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FILLING FEDERAL COURT VACANCIES IN A PRESIDENTIAL ELECTION YEAR

Carl Tobias *

Scholars and politicians who closely track the federal judicial selection process appreciate that confirmations slow and ultimately halt over presidential election years, a phenomenon which has greater salience in a chief executive's last administration. That policy comprises numerous strands. Important are the conventions—which have permitted the approval of many superb, uncontroversial district court nominees routinely through the fall of most presidential election years and in certain lame duck sessions—while allowing a number of capable, mainstream appellate nominees to manage consideration until the August Recess. The traditions derive from respect for voters' preferences expressed in the elections, the incoming chief executive, who should have the opportunity to fill vacant judicial posts, and new senators, who must discharge their constitutional responsibility to provide advice and consent on selections.

Nevertheless, GOP members have not always followed these customs and other venerable conventions throughout President Barack Obama's years. For instance, Republicans automatically hold over Judiciary Committee votes on able, moderate candidates for a week, and the GOP leadership denied talented, centrist appeals court nominees' final ballots after mid-June 2012. Ever since winning the upper chamber in November 2014, Republicans have incessantly promised to duly effectuate "regular order" again.¹ However, the Senate confirmed merely eleven jurists in 2015, which is the fewest since Dwight Eisenhower was Presi-

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1. See *infra* Part I.B.

dent.² Because the United States in fact confronts seventy-one openings (thirty-two “judicial emergencies”), which plainly undermine the delivery of justice, and the GOP will keep stalling and ignoring customs applied over presidential election years, 2016 court appointments merit scrutiny.

The first section of this article canvasses selection in Obama’s tenure, ascertaining that Republicans cooperated little and contravened numerous traditions, especially after the party captured a majority. Thus, section two analyzes why the GOP did not collaborate and the consequences. Because that obstruction—which undercuts justice and regard for the coequal branches of government—will actually continue across 2016, the piece surveys devices, which could rectify or ameliorate those critical impacts this presidential election year.

I. JUDICIAL SELECTION IN THE OBAMA ADMINISTRATION

A. *The First Six Years*

Selection proceeded well Obama’s first term and a half when Democrats controlled the Senate, particularly in contrast to 2015. He aggressively consulted home state politicians, seeking their guidance and requesting proposals of fine, mainstream candidates, advice which Obama usually followed.³ These endeavors promote cooperation, as senators defer to colleagues in jurisdictions with vacancies because of mutual respect, and they can and do halt processing by not returning blue slips—a tradition which permits consideration to advance. Despite solicitous, persistent White House cultivation of all lawmakers, many failed to coordinate, slowly adopting processes or submitting prospects, while some have not even tendered picks.⁴

2. Jennifer Bendery, *Congratulations, GOP. You’re Confirming Judges at the Slowest Rate in 60 Years*, HUFFINGTON POST (Sept. 17, 2015), http://www.huffingtonpost.com/entry/obama-judicial-nominations_55faced7e4b08820d9178a5c.

3. Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2239–40 (2013) [hereinafter Tobias, *Senate Gridlock*]; see Sheldon Goldman et al., *Obama’s First Term Judiciary: Picking Judges in the Minefields of Obstructionism*, 97 JUDICATURE 7, 13–16 (2013).

4. Goldman et al., *supra* note 3, at 17; *Texas: State of Judicial Emergency*, ALLIANCE FOR JUSTICE, <http://www.afj.org/our-work/issues/judicial-selection/texas-epicenter-of-the-judicial-vacancy-crisis> (last visited Jan. 4, 2016); see also 161 CONG. REC. S6151 (daily ed. July 30, 2015) (statement of Sen. Schumer).

Republicans cooperated with the Democratic majority in swiftly arranging committee hearings at which five nominees testified every three weeks, carefully questioning them in the panel sessions and effectively posing later written queries when indicated.⁵ However, the GOP automatically held over discussions and committee votes one week for all choices recommended but fifteen of 350 excellent, moderate nominees.⁶

Republicans slowly agreed to most possibilities' chamber debates, if warranted, and yes or no ballots, requiring exceptional, consensus selections to languish across months until Democrats petitioned for cloture.⁷ Republicans also demanded roll call votes and numerous debate minutes yet used virtually none for superior, uncontroversial prospects, many of whom captured appointment without opposition, thereby needlessly consuming precious Senate floor time.⁸ Those procedures stalled confirmations and meant openings remained close to ninety for much of the half decade following August 2009, numbers that were unprecedented.⁹

