate more policy than district courts, and issue opinions which cover several jurisdictions. Practically all of President Trump’s appellate court appointees have been extremely conservative, young, and impressive.

However, President Trump also rejects, ignores, or deemphasizes lengthy judicial selection rules and conventions. Assiduously consulting home state politicians—an efficacious custom, which virtually every modern


administration has employed and is a chief reason for blue slips—has not been widely practiced by the Trump White House Counsel. Blue slips permitted hearings when each home state politician directly returned slips in Obama’s presidency. Democratic senators alleged that McGahn engaged in limited or nominal active consultation regarding empty appeals court posts in their jurisdictions, while McGahn argued that consultation does not specifically appear in the text of the Constitution. Senator Tammy Baldwin (D-WI) accused President Trump and the White House Counsel of marshaling Wisconsin Seventh Circuit nominee Michael Brennan without the required number of affirmative votes from a bipartisan merit selection panel, which had vigorously examined, interviewed, and suggested excellent judicial prospects whom the home state senators correspondingly recommended to the White House throughout three decades. Senator Robert Casey (D-PA) diligently proposed several accomplished, mainstream Third Circuit candidates for White House analysis, but Casey asserted that the candidates whom he proffered received negligible consideration because the President had already mustered someone else, David Porter, to be the nominee. A related illustration of President Trump’s judicial selection measures was effectively provided by Senator John Kennedy (R-LA) who expressly contended during Louisiana Fifth Circuit nominee Kyle Duncan’s hearing that McGahn had basically told him whom the nominee would be.


Another crucial departure from longstanding precedent was the Trump Administration’s determination to exclude the American Bar Association from an official role in the judicial selection process. All Presidents in office following Dwight Eisenhower, except for George W. Bush, comprehensively incorporated ABA evaluations and ratings when nominating candidates. President Obama, for example, distinctly refrained from marshaling a single prospect whom the bar association had granted a not-qualified ranking. However, President Trump has mustered ten who received not-qualified votes from a majority of members who serve on the ABA Standing Committee on the Federal Judiciary, even as three of those appellate court nominees and four of the district court nominees rather smoothly captured appointment. McGahn purportedly was so critical of American Bar Association participation in the federal judicial selection process that the White House Counsel suggested nominees might forgo coordination with the organization’s investigative actions.


recent Presidents, depends on copious recommendations from home state politicians and bases many nominations on competence vis-à-vis ability to deftly resolve burgeoning criminal and civil caseloads.37 Numerous White House suggestions are prominent candidates who enjoy superb American Bar Association ratings.38 However, three individuals proposed for district court vacancies withdrew, and the ABA rated three more designees as not qualified because the candidates failed to provide comprehensive information or the selections’ administration review or hearing preparation lacked sufficient care. Furthermore, President Trump advised Senator Kennedy and his Republican colleagues to oppose all nominees whom they found lacked the requisite qualifications.39

The executive branch ignores or downplays substantial numbers of effective judicial selection mechanisms. The central predicament with President Trump’s district court submission activities is his administration’s consummate failure to prioritize the sixty-five district court vacancies, forty-one of which involve emergencies,40 in the haste to expeditiously appoint conservative, young, accomplished possibilities for all court of appeals openings. Illuminating is that emergencies significantly increased after Republicans captured a Senate majority.41 President Trump also proposes fewer nominees from jurisdictions


38 Western District of Texas Judge Walter Counts and Northern District of Texas Judge Karen Gren Scholer constitute excellent illustrations. See 115TH ABA RATINGS, supra note 34.


41 Judicial emergency vacancies increased from thirty-eight to seventy-three by the end of Trump’s first year in office. Compare Judicial Emergencies for January 2017, U.S. COURTS,
which are represented by Democratic senators, even though many of the states confront immense emergencies. Indeed, California and New York have encountered vacancies in as many as seventeen and sixteen circuit and district court positions respectively, all of which comprised emergencies in California. Nevertheless, the President neglected to send one candidate for twenty-three vacancies until May 2018 or a California appellate court or district court post before November of that year; the administration has yet to appoint a California district court judge, and the White House and the Republican Senate majority have appointed comparatively few jurists to the myriad New York district court openings.

Another constructive mechanism which President Trump and Republican senators have ignored or deemphasized has been improving minority judicial representation, in stark contrast to robust Democratic endeavors that substantially increase diversity. For example, this White House apparently


See Judicial Confirmations for January 2019, supra note 35; Judicial Confirmations for August 2020, supra note 35.

See, e.g., Stacy Hawkins, Trump’s Dangerous Judicial Legacy, 67 UCLA L. REV. DISCOURSE 20, 29-38 (2019); Carl Tobias, President Donald Trump’s War on Federal
instituted negligible effort to identify, evaluate, nominate, and confirm racially or ethnically diverse or LGBTQ prospects. The administration did not, for instance, recruit and assign diverse staff to appointments endeavors, encourage home state politicians to recommend substantial numbers of minority candidates, nor propose a single African American court of appeals nominee.47 Among President Trump’s nearly 250 appellate court and district court nominees, only Northern District of Illinois Judge Mary Rowland and Ninth Circuit Judge Patrick Bumatay identify as LGBTQ and merely thirty-eight are people of color.48

B. Confirmation Process

The confirmation process resembles the detrimental elements of the nomination system in many ways, principally by omitting, revamping, or eroding lengthy customs or by abrogating, changing, or diluting ideas which had performed well in the past. Helpful examples are selective revisions in (1) the 100-year-old practice for blue slips—which permit nominee committee hearings and Senate processing only when home state senators provide slips—and (2) committee hearings.

In the autumn of 2017, Senator Chuck Grassley (R-IA), who served as the Chair of the Senate Judiciary Committee from January 2015 to January 2019, declared that the panel majority would formulate an exception to the blue slip process for nominees who had the support of their home state senators. His reasoning was that the Senate Judiciary Committee had a duty to ensure that all nominees had the support of their home state senators, and that doing so would ensure that the nominees were qualified and胜任 the positions they were nominated for. This decision was met with criticism from some senators and advocacy groups, who argued that it would lead to a more politicized and less qualified judiciary. Despite this criticism, the panel majority continued to follow this approach, and it has been widely criticized as an example of the confirmation process being used to further political goals rather than the interests of justice.


47 See sources cited supra note 46. LGBTQ means openly disclosed sexual preference, which some nominees and confirmees may have not divulged. LGBTQ individuals are considered “minorities” throughout this piece.

policy for appeals court nominees. The Chair remarked that hearings would be conducted for appellate court nominees, even if they lacked slips retained by two home state members, particularly when those senators opposed the nominees for “political or ideological” reasons. This determination modified the blue slip notion that Republican and Democratic senators, including most compellingly Senator Grassley, comprehensively followed all eight years of President Obama’s administration, without providing substantial persuasive support for the significant change.

Practical application of the newly-created appellate court exception materialized with the committee’s provision of a January 2018 hearing for Wisconsin Seventh Circuit nominee Michael B. Brennan whom President Trump proffered, even though the White House Counsel had only minimally consulted home state Democratic Senator Baldwin and the nominee lacked the required votes of a bipartisan merit selection commission, which had successfully proposed strong, well qualified, and mainstream federal court candidates for thirty years. The situation was exacerbated, because Grassley negligibly supported placing in the Chair (himself) abundant discretion for concluding whether the executive branch had “adequately consulted” about the particular nominee. Grassley resolutely continued this approach by scheduling a committee hearing in May for Oregon Ninth Circuit possibility Ryan Bounds, although McGahn consulted minimally with Oregon Democratic


50 Senator Grassley followed that approach for appellate court selection when he was Chair of the Senate Judiciary Committee during the final half of Obama’s second term, as did Senator Patrick Leahy (D-VT) when he served as Chair during the initial six years of President Obama’s administration. See BARRY J. MCMILLON, CONGRESSIONAL RES. SERV., THE BLUE SLIP PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: FREQUENTLY ASKED QUESTIONS 4 (2017) [hereinafter BLUE SLIP REPORT], https://fas.org/sgp/crs/misc/R44975.pdf [https://perma.cc/JS7S-VMW9].


Senators Ron Wyden and Jeff Merkley and the nominee ostensibly withheld pertinent material from a bipartisan merit selection commission, which had canvassed applications, interviewed candidates and suggested exceptional prospects for numerous years.53

Grassley acknowledged that blue slips were meant to ensure that Presidents meaningfully consult home state politicians while strenuously protecting senators’ prerogatives regarding judicial selection and the profound interest of the electorate whom the legislators dutifully represent. The Iowa senator continued to honor slips for district picks, as has Senator Lindsey Graham (R-SC), when he succeeded Grassley as the Judiciary Committee Chair in January 2019.54 However, Republican senators had persistently invoked slips to exclude highly qualified, moderate court of appeals nominees whom President Obama recommended across his eight-year tenure, many because of political or ideological reasons—the identical criteria which Grassley explicitly deemed illegitimate.55

Both Chairs Grassley and Graham also changed or deemphasized efficacious rules and traditions which govern panel hearings. Crucial was Grassley’s arrangement of ten committee sessions in which two appellate court, and often four district court, nominees testified without the approval of the minority party. This radically contrasted to Democrats setting three analogous nominee committee hearings throughout the eight Obama years and then under peculiar

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55 See supra text accompanying note 49. A number of Republican senators declined to even offer reasons for retaining blue slips. See Tobias, supra note 53, at 899 n.89.
conditions and with specific Republican permission. Most troubling during Grassley’s tenure as Chair was a hearing which featured two controversial appellate court aspirants, four district court nominees, and the American Bar Association representative, who comprehensively and clearly explained the strenuously challenged not-qualified rating which the bar association had granted a Trump Eighth Circuit nominee. Indeed, the panel session was sufficiently packed that committee members lacked time for questioning any of the four district court prospects.

Many hearings appeared to be rushed, while the sessions lacked that degree of care which is appropriate for nominees who will enjoy life tenure to decide compelling questions when confirmed. With most nominees, the panel allotted committee members only five minutes when they presented questions. Certain nominees appeared to delay by reiterating multiple inquiries, while they deflected or evasively replied to queries which members posed. Illustrative were two Texas Fifth Circuit nominees, who testified in the aforementioned packed hearing, and several Texas district court selections. Another example was the unwillingness of plentiful nominees to testify whether, once confirmed, the nominees anticipated recusing themselves in cases which addressed matters that


57 Hearing on Nominations Before the S. Comm. on the Judiciary, 115th Cong. (Nov. 15, 2017) [hereinafter Nov. 15 Hearing]; see also Hearing on Nominations Before the S. Comm. on the Judiciary, 115th Cong. (Oct. 24, 2018) (conducting hearing for two Ninth Circuit nominees after Senate had recessed to campaign) [hereinafter Oct. 24 Hearing]; Hearing on Nominations Before the S. Comm. on the Judiciary, 115th Cong. (Aug. 1, 2018) [hereinafter Aug. 1 Hearing] (conducting hearing for New York Second Circuit nominee and six New York district nominees while Kavanaugh Supreme Court nomination was pending); Hearing on Nominations Before the S. Comm. on the Judiciary, 115th Cong. (Sept. 6, 2017) (conducting similarly-packed hearing).

58 The senators merely had time for nominee introductions. Nov. 15 Hearing, supra note 57; see also 163 CONG. REC. S8,022-24 (daily ed. Dec. 14, 2017) (statements of Sens. Feinstein & Leahy) (holding five appellate court nominee hearings over November, a month which included a one-week recess).


nominees had litigated or about which they had articulated clearly-held perspectives.61

The discussions before committee votes on most appellate court and district court nominees analogously lacked much valuable content and context. Senators neglected to probe issues. One departure from regular order was Grassley’s decision to hold committee votes without first receiving ABA evaluations and ratings, despite nonstop requests from Senator Dianne Feinstein (D-CA), the Ranking Member, to wait until after the ABA finished its work. The Chair vigorously stated that he would not allow this external political organization to dictate panel scheduling.62 It, therefore, was predictable that more controversial submissions would capture party-line ballots.63

After the committee mustered approval of nominees who came to the floor, similar—although somewhat less problematic—concerns frustrated meaningful nominee review. For example, Democrats asked for cloture and roll call votes regarding virtually all nominees, even capable, mainstream individuals who eventually earned smooth confirmations. Meaningful nominee review was also frustrated because the GOP possessed a narrow chamber majority and the release in 2013 of the “nuclear option” meant that nominees could win appointment on majority ballots.64 Egregious was pressing four appellate court nominees’ debates and chamber votes into less than a week following minimal prior notice.

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62 Aug. 1, 2018 Hearing, supra note 57 (holding hearing for two district court nominees who received no ABA ratings and four nominees who received ratings day of hearing); see also Michael Macagnone, DC Court Picks Face Senate Panel Ahead of ABA Report, LAW360 (June 28, 2017, 4:35 PM), https://www.law360.com/articles/939442/dc-court-picks-face-senate-panel-ahead-of-aba-report.


64 159 Cong. Rec. 17824-26 (2013) (employing “nuclear option”). In 2017, the Republican Senate majority margin was 51-49. It is now 53-47. When Trump nominates well qualified, mainstream individuals, substantial numbers of Democratic senators vote to confirm the nominees. For recent examples, see 166 Cong. Rec. D776 (daily ed. Sept. 10, 2020); id. at D769 (daily ed. Sept. 9, 2020); see also infra note 67 and accompanying text.
and even cramming six into one week after de minimis notice.\textsuperscript{65} The multiple nominees, their mammoth records, and the late notice left Democrats insufficient resources to dutifully prepare.\textsuperscript{66} More relevant in this examination was similar compression of district court nominee debates and ballots, particularly immediately before chamber recesses. For example, over both mid-December and late July 2019, thirteen nominees received confirmation, while, in October 2018, twelve won appointment following limited, and sometimes no, debate.\textsuperscript{67} These initiatives had effects that were rather comparable to appointing court of appeals jurists.\textsuperscript{68}