In the 2012 presidential election year, these strategies continued and increased.¹⁰ The GOP regularly held over committee discussions and ballots for one week, rejected prompt floor vote concords, and mandated roll call ballots for accomplished, noncontroversial designees who easily secured confirmation, while final appellate votes ceased in mid-June.¹¹ With Obama's re-election, Democrats hoped that Republicans would actually enhance collaboration, but they did not, and this recalcitrance culminated in

5. Goldman et al., *supra* note 3, at 16–17; Tobias, *Senate Gridlock*, *supra* note 3, at 2242–43.

6. It found most fine. Tobias, *Senate Gridlock*, *supra* note 3, at 2242–43. Six of the fifteen were for the Arizona District that was an emergency. Carl Tobias, *Filling the District of Arizona Vacancies*, 56 ARIZ. L. REV. SYLLABUS 5, 5–6 (2014) [hereinafter Tobias, *Arizona Vacancies*].

7. Goldman et al., *supra* note 3, at 26–29; Tobias, *Senate Gridlock*, *supra* note 3, at 2243–46.

8. Tobias, *Senate Gridlock*, *supra* note 3, at 2244; *see also* Juan Williams, *The GOP's Judicial Logjam*, THE HILL (July 27, 2015, 6:00 AM), <http://thehill.com/opinion/juan-williams/249196-juan-williams-the-gops-judicial-logjam> (discussing Republican obstruction of judicial confirmations).

9. U.S. COURTS, ARCHIVE OF JUDICIAL VACANCIES (2009–14), <http://www.uscourts.gov/judges-judgeships/judicialvacancies/archive-judicial-vacancies>; *see infra* note 44 and accompanying text.

10. Tobias, *Senate Gridlock*, *supra* note 3, at 2246; *supra* notes 6–8 and accompanying text; *infra* note 24 and accompanying text.

11. Tobias, *Senate Gridlock*, *supra* note 3, at 2252.

June 2013 when he proffered three well qualified, mainstream, diverse recommendations for the U.S. Court of Appeals for the District of Columbia Circuit, the nation's second most important court.¹² The GOP refused each a floor ballot, and frustration with incessant obstruction provoked Democrats to cautiously exercise the "nuclear option," which limited filibusters.¹³ The measure's November 2013 implementation, which Republicans asserted violated tradition, enabled the 113th Congress to approve 134 jurists, including twenty-seven persons in the 2014 lame duck session.¹⁴ After that mechanism's explosion, Republicans forced Democrats to invoke cloture on all nominees until 2015.¹⁵

B. *Selection in 2015*

Once the GOP became the majority,¹⁶ this lack of cooperation persisted and eclipsed that when Republicans were the minority. The leadership has constantly said that it would dutifully restore the world's greatest deliberative body to regular order.¹⁷ Members duly recited this litany to describe reinstitution of the normal processes which ostensibly governed the chamber before Democrats subverted them. Early in January 2015, Mitch McConnell (R-Ky.), the new Majority Leader, proclaimed: "We need to return to regular order,"¹⁸ and he directly reiterated that phrase over

12. See Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L.J. 121 (2015); Jeffrey Toobin, *The Obama Brief*, NEW YORKER (Oct. 27, 2014), <http://www.newyorker.com/magazine/2014/10/27/obama-brief>.

13. Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-control-at-stake-in-todays-midterm-elections/2014/11/04/e882353e-642c-11e4-bb14-4cfceale742d5_story.html.

14. U.S. COURTS, ARCHIVE OF JUDICIAL VACANCIES (2013–14), <http://www.uscourts.gov/judges-judgeships/judicialvacancies/archive-judicial-vacancies>.

15. 161 CONG. REC. S3223 (daily ed. May 21, 2015) (statement of Sen. Leahy); Carl Tobias, *Judicial Selection in Congress' Lame Duck Session*, 90 IND. L.J. SUPP. 52, 56 (2015) [hereinafter Tobias, *Lame Duck Session*].