The impacts of debates convened ahead of confirmation ballots resembled the effects of committee aspirant discussions which preceded panel votes; some chamber floor debates were even relatively less informative than the committee exchanges.\textsuperscript{69} Senate Democrats required cloture ballots for practically all choices, while much of the thirty hours granted for debate after cloture addressed issues that lacked much, if any, relationship to specific candidates and, even when politicians discussed particular nominees, few members heard their colleagues’ statements. Republican senators apparently decided that the post-cloture rule which previously allowed thirty hours of chamber debate respecting trial level nominees was so inefficacious (or too effective for the minority’s
efforts to comprehensively evaluate nominees) that the GOP lawmakers drastically reduced the hours available to two.\textsuperscript{70}

The Republican chamber majority, analogously to President Trump, prioritized court of appeals over district court approvals, confirming nominees from jurisdictions with Republican senators, appointing conservative white males, and filling nonemergency openings.\textsuperscript{71} Those priorities helped President Trump shatter the record for appellate court jurists appointed in a presidential administration’s first year, but the concepts left more than twenty district court aspirants without confirmation and substantial empty lower court posts, many of which constituted emergencies, at the close of 2017. Comparatively few nominees realized appointment in jurisdictions that Democratic senators represent, only two minority nominees captured judgeships, and emergencies dynamically increased.\textsuperscript{72} The emphases deployed concomitantly allowed President Trump to establish the record for most appellate court judges appointed over an administration’s second year, but they inflicted problematic effects similar to the previous year on district court nominees at the conclusion of 2018. This meant that small numbers of choices received appointment in jurisdictions with Democratic politicians, President Trump and the Republican Senate majority confirmed few minority nominees, and emergencies remained substantial—trends that continued, and even worsened, across the President’s third and fourth years.\textsuperscript{73}

C. Explanations For Nomination and Confirmation Problems

It is difficult to identify the reasons why many concerns infuse the nomination and confirmation regimes because the chief executive and the Senate provide comparatively restricted information about nominations and confirmations.\textsuperscript{74}


\textsuperscript{71} See supra notes 22-29 and accompanying text.

\textsuperscript{72} See supra notes 40-48.


\textsuperscript{74} Privacy concerns, especially regarding candidates, may support limiting information. Tobias, supra note 21, at 1107. But see Doing What He Said He Would: President Donald Trump’s Transparent, Principled and Consistent Process for Choosing a Supreme Court Nominee, WHITE HOUSE (Jan. 31, 2017), https://www.whitehouse.gov/briefings-
However, specific explanations might be derived from recent nomination and confirmation practices.

A crucial reason for some predicaments with trial level nominees was that the Trump Administration stressed placing myriad conservatives in appellate court vacancies to the near exclusion of many other important considerations—namely district court appointments. President Trump expressly ordered the White House Counsel to afford court of appeals openings extraordinary significance. Both officials rely primarily on Federalist Society ideas, even if the President does not completely outsource selection to this exogenous political group.75

The White House also seems to underemphasize: (1) vacant trial court positions, conveying more responsibility for those nominations to home state politicians, (2) openings in jurisdictions with Democratic senators, (3) minority judicial representation, and (4) emergency vacancies in a substantial number of courts. This lack of attention is unwarranted because district jurists comprise the judiciary’s workhorses and definitively resolve plenty of cases, senator party affiliation should clearly not affect the distribution of court judicial resources and thus justice’s quality, minority jurists furnish numerous benefits, and emergency designations are only applied in the most troubling circumstances.76

The appellate court focus could also reveal why district court nominees often lack the requisite qualifications: the Department of Justice and the White House Counsel Office employed insufficiently rigorous examinations, probably devoted comparatively minuscule resources to nominee scrutiny, and decidedly ignored many American Bar Association candidate ratings prior—and even subsequent—to nominations.77

In fairness, the President confronted the start-up expenses of marshaling a nascent government after eight years of a Democratically-controlled presidency. President Trump had never served in the public sector or attempted to run for elective office. The chief executive also campaigned on a pledge to “drain the swamp” in Washington and radically disrupt customary politics, phenomena which President Trump’s unconventional management style and chaotic

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75 See supra notes 26-28 and accompanying text.
76 See supra notes 36, 39-42 and accompanying text; infra notes 90-93 and accompanying text; see also Wheeler, supra note 23.
77 For how emphasis on filling appellate court vacancies showed why some district nominees were weak, see supra note 40-41; see also supra note 34 (appellate court not qualified ratings). For Justice Department and Counsel deficiencies, see supra notes 34-35, 38, 62 and accompanying text.
administration infighting putatively exacerbated. President Trump apparently lacks understanding of the federal courts, separation of powers, the rule of law, and judicial selection, propositions illuminated by (1) his scathing criticisms of numerous jurists who authored rulings which complicated his political efforts and (2) the constant White House and Justice Department initiatives to nominate and confirm myriad judges who could dependably sustain presidential activities—notable examples were commencing substantial construction on border fences without congressional authorization and dismantling the modern administrative state.

The President’s castigation of jurists and courts as “Obama judges” became so incendiary and excessive that United States Supreme Court Chief Justice John Roberts directly responded by praising the jurists for their valiant service and famously proclaiming: the United States does “not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.” These propositions were magnified by the desperate necessity to fill the Supreme Court vacancy that resulted from Justice Antonin Scalia’s death and the 103 open circuit and district

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court posts upon President Trump’s inauguration, both of which Senator Mitch McConnell, the Senate Republican leader, orchestrated.81

Numerous analogous problems—mainly the seemingly critical need to promptly approve the maximum possible number of conservative appellate court jurists—explain the many concerns in the selection regime. At the committee level, the blue slip policy modification epitomizes those difficulties. In Senator Grassley’s haste to rapidly appoint numerous conservatives to appeals courts, he undercut this mechanism which had long operated efficaciously to protect home state legislators’ prerogatives in the selection process. He implemented an exception for court of appeals nominees by according the Judiciary Committee Chair much discretion to ascertain in case-by-case application of subjective criteria whether President Trump had adequately consulted politicians from home states.82 Grassley’s reasoning was unconvincing because only nominal precedent justified distinguishing circuit slips, even though Republican and Democratic officials, especially Grassley, concur that these vacancies are more compelling.83

Perhaps somewhat less troubling was the rushed scheduling of most panel hearings, discussions, and votes, which could similarly have been animated by the ostensible necessity to immediately process myriad conservative appellate court judges.84 Analogous concepts seemingly apply to Grassley’s failure to await ABA nominee ratings before committee ballots and to McConnell’s determination to stack confirmation votes for numerous appeals court and trial level prospects.85 However, Republican members’ utter failure to cast one 2017 panel ballot against a single court pick and more than one negative confirmation vote show the tactics surveyed in this paragraph are somewhat less problematic than Grassley’s blue slip concept and hurried chamber evaluation more generally.86

82 See supra notes 49-55 and accompanying text.
83 See supra note 54 and accompanying text; Exec. Meeting Feb. 2018, supra note 51 (statements of Sens. Crapo, Feinstein and Leahy). For the assignment of appellate court judgeships to states, see Tobias, supra note 56, at 2171-74; infra note 125 and accompanying text.
84 See supra text accompanying notes 55-63. Committee hearings, discussions, and votes certainly do warrant improvement.
85 See supra notes 62, 62-68. The panel needs ABA input before votes and the Senate needs less stacking of nominees.
86 Lockstep voting suggests that more effective selection practices may not significantly improve the appointments process or the vacancy crisis. See supra note 63 (no negative Republican panel vote); 163 CONG. REC. S7,351 (daily ed. Nov. 28, 2017) (one negative Republican vote).
III. CONSEQUENCES

The nomination and confirmation processes’ descriptive assessment reveals that the practices which President Trump and the Senate employ have deleterious ramifications. Cogent metrics are the lack of a single appeals court opening and the sixty-five district court vacancies, forty-one of which involve emergencies. Many of the district court vacancies emanate from jurisdictions that Democrats mainly represent and show a problematic dearth of minority confirmees and nominees. Upon the President’s inauguration, there were 103 appellate court and district court openings, forty-two implicating emergencies, numbers that continued to grow even while active judges’ inclination to leave active status narrows.

The substantial vacancies, excessive percentages consisting of emergencies and clustered in districts and jurisdictions represented by Democrats, together with their prolonged character and constricted minority representation, have numbers of specific adverse effects. The figures increase pressures imposed upon numerous trial court jurists—the only judges whom many federal court litigants encounter—in their efforts to swiftly, inexpensively, and equitably resolve civil and criminal suits. District court jurists are the justice system’s workhorses, resolving most civil lawsuits and criminal dockets, while criminal prosecutions realize precedence under the Speedy Trial Act. Numerous protracted unfilled slots frustrate minority party home state politicians who can receive blame for the lengthy vacancies, while they also deprive the electorate and litigants of court judicial resources which they need and senators of political patronage.

Salient parameters—including the sixty-five trial level open positions, forty-one of which comprise emergencies, and comparatively few minority appointees, numbers of whom could make astute contributions—accentuate the

87 See supra notes 41-48 and accompanying text.
89 FED. R. CIV. P. 1; see generally Patrick Johnston, Problems in Raising Prayers to the Level of Rules: The Example of Federal Rule of Civil Procedure 1, 75 B.U. L. REV. 1325 (1995) (describing the deployment and history of rule one of the Federal Rules of Civil Procedure and the provision’s admonition regarding expeditious, inexpensive and fair dispute resolution).
crucial necessity to place significantly more judges who are diverse in empty slots. President Trump’s neglect of minority representation has numerous problematic impacts. The federal courts are one important locus of the justice system where individuals of color, especially Black, Latinx, and Indigenous people, can be overrepresented in the criminal justice system and experience limited representation on the bench. The Trump Administration’s minimal attention to enhancing diversity has been a lost opportunity for improving the quality of justice for litigants, numbers of whom can appear before federal jurists more often.

Greater minority representation furnishes numerous substantive and procedural benefits. Many persons of color, women, and LGBTQ jurists clearly supply efficacious “outsider” perspectives and different, constructive views about numbers of critical issues related to abortion, criminal procedure, and other daunting questions that federal courts address.91 With different perspectives, these judges constrict or ameliorate racial, ethnic, gender, and sexual orientation prejudices that undermine justice.92 Jurists who mirror the country’s diverse populace increase citizen respect for the bench by showing that many people of color, women, and LGBTQ people do serve professionally as judges, while these more representative jurists could better appreciate the conditions which prompt minorities to appear before federal courts in disproportionate numbers.93

Excuses for not treating diversity seriously, which arguably may have once possessed a semblance of plausibility, are unpersuasive now. For instance, President Trump’s conferees encompassed many conservative, young, and superb persons of color and women. Judge Bumatay, Judge Rodriguez, and Judge Smith decidedly rebut the condescending notions that appointing minority, female, and LGBTQ jurists will compromise merit, as the pool is small or the country lacks adequate conservative aspirants.94 Numerous people of


92 See, e.g., FINAL REPORT OF THE NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS & ETHNIC FAIRNESS 8-17 (1997).


94 See supra notes 47-48. President Trump confirmed many accomplished, conservative women, including Seventh Circuit Judge Amy Coney Barrett and Sixth Circuit Judge Joan
color, women and LGBTQ individuals nominated and confirmed to date show that President Trump has nominated and confirmed plentiful candidates who offer conservative viewpoints and merit. He need only capitalize on this salient potential.

The administration’s limited consultation with home state politicians, de minimis transparency and rigor when considering suggestions for nominees, exclusion of American Bar Association inquiries, dependence on restricted or inefficacious measures, and the practice of swift confirmations for appellate jurists impede presidential discharge of the constitutional responsibility to nominate and confirm accomplished, independent and effective judges for the myriad openings, particularly in the district courts. Senate proclivity to rapidly confirm jurists—especially through altering blue slips, eschewing rigorous investigations during panel hearings, and rubberstamping White House candidates—erodes senators’ meticulous fulfillment of their constitutional responsibilities to advise and consent.

The substantial quantity of openings and vacancies’ prolonged nature, specifically in the federal district courts, might impair the realization of the preeminent responsibility for speedily, inexpensively, and equitably deciding cases by imposing enormous pressure on jurists and slowing the resolution of lawsuits. When the appellate, and peculiarly the district, courts lack sufficient judicial resources necessary to provide justice, this state of affairs can have detrimental consequences. Incessant, explicit overemphasis on ideology when appointing judges makes the courts resemble the President or Congress. Moreover, jurists who secure nomination and confirmation through overtly partisan and supremely politicized selection procedures seem exceedingly partisan and strikingly political, which undercuts public confidence in the federal judiciary.95


The evisceration and diminution of traditions, particularly White House consultation of senators and blue slips, can make the presidency, the Congress, and even the judiciary appear to be in critical decline, as these customs are essentially the “glue” that binds institutions.\textsuperscript{96} Finally, problems could erode public regard for, and trust in, the coequal branches, which embody American democracy.

In sum, President Trump has realized considerable success when nominating appellate court and district court jurists, and this administration has established a record for confirming appeals court jurists, many of whom are extremely conservative, young, and competent. Nonetheless, the Trump White House has abolished, changed, or downplayed valuable mechanisms that in the past promoted a very effective judicial nomination and confirmation process. Moreover, the nation and the courts possess sixty-five trial level vacancies, forty-one involving emergencies. Therefore, the final Part assesses measures which can increase confirmations, especially for the district courts, and maintain the judiciary’s legitimacy.

IV. SUGGESTIONS FOR THE FUTURE

The above evaluation demonstrates that the recent federal court nomination and confirmation processes implemented by the President and the Republican Senate majority discombobulate numerous established appointments strictures and conventions and maintenance of ideological balance in the courts of appeals. President Trump and the Grand Old Party Senate majority need to revive dynamic regular order. The assessment concomitantly demonstrates that a few ideas which President Trump has employed performed comparatively well and ought to continue, but some practices were inefficacious and could require deletion or modification; further other notions that his administration jettisoned merit reinstitution. Thus, this segment proffers a number of devices which may help remedy or ameliorate the confirmation wars, specifically during the 2020 presidential election year and subsequently by improving the nomination and confirmation procedures.