16. Jerry Markon et al., *Republicans Win Senate Control as Polls Show Dissatisfaction with Obama*, WASH. POST (Nov. 4, 2014), https://www.washingtonpost.com/politics/senate-control-at-stake-in-todays-midterm-elections/2014/11/04/e882353e-642c-11e4-bb14-4cfceale742d5_story.html; Jonathan Weisman & Ashley Parker, *Riding Wave of Discontent, G.O.P. Takes Senate*, N.Y. TIMES (Nov. 4, 2014), <http://www.nytimes.com/2014/11/05/us/politics/midterm-elections.html>.

17. See, e.g., 160 CONG. REC. S4679, S4681 (daily ed. July 22, 2014) (statement of Sen. Hatch) ("It is past time to restore the Senate's rightful place in our constitutional order.").

18. 161 CONG. REC. S28 (daily ed. Jan. 7, 2015).

subsequent months.¹⁹ Charles Grassley (R-Iowa), the Judiciary Committee Chair, propounded analogous views. Emblematic was his January 21 statement that the Committee would deploy regular order in assessing judicial nominees.²⁰ Despite many pledges, the GOP has failed to expeditiously offer suggestions for presidential review, committee hearings and ballots or chamber floor debates, when required, and final votes.

1. The District Court Process

a. The Nomination Process

Obama has continued to assiduously consult, seeking proposals from home state officers about well qualified, consensus picks, which he normally used by selecting them, as moderation and competence are Obama district possibilities' hallmarks.²¹ Notwithstanding his insistent cultivation of all legislators, many Republicans have declined to coordinate, slowly establishing procedures or forwarding candidates, and a few have chosen none.²² Thirty-six in forty-three (eight of nine appeals courts) openings lacking nominees and eighteen in twenty-one vacancies without them—which the U.S. Courts Administrative Office ("AO") dutifully classifies emergencies—are currently in jurisdictions that at least one GOP senator represents.²³

19. *Id.* at S155 (daily ed. Jan. 12, 2015); *id.* at S2767 (daily ed. May 12, 2015). This approach has encountered some criticism from across the aisle. *See, e.g., id.* at S2949 (daily ed. May 18, 2015) (statement of Sen. Reid); *id.* at S3223 (statement of Sen. Leahy). Other commentators have noticed the decline in judicial confirmations as well. Jim Manley, *Has the Senate Really Turned a Corner?*, WALL ST. J., (June 24, 2015) <http://blogs.wsj.com/washwire/2015/06/24/has-the-senate-really-turned-a-corner/>.

20. *See Hearing on Judicial Nominees Before the S. Comm. on the Judiciary*, 114th Cong. (Jan. 21, 2015) (statement of Sen. Chuck Grassley) [hereinafter *Jan. 21 Hearing*]; David Catanese, *Chuck Grassley's Gavel Year*, U.S. NEWS & WORLD REP. (Jan. 28, 2015), <http://www.usnews.com/news/articles/2015/01/28/chuck-grassleys-gavel-year> (stating Grassley's desire to maintain traditional protocol for nominations). *But see* 161 CONG. REC. S6151 (daily ed. July 30, 2015) (statement of Sen. Schumer).

21. Most Presidents tap able centrists. Goldman et al., *supra* note 3, at 15–17; Tobias, *Senate Gridlock*, *supra* note 3, at 2240.

22. Goldman et al., *supra* note 3, at 17; ALLIANCE FOR JUSTICE, *supra* note 4.

23. U.S. COURTS, JUDICIAL VACANCIES: JUDICIAL EMERGENCIES (2015), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies>; U.S. SENATE, SENATORS OF THE 114TH CONGRESS (2015), <http://www.senate.gov/senators/contact>. The AO, the administrative arm of the federal courts, premises emergencies on dockets' large magnitude and vacancies' protracted length. *Judicial Emergency Definition*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicialvacancies/archive-judicial-vacancies/judicial-emergencies/judicial-emergency-definition> (last visited Jan. 4, 2016).