A. Near-Term Suggestions

When restoring distinctive regular order, the Trump Administration might capitalize on numerous solutions that have long proved effective, some of which the President has already applied. One construct is elevating (1) accomplished, centrist magistrate judges whom the Article III jurists in the ninety-four districts cautiously appoint for eight-year terms, (2) rigorous conservative, and moderate,

state court judges, and (3) talented, consensus district jurists to federal appellate courts. This mechanism is pragmatic, as the selections have compiled easily available, complete records and provide significant pertinent experience.\footnote{28 U.S.C. § 631 (2018). For elevating district court judges whom the Senate has already confirmed once, see Elisha Carol 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, 479-80 (2006); Tobias, supra note 53, at 910-11.}

Valuable illustrations comprise Northern District of Texas Judge Gren Scholer and Southern District of Alabama Judge Moorer, whom President Trump elevated to district courts.\footnote{Gren Scholer had been a Texas state court judge, and Moorer was an Alabama federal magistrate judge. See sources cited supra notes 34, 48. Trump concomitantly elevated Justice Alison Eid from the Colorado Supreme Court and Justice Britt Grant from the Georgia Supreme Court to the Tenth and Eleventh Circuits and Judge Danielle Hunsaker from the Oregon state trial court and then-Magistrate Judge Bridget Shelton Bade from the U.S. District Court for the District of Arizona to the Ninth Circuit. Judicial Confirmations for January 2019, supra note 35.}

Another practical notion would be renominating a few of the twenty capable, moderate, and conservative, Obama district court nominees who in 2016 earned committee approval yet lacked confirmation votes.\footnote{The Senate did not confirm President Obama’s district nominees because the Republican majority steadfastly refused to schedule confirmation votes. Carl Tobias, Recalibrating Judicial Renominations in the Trump Administration, 74 WASH. & LEE L. REV. ONLINE 9, 18-19 (2017).} This suggestion promotes comparatively swift appointment because most renamed nominees must only capture committee and confirmation ballots.\footnote{Most home state senators will return blue slips, as they already did once. See id. For those nominees who need another hearing, their prior panel, FBI, and ABA reviews will only require updating.} President Trump has already deployed renomination with fifteen Obama nominees, including Western District of Texas Judge Walter Counts and Eastern District of New York Judge Gary Richard Brown. Many of the nominees have secured confirmation, but others whom President Obama also designated, including Inga Bernstein, Julien Neals and Florence Pan, can expand minority representation and fill numerous lengthy district court openings.\footnote{Other examples of Obama nominees whom the Senate confirmed under President Trump are District of Idaho Judge David Nye, Western District of Oklahoma Judge Scott Palk, and District of South Carolina Judge Donald Coggins. See id at 21-22 (documenting twenty-eight other Obama 2016 nominees, including recently confirmed Eastern District of New York Judge Diane Gujarati, who lacked committee approval, whom Trump may rename); Judicial Confirmations for January 2019, supra note 35; Judicial Confirmations for August 2020, supra note 35.}

President Trump also may contemplate instituting, stressing, revitalizing, or enhancing a number of productive actions that he has either ignored or diluted. One would be to meaningfully consult home state senators about potential
nominees, which constitutes a major purpose for blue slips. Assiduous White House cultivation of politicians, especially those who rely on astute selection panels to submit competent individuals, expedites nominations and confirmations. An illuminating example was mustering the nomination of three excellent, mainstream Northern District of Illinois picks whom both home state senators powerfully favored and the committee smoothly reported. Therefore, effective consultation will not invariably yield the strongest Republican or Democratic preferences, but it might speed nominations and confirmations and perhaps resolve disputes that have eroded the process and interparty cooperation.

The administration should concomitantly reevaluate its decision to overemphasize the confirmation of conservative appeals court jurists, which now constitutes the principal reason for the sixty-five district court openings, forty-one of which comprise emergencies. The administration should comprehensively analyze plentiful concepts that will effectively reduce the surplus of district court vacancies, many constituting emergencies. For instance, the appointments team might employ a regime which concentrates on the needs of all courts. One helpful alternative may be prioritizing the nomination of people who could offer relief to the forty-one emergencies. The team could emphasize the substantial openings in districts and the courts with rather large percentages of vacant seats, mainly districts in California and New York. Stressing those jurisdictions and certain others—especially Illinois, Massachusetts, New Jersey, and Washington courts—would ameliorate the lack

102 See supra notes 29-32 and accompanying text.
103 For the comparatively smooth approval of Judge Rowland, Judge Pacold, and Judge Seeger, see Carl Tobias, Filling the Illinois Federal District Court Vacancies, 47 PEPP. L. REV. 115, 119-21 (2019); see also Fifteen Nominations and Two Withdrawals Sent to the Senate, WHITE HOUSE (Feb. 12, 2020), https://www.whitehouse.gov/presidential-actions/fifteen-nominations-two-withdrawals-sent-to-the-senate/#:~:text=NOMINATIONS%20SENT%20TO%20THE%20SENATE,Julia%20Clark%20term%20expired. [https://perma.cc/2NMK-L237] (nominating three more similar nominees to fill all Illinois vacancies). But see Judicial Confirmations for January 2019, supra note 35; Judicial Confirmations for August 2020, supra note 35 (showing on May 21, 2019, President Trump only sent the Senate the three Illinois nominees whom the committee later approved, in addition to seven New York and four Obama nominees, even though President Trump had renamed fifty others whose nominations expired on January 2, 2019, in that month).
104 See Kaplan, supra note 29 (similar Ohio and Washington disputes); supra notes 30-31, 52-53 and accompanying text (showcasing Oregon and Wisconsin disputes with White House Counsel); sources cited supra note 32 (California and New York disputes).
105 See sources cited supra notes 40-45, 74.
106 See sources cited supra notes 32, 43-45.
of nominees from jurisdictions represented by Democrats. President Trump
can do this by providing home state officials with greater responsibility for
detecting, recruiting, and proposing numerous superb candidates whom the
President can then nominate.

The White House should correspondingly reassess its mistaken choice to
directly exclude the American Bar Association from the official responsibility
for performing candidate and nominee inquiries and delivering rankings,
because Presidents since the 1950s, except President George W. Bush and
Trump, have clearly depended upon the ABA’s massive network of incisive
evaluators, impressive expertise, and careful, instructive ratings. Moreover,
deployment of ABA examinations and rankings during candidate pre-
nomination investigations might restrict the embarrassment suffered by
President Trump’s choices whom the ABA assigns not qualified ratings. The
eventual confirmation of most people who drew this not qualified ranking
indicates that the American Bar Association does efficaciously alert selection
participants to ostensible concerns about nominees, even if the Senate ultimately
confirms the nominees. Should the President insist on forgoing official ABA
recommendations, White House Counsel may at least permit some candidates
and nominees to collaborate with the ABA in the entity’s meticulous evaluation
of choices as the American Bar Association prepares its cogent ratings.