The clearest example is Texas, which has the most U.S. openings, notwithstanding approval of three excellent, uncontroversial jurists by May 2015. It presently faces two circuit and seven district court vacancies, all lacking nominees with eight comprising emergencies, and for many of which the recommendation process has yet to begin or has stalled.²⁴ Texas is not alone. Most crucial are Pennsylvania's two empty Third Circuit seats and Western District openings in three of ten positions without nominees for multiple years,²⁵ while Georgia had two unfilled Eleventh Circuit slots and the Northern District had a third of posts vacant several years before politicians reached a "deal" with Obama to fill them.²⁶

b. The Confirmation Process

i. Judiciary Committee Hearings

Similar, but exacerbated, problems infect confirmations. Grassley set the first hearing on January 21, 2015, promising he would analyze strong, mainstream nominees under regular order.²⁷ The Chair alleged the public should expect no "discernible difference" between how the panel operates with GOP rather than Democratic leadership, suggesting it would provide hearings every few weeks that Congress was in session, a policy ex-Chair Patrick Leahy (D-Vt.) ably instituted the last three Congresses and

24. ALLIANCE FOR JUSTICE, *supra* note 4; *accord*, 161 CONG. REC. S2104 (daily ed. Apr. 13, 2015) (statement of Sen. Leahy). This derives from senators' slow responses to current vacancies and not foreseeing future ones, slow selection panel scrutiny, differences on picks among Democratic House members and between them and the senators and slow White House action. *But see* Sylvan Lane, *Senate Fills South Texas Judgeship; First Confirmation Since GOP Takeover*, DALL. MORNING NEWS: TRAIL BLAZERS BLOG (Apr. 13, 2015, 6:10 PM), <http://trailblazersblog.dallasnews.com/2015/04/senate-fills-south-texas-judgeship-first-confirmation-since-gop-takeover.html/>.

25. U.S. COURTS, JUDICIAL VACANCIES: CURRENT JUDICIAL VACANCIES (2015), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies>.

26. *Id.* (2011–14); *see* Tobias, *Senate Gridlock*, *supra* note 3, at 2261; Lauren French, *Lewis Opposes Boggs Nomination*, POLITICO (May 19, 2014), <http://www.politico.com/story/2014/05/john-lewis-michael-boggs-oppose-judge-nomination-georgia-106839>; Dan Malloy, *The Delegation Georgians in D.C.; Woodall Does Balancing Act in House GOP Post*, ATLANTA J.-CONST., July 20, 2014, at 14A.

27. *See* Jennifer Jacobs, *Grassley's Priority Checklist*, DES MOINES REG. (Jan. 7, 2015), <http://www.desmoinesregister.com/story/news/politics/2015/01/07/grassley-checklist-priorities-judiciary-committee/21394233>.

Grassley, the Ranking Member over the 112th and 113th, helped effectuate.²⁸ Disparities rapidly materialized, however. For instance, the next hearing occurred *seven* weeks after the first and the third *eight* weeks later, while the fourth and fifth came in June and July with the latest on September 30, October 21, and December 9.²⁹ The March hearing was conducted for a pair of nominees and the summer hearings for three each, in comparison with the five Leahy typically evaluated.³⁰

In the April 20 debate on a Texas re-nominee, Grassley proclaimed Republicans matched the Democratically led Senate over President George W. Bush's seventh year,³¹ because at the identical juncture, the "committee had held three nominee hearings for a total of 10 judges," while the panel "already held 4 nomination hearings" [on] 6 judges.³² Harry Reid (D-Nev.), the Minority Leader, countered that the 2015 panel was "not having any hearings to speak of;" by June 8, 2007, "Democrats confirmed 18 judges, including 3 circuit court judges."³³

ii. Judiciary Committee Discussions and Votes

Despite Grassley's pledges, which he repeated at the February 12 meeting, the Chair held over votes from that session until February 26,³⁴ retaining a practice the GOP used during Obama's

28. Compare Jan. 21, 2015 Hearing, *supra* note 20, with *Hearings on Judicial Nominees Before the S. Comm. on the Judiciary*, 113th Cong. (Jan. 23, Feb. 13, 2013, Jan. 8, 28, 2014); see Catanese, *supra* note 20.

29. *Hearing on Judicial Nominees Before the S. Comm. on the Judiciary*, 114th Cong. (Mar. 11, 2015); *id.* (May 6, 2015); *id.* (June 10, 2015); *id.* (July 22, 2015); *id.* (Sept. 30, 2015); *id.* (Oct. 21, 2015); *id.* (Dec. 9, 2015).

30. Compare *Hearings on Judicial Nominees Before the S. Comm. on the Judiciary*, 114th Cong. (Mar. 11, June 10, July 22, 2015), with *Hearings on Judicial Nominees Before the S. Comm. on the Judiciary*, 113th Cong. (Jan. 28, Sept. 9, 2014); see *supra* text accompanying note 24 (noting many senators' failure to tender picks for judicial nomination).