Furthermore, the administration needs to implement efforts that will increase
federal appellate court and district court diversity because expanded minority
representation furnishes a number of advantages. The White House should
elevate the importance of diversity while communicating to selection
participants and citizens that President Trump believes greater minority
representation has ample importance. The White House Counsel should lead this
endeavor by actively conveying that diversity’s accentuation deserves priority
similar to conservatism.

107 Illinois, which President Trump recently emphasized, experiences four, Washington
five, and New Jersey six openings. Current Judicial Vacancies, supra note 73. In the latter
two jurisdictions, all of the vacancies are emergencies. See Judicial Emergencies, supra note
73. States, such as Montana and Alaska, which have few judgeships, also merit emphasis, as
one vacancy can be a large percentage. See 28 U.S.C. § 133 (2018).

108 Trump has seemingly deferred to a substantial number of home state senators’
recommendations for candidates who can fill district vacancies. See supra notes 37-38, 103
and accompanying text.

109 See supra note 33 and accompanying text. But see supra note 34.

110 See supra note 38-39. The President may decline to nominate or the candidate might
choose to privately withdraw.

111 See supra note 34-35 (showing numerous appointments despite American Bar
Association recommendations).

112 See supra note 35. But see supra note 34.

113 See supra notes 89-93 and accompanying text.
The White House Counsel ought to articulate thorough recommendations to further supplement diversity. For example, Counsel Office personnel and others who recruit candidates need to include minority staff while committing adequate resources to enlarging diversity. Participants in nominations must seek out, pinpoint, examine, and tender numerous strong people of color, women, and LGBTQ jurist submissions by contacting racial and ethnic minority, women’s, and LGBTQ political interest and bar groups—encompassing the Federalist Society—that know of strong prospects. The Counsel should persuade senators from jurisdictions which have open positions to search for and proffer talented, conservative minorities. The senators must then scrutinize, interview, and propose these candidates, asking that President Trump seriously evaluate the possibility of naming those individuals. The President might lead by example with prospects’ consequent nominations, persuading senators to powerfully support and promptly canvass future aspirants.

The Republican Senate majority, for the chamber’s part, needs to closely examine many initiatives that would allow the chamber to revive the desirable previous regular order by dutifully reinstituting proven solutions. One distinct possibility is reimplementing appellate court blue slips, as the system effectively protects home state politicians’ salient prerogatives concerning which judges will serve their jurisdictions, while the appeals court exception which Grassley created lacks persuasive support. Another possibility is restoring enhanced rigor to the confirmation process generally and Senate Judiciary Committee actions specifically. For example, the panel should deftly promote systematic, less hurried nominee perusal, which could include robust American Bar Association candidate and nominee investigation together with comprehensive evaluation of bar association input. The panel should also rigorously question nominees during committee hearings and robustly discuss them before votes. Finally, the chamber must engage in rigorous, thoroughgoing debates prior to confirmation ballots.

B. Longer-Term Suggestions

This evaluation shows that the confirmation wars that preceded President Trump’s election have persisted and rampantly worsened since his presidential inauguration, exemplified by Democrats’ rare concurrence on most confirmation votes and Republican detonation of the nuclear option for Supreme Court and district court aspirants.\(^{114}\) Multiple phenomena reveal that 2020 is an ideal time for completely surveying, and thoroughly introducing, activities which directly rectify or temper the ongoing confirmations wars. These include: the incredibly

small number of appointments during President Obama’s last two years, the processes’ counterproductive downward spiral manifested by striking partisanship that culminated with Republican refusal to vote on Judge Garland, the stunningly limited collaboration between the parties so early in President Trump’s administration, and the seemingly declining prospects for remedying the confirmation process’s many difficulties. The President’s omission, revision, or dilution of appointments strictures and traditions which had previously operated rather effectively has significantly accelerated the procedures’ steady deterioration.

The presidential and Senate elections in November 2020 make this year propitious. One compelling reason for this season’s promise is the salient tradition, variously described as the Thurmond or Leahy Rule by the respective parties, which clearly states that the nomination and confirmation processes inexorably slow and ultimately halt early in presidential election years. The principal support for this convention is dutifully honoring the will of the people expressed in the November presidential and Senate elections. The most notorious instances of this concept’s perversion were the Republican Senate majority’s unprecedented peremptory refusal to even consider Supreme Court nominee Garland in 2016 and confirmation of only two appellate court and eighteen district court nominees in President Obama’s last half term. This Republican obstruction sharply contrasts to the Democratic Senate majority’s confirmation of ten appellate court, and fifty-eight trial court, judges in President Bush’s final two years. The rule’s asymmetrical deployment by Republicans has made the rule increasingly controversial, although excessive Republican capitalization on the idea to severely undercut the Democratic Party suggests

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that fairness would necessitate the rule’s vigorous enforcement during this year.\textsuperscript{117}

Another major reason why 2020 is appropriate for adoption of constructive reforms is that the Republican and Democratic parties lack considerable clarity about who will capture the White House and the Senate come November and, consequently, who will directly benefit from the modifications. Thus, this year could essentially be replete with uncertainties and opportunities for compromise. Accordingly, 2020 can be a very auspicious occasion for prescribing longer-term remedies.\textsuperscript{118} The best time for legislating the solutions is before the 2020 elections, because little clarity about the presidential and Senate outcomes can encourage Republicans and Democrats to concur.

The President and Congress may agree to change the existing appointments system through invocation of a bipartisan judiciary that would allow the party without executive control to recommend a significant percentage of nominees.\textsuperscript{119} Senators from multiple states have implemented relatively analogous endeavors over various periods. New York senators apparently formulated the first modern construct that permitted the senator whose party did not occupy the White House to send one in a few district court prospects; this measure operated efficaciously beginning in the 1970s.\textsuperscript{120} Pennsylvania affords a comparatively modern illustration. Senators Casey (D-PA) and Patrick Toomey (R-PA) rely on numerous merit selection commissions across the commonwealth which have professionally canvassed and suggested picks since 2011.\textsuperscript{121} The legislator whose party does not enjoy the presidency might submit

\textsuperscript{117} Appellate court selection’s accelerated pace, which undercut the nomination and confirmation regimes’ rigor and permitted approval of some judges who lacked the traditionally required qualifications, makes honoring the rule more critical in 2020. This proposition could suggest halting the nomination and confirmation processes significantly earlier than usual. The custom should be codified in a rule or statute. Tobias, supra note 115, at 2008-10.

\textsuperscript{118} For numerous longer-term concepts that may remedy or ameliorate the confirmation wars, see Michael L. 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.


\textsuperscript{120} The New York senators initially allowed one of four and most recently one of three nominees under Senators Alfonse D’Amato (R-NY) and Daniel Patrick Moynihan (D-NY). 143 Cong. Rec. 4,253 (1997) (statement of Sen. Biden); see also Stephan O. Kline, The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott, 103 Dick. L. Rev. 247, 297-99 (1999).

one in four trial court nominees. Lawyers from quite a few other jurisdictions, encompassing California, Illinois and Washington, have effectuated rather similar approaches.

Varying procedures control in the fifty states and would comprise matters for discussion among the jurisdictions’ legislators and between them and the President. The percentage of nominees whom the party that does not control the White House may submit should be of particular importance. In split delegations, important factors may be whether the Republican or Democratic senator and the executive will initially rank candidates and what critical differences there are between the lawmakers and the President. A salutary option could be permitting the senators to agree while forwarding one candidate at a time until the executive concurs, as these ideas embody contemporary practice and constitutional phraseology.

A number of tribunals, especially the U.S. District Court for the District of Columbia, may require omission, as the District of Columbia lacks senators and the White House traditionally heads this nomination process. Because court of appeals vacancies rarely occur and the courts include a few states, the bipartisan judiciary apparently works most effectively for tribunals with numerous states. Nevertheless, perceptions that seating jurists is quite politicized, complex, and crucial—because appellate court opinions enunciate substantially more policy and have greater importance—suggest that excluding


123 Tobias, supra note 53, at 916.

124 See sources cited supra note 119.

125 The regimes which most senators apply today allow opposition members to send one in three or four. In 2020 specifically, states which two Democrats or two Republicans represent suggest candidates according to their party, and in states with split delegations, the Democrat should pick. Thus, all legislators must cooperate with each other and then the President.

126 See infra note 133. The officers also should send a few picks, rank them to increase flexibility, and hasten selection by obviating the need to start over when the President and senators differ.

127 Those courts which have a bipartisan judiciary may be issues for negotiation or could be left to the party lacking the presidency.

128 Even the Ninth Circuit, which is the largest appellate court, has openings every two decades in Alaska, Hawaii, Idaho, and Montana. Each appellate court’s states must have at least one active judge. 28 U.S.C. § 44(c) (2018).
the current appellate court selection process from the bipartisan judiciary construct would be appropriate.

Congress ought to astutely buttress the bipartisan judiciary with legislation that provides sixty-five new trial level and merely five court of appeals posts.129 This suggestion would embody Judicial Conference recommendations for the Senate and House, recommendations which the federal courts’ policymaking arm derives from conservative estimates involving judicial work and case loads.130 These mechanisms would take effect over 2021, thereby granting neither party advantages when instituted while circumscribing their ability to game the system.131

Combining a bipartisan judiciary and seventy additional appellate court and district court positions can furnish numerous salient benefits. This suggestion might halt or stall the nomination and confirmation process’s downward spiral while affording (1) each party incentives to coordinate, (2) jurists who are relatively diverse in terms of experience, ideology, ethnicity, gender, and sexual preference as members of the federal judiciary, and (3) district courts necessary judicial resources. Marshaling 2020 congressional adoption with implementation during 2021 will limit each party’s opportunity to realize unfair advantages, but this concept’s institution would require significant care. For example, Joe Biden, when serving as a senator, plainly disparaged a rather similar proposition because the idea was unconventional and the Constitution specifically provides that the President nominates with the advice and consent of the Senate.132 Biden’s criticism also describes the unprecedented

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129 JUDICIAL CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 26-27 (March 2019). Of course, should the selection process not improve, more judgeships will not improve the process or alleviate the vacancy crisis.

130 Id. For the most recent proposed comprehensive judgeships legislation, see S. 1385, 113th Cong. (2013).

131 Senator Graham has championed analogous propositions ever since he became the Judiciary Committee Chair in January 2019. See, e.g., Exec. Bus. Meeting of the S. Comm. on the Judiciary, 116th Cong. (Nov. 21, 2019); see also Hearing on the Judicial Conference Recommendations for More Judgeships Before the S. Comm. on the Judiciary, 116th Cong. (June 30, 2020); Andrew Kragie, Sens. Moving Forward On Bill With 65 New Fed. Judgeships, LAW360 (July 20, 2020), https://www.law360.com/articles/1293706/sens-moving-forward-on-bill-with-65-new-fed-judgeships. When the political parties concur before elections, it is considerably more difficult for Republicans and Democrats to game the system. Presidential election years are most felicitous, as the President can be on the ballot and may want to appear cooperative.

132 Senator Biden was invoking “trades” which Republican senators proposed to President Clinton. 143 CONG. REC. 4,253 (1997) (statement of Sen. Biden). President Obama and Georgia Republican senators Saxby Chamblis and Johnny Isakson used trades when they could not agree on nominees. Daniel Malloy, The Delegation Georgians in D.C., ATLANTA J.-CONST., May 3, 2015, at 13A.
confirmation wars that have paralyzed appointments since 2009, so a bipartisan judiciary which honors the Constitution might appeal to Democrats and Republicans.\textsuperscript{133} Initiating this solution seems relatively complicated, but lawmakers may comparatively easily remedy or temper a number of potential concerns.\textsuperscript{134}

A related concept would be modifying the filibuster which has been integral to the neverending confirmation wars. The filibuster has traditionally protected the Senate minority, even though recent abuses show the measure could warrant refinement.\textsuperscript{135} For example, senators may want to reserve the filibuster’s application for nominees who lack the intelligence, ethics, temperament, diligence, or independence to be exceptional federal jurists. This purpose would be secured through allowing filibusters only in “extraordinary circumstances,” a precept that applied rather well in 2005.\textsuperscript{136} These actions might concomitantly foster the reinstatement of sixty votes for cloture, a development that would reverse the nuclear option’s 2013 detonation and perhaps spark enhanced party cooperation.\textsuperscript{137}

\textsuperscript{133} The confirmation wars may politicize selection or provide the victors the spoils. Even though the confirmation wars may enhance selection for a particular political party, the confirmation wars must end and litigant needs should be critical. See Josh Chafetz, \textit{Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past}, 131 Harv. L. Rev. 96, 96-110 (2017); Michael J. Gerhardt, \textit{Practice Makes Precedent}, 131 Harv. L. Rev. F. 32, 44-47 (2017).

\textsuperscript{134} Congress has effectively remedied more complex issues, notably how to address substantial, increasingly complex dockets with limited resources by approving new judgeships. However, Congress adopted the last comprehensive judgeship statute in 1990. See Federal Judgeship Act of 1990, Pub. L. No. 101-650, 104 Stat. 5098. The ideas above treat many issues that a bipartisan judiciary may raise. For more specific suggestions respecting bipartisan courts, see Tobias, supra note 1159, at 2055-59.

\textsuperscript{135} Filibuster abuse promoted the nuclear option’s invocation, which confined filibusters by requiring a majority vote for cloture. The Republican Senate majority’s 2015-2016 denial of floor votes to myriad Obama nominees was abusive, as has been the Democratic Senate minority’s 2017-2020 automatic denial of unanimous consent, which consumed hours of floor debate time. See sources cited supra notes 21, 62, 67.