31. 161 CONG. REC. S2264 (daily ed. Apr. 20, 2015).

32. *Id.* He said four executive nominees, including for Attorney General, testified and that Obama's nominees had been treated "extremely fairly," as he named 309 judges versus 273 for Bush. *Id.* But see *supra* note 29, *infra* notes 33, 42, 44, 52.

33. 161 CONG. REC. S3850 (daily ed. June 8, 2015). But see *supra* notes 28, 31–32 and accompanying text.

34. *Executive Business Meeting Before the S. Comm. on the Judiciary*, 114th Cong. (Feb. 26, 2015) [hereinafter *Feb. 26 Executive Business Meeting*]; see also *Executive Business Meeting Before the S. Comm. on the Judiciary*, 114th Cong. (Feb. 12, 2015); Josh Voorhees, *Procedural Purgatory*, SLATE (Mar. 29, 2015), http://www.slate.com/articles/news_and_politics/politics/2015/03/loretta_lynch_confirmation_mitch_mcconnell_and_the_gop_have_delayed_it_but.html; *supra* text accompanying note 20.

first term and a half.³⁵ Those delayed were five superb, moderate U.S. Court of Federal Claims re-nominees whom the panel duly reported last year on unopposed voice votes³⁶ and four superior, consensus district re-nominees, two for emergencies, with powerful support of the Republican party home state panel members: John Cornyn, Ted Cruz, Orrin Hatch, and Mike Lee.³⁷

iii. Floor Debates and Votes

McConnell concurred on few quick nominee debates and votes when he was the Minority Leader Obama's initial six years,³⁸ thus requiring Democrats to pursue cloture on numerous selections and eventually change filibusters.³⁹ However, McConnell pledged additional cooperation in his new role as Majority Leader, while scheduling nominee floor debates and chamber ballots afforded a constructive opportunity for respecting this promise.⁴⁰

Nevertheless, McConnell actually set no fast consideration on the four districts, and the five Claims Court, re-nominees whom the panel approved with February 26 voice votes. A month later, he finally convened a lone district re-nominee's April 13 floor debate and ballot.⁴¹ This seemingly treated the contention by Leahy,

35. See, e.g., *Executive Business Meeting Before the S. Comm. on the Judiciary*, 113th Cong. (Sept. 11, 2014); *Executive Business Meeting Before the S. Comm. on the Judiciary*, 114th Cong. (Nov. 13, 2014); see also *supra* note 6.

36. *Executive Business Meeting Before the S. Comm. on the Judiciary*, 113th Cong. (Nov. 20, 2014); see also *supra* note 24.

37. *Jan. 21, 2015 Hearing*, *supra* note 20 (showing four District Judge nominees on the agenda); *Feb. 26 Executive Business Meeting*, *supra* note 34 (voting on judicial nominees). Grassley eschewed weekly meetings, unlike Leahy. See, e.g., *Executive Business Meeting Before the S. Comm. on the Judiciary*, 113th Cong. (June 12, 19, 26, 2014) (providing statements from Leahy during weekly meetings).

38. 158 CONG. REC. S8375 (daily ed. Dec. 21, 2012) (statement of Sen. Leahy); see Tobias, *Senate Gridlock*, *supra* note 3; Burgess Everett & Seung Min Kim, *Judge Not: GOP Blocks Dozens of Obama Court Picks*, POLITICO (July 6, 2015), <http://www.politico.com/story/2015/07/payback-gop-blocks-obama-judge-picks-judiciary-119743>.

39. 159 CONG. REC. S8418 (daily ed. Nov. 21, 2013); see Jeffrey Toobin, *Reid Changed the Federal Courts*, NEW YORKER (Mar. 27, 2015), <http://www.newyorker.com/news/news-desk/how-harry-reid-changed-the-federal-courts>; Carl Hulse, *Reid to Retire from Senate in 2016*, N.Y. TIMES (Mar. 27, 2015), <http://www.nytimes.com/2015/03/28/us/politics/senator-harry-reid-retire.html>.

40. See Neil Eggleston, *Judicial Nominations: Accomplishments and the Work that Lies Ahead*, WHITE HOUSE BLOG (Dec. 17, 2014, 3:39 PM), <https://www.whitehouse.gov/blog/2014/12/17/judicial-nominations-accomplishments-and-work-lies-ahead>.