\textsuperscript{137} Republicans control the Senate, so they might reject the proposition; however, filibuster change may be one aspect of a larger solution. \textit{But see} Everett & Levine, supra note 70 (stating that Schumer suggested the proposal of shortened debates for district nominees, if the GOP would honor appellate court blue slips but Republicans rejected this). Republicans will not always be the majority and could agree to this trade. A useful 2007-08 custom was final votes on strong, centrist district nominees at recesses. Tobias, supra note 116, at 32; see sources cited supra note 67 (showing similar 2018-19 notion). The Senate may use other customs to restore regular order.
C. More Dramatic Suggestions

If the suggestions to revitalize the distinctive, traditional, regular order and improve balance vis-à-vis federal court ideology prove unworkable because President Trump and the Senate eschew them or persist in eroding meaningful Democratic involvement with selection, the Democrats could seriously contemplate implementing comparatively dramatic steps to expand the rigor of the presidential nomination and the Senate confirmation processes to duly insure that many excellent, centrist nominees secure appointment. Continued presidential failure to consult home state politicians and the Senate Republican majority’s lack of respect for appellate court blue slips trenchantly epitomize the GOP’s propensity to subvert and dilute long established strictures and customs. The Senate majority recently activated the nuclear option, with its explosion modifying post-cloture debates regarding district nominees by reducing the thirty hours of debate to merely two—thus eviscerating a longstanding convention.138

Blue slips ironically furnish another potential approach, even though the Republican Senate majority has clearly diminished their force when applied to appeals court openings.139 Individual Democrats still retain the ability to not return blue slips on nominees proffered for most trial level vacancies in their jurisdictions, until the President taps nominees whom the senators consider more acceptable.140 Legislators can apply a finely-calibrated analysis of pertinent considerations, such as whether the opening comprises a judicial emergency, the aspirant possesses exceptional qualifications, and how close the presidential and Senate elections are temporally.

The Democratic Caucus also could pledge to retain blue slips regarding all White House nominees for district vacancies pending Republican agreement to honor court of appeals slips.141 The leverage derived from collective action respecting the numerous district openings combined with the present lack of

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138 See sources cited supra note 70.
140 Kang contends that Democratic senators have been less assertive in championing their preferred candidates with President Trump than Republican senators were with President Obama. Id.
141 Everett & Levine, supra note 70 (documenting Republican rejection of a similar proposal); Stahl, supra note 139; see also sources cited supra note 21 (explaining that Republican Senate majority denied Garland and four Obama circuit nominees consideration in 2016 and denied three nominees confirmation votes).
appellate court vacancies among the 179 judgeships can persuade Republicans to acquiesce on appeals courts.142

A solution related to the proposition that Democratic senators ought to be more aggressive with President Trump in championing their preferred candidates for district court openings is “trades.”143 For example, the composition of all the California trial level nominee packages and many rather similar New York appellate court and district court nominee packages indicates that the White House and both sets of home state senators recommended quite a few nominees.144 More specifically, Senator Feinstein described the trial court nominees proposed as a relatively equitable compromise, while President Trump seemingly proffered most New York appellate court candidates and the senators picked many district court choices.145 The four senators were apparently rather pleased with the district candidates, because they returned practically all trial level blue slips. Nonetheless, “horsetrading” of jurists might have a negative connotation. For instance, across 2018, multiple New York district possibilities earned hearings and committee reports, albeit lacked confirmation. President Trump did in fact rename the candidates during April 2019, but the chief executive and senators confirmed merely one nominee ahead of December; California must address seventeen emergency vacancies, yet President Trump and the Republican Senate majority have neglected to attain a single confirmation.146

Analogous problems may suffuse the idea of “boycotting” nominee committee hearings and ballots or chamber floor debates and confirmation votes. For example, minority party lawmakers were absent from a hearing for several nominees which Grassley convened after the Senate had recessed in October 2018 to campaign.147 The endeavors of individual Democratic senators and their

142 Stahl, supra note 139. Because there presently are no appellate court vacancies, Republican acquiescence would essentially be symbolic and GOP senators will give up little. However, this change might serve as a goodwill gesture in the future when more appellate court vacancies will arise.

143 See sources cited supra note 132, 139.

144 See sources cited supra note 42.

145 Four California and two New York Trump court of appeals confirmees are very conservative and young. Two additional New York confirmees were President George W. Bush’s district appointees who seem comparatively moderate. Both jurisdictions’ district court nominees appear considerably more centrist. Tobias, California District Courts, supra note 32, at 74; Tobias, California Ninth Circuit, supra note 32, at 90-95; Tobias, New York, supra note 32, at 25.

146 He also confirmed all California Ninth Circuit and three New York Second Circuit judges before any district jurist in those states. See sources cited supra note 32. For judgetrading, see Tobias, supra note 25, at 2260 n.126; sources cited supra note 132. Trades should be reserved for desperate situations.

147 Grassley claimed that Feinstein agreed to the hearing which Democrats said violated the committee rules. Oct. 24 Hearing, supra note 57; Exec. Bus. Meeting of the S. Comm. on
caucus to assemble viable compromises have not been particularly effective because specific Republican legislators and their caucus appeared more concerned about extracting copious benefits from violating or restricting practically all Senate rules and customs. Therefore, although boycotts could publicize and illuminate the corrosive effects of the deteriorating judicial selection process—which the Republican Senate majority’s recalcitrance accentuates—boycotts’ harmful impacts can apparently eclipse their advantages.149

Finally, the Democratic Party should institute vigorous efforts to regain the presidency and the Senate partly by demonstrating the deleterious ramifications which the appointments procedures of the Trump White House and the Republican Senate Majority have for the federal judiciary and the nation and how Democrats would improve the nomination and confirmation processes. If Democrats capture the White House and the Senate, they must eliminate or reduce the imbalance which President Trump’s confirmations have perpetrated by nominating and confirming exceptionally qualified, mainstream nominees, especially for appellate court vacancies that materialize. If Democrats win only the Senate, the party should attempt to restore distinctive regular order while carefully deploying all legitimate practices that could rectify or ameliorate President Trump’s concerted endeavors that further skewed the federal appellate judiciary’s ideological balance toward extreme conservatism. A Democratic Senate should also carefully scrutinize and seriously consider applying ideas which the Grand Old Party has successfully employed.150

the Judiciary, 115th Cong. (Nov. 30, 2017) (showing Graham intimating that Democrats boycotted the meeting). Some committee rules and customs, such as holding over discussions and votes on nominees until subsequent meetings, require minority party participation.

148 Examples include numerous appellate court appointments, even though Democrats retained slips. See 165 CONG. REC. S1,467 (daily ed. Feb 26, 2019) (confirming, for the first time in a century, appellate court nominee over two home state senators’ opposition); sources cited supra notes 30-32, 45, 49-52.

149 Therefore, boycotts must be a last resort. See Colby Itkowitz, ‘Shame’: Democrats Slam Republicans Over Trump Judicial Nominee’s Support for Overturning Obama Care, WASH. POST (Mar. 5, 2019), https://www.washingtonpost.com/politics/2019/03/05/shame-democrats-slam-republicans-over-judicial-nominees-support-overturning-obamacare/ (showing Democrats using related idea of shaming the GOP).

CONCLUSION

President Donald Trump and the Republican Senate majority have persistently worsened the unproductive dynamics that support the reinvigorated, increasingly destructive confirmation wars. Accordingly, the White House must collaborate with both Republican and Democratic senators and eliminate or restrict the vacancy conundrum that has impaired the efforts of federal districts and the courts’ jurists to rapidly, inexpensively, and fairly resolve enormous caseloads, for the good of litigants, the judiciary, the President, the Senate, and the nation.