41. The delay troubled Leahy, as the GOP proposed all four. See 161 CONG. REC. S2104-05 (daily ed. Apr. 13, 2015) (statement of Sen. Leahy).

the Ranking Member, that the absence of 2015 nominee votes contravened precedent and contrasted with how Democrats scrutinized Bush picks.⁴² He asserted that the Senate's constitutional responsibility to give "advice and consent" does not end with a presidency's final two years and carefully urged swift authorization of the Judicial Conference proposal for seventy-three judgeships to provide the bench resources for delivering justice.⁴³ Leahy responded to Grassley's idea that eleven nominees appointed in the 2014 lame duck session must "count towards confirmations this year" by arguing that prior "Congresses have always confirmed consensus nominees" ahead of lengthy recesses, maintaining "Democrats were only forced to do so because Republican obstruction had left judicial vacancies close to [ninety across Obama's] first six years."⁴⁴

McConnell failed to publicly say when the other three district or five Court of Federal Claims aspirants would have votes. Nonetheless, he confirmed one trial level re-nominee on April 20, prompting Leahy's contention this was only the second appointment, which clearly proved that GOP "delay and obstruction" revealed the earlier Obama years was continuing, and his denunciation of the "slow trickle," which harms courts and the public.⁴⁵ When the Senate Republican leader denied rapid ballots for the last two district re-nominees, Reid compared the pair of jurists the GOP approved the entire year with sixteen over 2007, while he mentioned twenty nominees were pending in committee, emergencies doubled this year, and Republicans' disregard of their constitutional responsibility was an "injustice to the American people."⁴⁶ These efforts seemingly provoked McConnell to

42. 161 CONG. REC. S2029–30 (daily ed. Mar. 26, 2015). They approved sixty-eight jurists during Bush's last two years and fifteen by the end of March 2007, in contrast to none in 2015. *Id.*

43. 161 CONG. REC. S2028–30 (daily ed. Mar. 26, 2015); *accord, id.* at S2264 (daily ed. Apr. 20, 2015); see U.S. JUDICIAL CONF. PROCEEDINGS 18 (2015). The courts' policymaking arm bases proposals on conservative caseload estimates.

44. 161 CONG. REC. S2029–30 (daily ed. Mar. 26, 2015). For consensus nominees' approval, see Goldman et al., *supra* note 3, at 13–14; Michael Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Nominations on Track*, 65 ARK. L. REV. 217, 292 (2012). For the ninety vacancies idea, see ARCHIVE OF JUDICIAL VACANCIES, *supra* note 9; Goldman et al., *supra* note 3, at 13.

45. 161 CONG. REC. S2263–64 (daily ed. Apr. 20, 2015). Grassley said approving eleven judges in the 2014 lameduck session violated "standard practice." When they are included, 2015 is like 2007. 161 CONG. REC. S2264 (daily ed. Apr. 20, 2015).

46. 161 CONG. REC. S2659 (daily ed. May 6, 2015). Continuing GOP inaction led Reid to repeat the earlier concerns and focus on Texas's seven emergencies. *Id.* at S2949 (daily

schedule floor consideration near the Memorial Day Recess for the district re-nominees. In their debates, Leahy charged that both persons enjoyed September nominations and January hearings with unanimous February panel reports, yet had languished on the floor for almost three months,⁴⁷ contending José Olvera would fill one of six district emergencies in Texas.⁴⁸ He alleged Republicans persistently tendered excuses for nominee obstruction⁴⁹ and criticized their “delay for delay’s sake” which miss[es] the bigger picture” of the responsibility to fill openings.⁵⁰ When the Senate approved a lone nominee in July, Democrats pursued multiple unanimous consent requests on votes that were denied.⁵¹ For example, Charles Schumer (D-N.Y.) aptly contrasted the 2008 appointments results with this year, pleading for three designees’ consideration, but Grassley reiterated his notions about the 2014 lame duck session confirmations, which violated regular order, and how this year was like 2007, urging his colleague to “put that in your pipe and smoke it.”⁵²

c. Summary

Despite repeated declarations of the regular order mantra by prominent GOP leaders since winning the chamber, from early January until April 12, 2015, they confirmed no district judges, with only four ahead of July.⁵³ Before June, the committee also granted merely three hearings and one included two nominees; the panel correspondingly allowed four district and five Court of

ed. May 18, 2015).

47. *Id.* at S3223 (daily ed. May 21, 2015).

48. It had eight openings at that time. 161 CONG. REC. S3223 (daily ed. May 21, 2015).

49. 161 CONG. REC. S3223 (daily ed. May 21, 2015). He refuted Grassley’s claim that only eighteen judges were confirmed in 2007, as they were held over from 2006, by urging he failed to say nine judges “were *not* . . . left pending” on the floor at 2006’s end. *Id.* at S3223 (emphasis added); see *supra* text accompanying notes 43–44; *Editorial: Grassley Joins Race to Bottom*, DES MOINES REG. (Aug. 1, 2015), <http://www.desmoinesregister.com/story/opinion/editorials/2015/07/31/grassley-joins-race-bottom-political-rhetoric/30963785/>.

50. 161 CONG. REC. S3223 (daily ed. May 21, 2015). After much home-state politician praise, both nominees had 100-0 votes. *Id.* at S3223–24.

51. See 161 CONG. REC. S4678 (confirming the nomination of Kara Stoll).

52. 161 CONG. REC. S6151–52 (daily ed. July 30, 2015); see *id.* at S6999–7000 (daily ed. Sept. 29, 2015) (Sen. Leahy summarizing dismal 2015 record, contrasted to 2007); *id.* at S5047–48 (daily ed. July 14, 2015) (statement of Sen. Coons) (requesting unanimous consent). But see *id.* at S5048–49 (statement of Sen. Cotton) (objecting).

53. ARCHIVE OF JUDICIAL VACANCIES (2009–14), *supra* note 9.

Claims re-nominees' ballots on February 26 and two more April 23.⁵⁴ This desultory record contrasts with Democratic endeavors in Obama's first six years and even over Bush's presidency; for instance, the strongest precedents were thirty-four of his fine, uncontroversial recommendations for districts, who realized confirmation in 2007, and Democrats' systematic consideration of trial jurists before lengthy recesses.⁵⁵

2. The Appellate Court Process

Both parties examine appellate nominees very closely because the selections are comparatively fewer, while they articulate more policy, which often has ideological effects. In November 2014, Obama mustered nomination of Kara Farnandez Stoll to the U.S. Court of Appeals for the Federal Circuit and District Judge Luis Felipe Restrepo to the U.S. Court of Appeals for the Third Circuit.⁵⁶ He marshaled no other appellate designees, primarily because GOP senators represent most jurisdictions that have present circuit vacancies without nominees, and they have coordinated little.⁵⁷ Stoll was an experienced, mainstream Federal Circuit practitioner, and Restrepo is a stellar, centrist jurist, and each is Latina/o.⁵⁸ Neither received Committee hearings in 2014, as Obama proffered both following the 2014 elections.

54. See *supra* notes 30, 36, 38 and accompanying text (discussing delayed voting by the judiciary committee in late 2014 and hearings conducted for nominees in March and the summer of 2015); *infra* note 52 and accompanying text (noting that voting on nominees was again stalled in March 2015).

55. U.S. COURTS, ARCHIVE OF JUDICIAL VACANCIES (2007), <http://www.uscourts.gov/judges-judgeships/judicialvacancies/archive-judicial-vacancies>; 161 CONG. REC. S2029-30 (daily ed. Mar. 26, 2015) (statement of Sen. Leahy). Democrats' acts, such as using the nuclear option, seemed to extend the "confirmation wars." See source cited *supra* notes 3, 12.

56. WHITE HOUSE, OFFICE OF THE PRESS SEC'Y, *President Obama Nominates Two to Serve on the U.S. Courts of Appeals* (Nov. 12, 2014); see U.S. COURTS, JUDICIAL VACANCIES: CURRENT JUDICIAL VACANCIES (2015), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies> (noting Luis Felipe Restrepo as unconfirmed nominee to the Third Circuit); U.S. COURTS, JUDICIAL VACANCIES: CONFIRMATION LISTING (2015), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/confirmation-listing> (noting Kara Farnandez Stoll as confirmed appointee to the Federal Circuit); WHITE HOUSE, OFFICE OF THE PRESS SEC'Y, *Presidential Nominations Sent to the Senate* (Jan. 7, 2015).

57. Russell Wheeler, *With Senate Control, Will the GOP Stop Confirming Circuit Judges?*, BROOKINGS: FIXGOV BLOG (Nov. 16, 2015, 1:51 PM), <http://www.brookings.edu/blogs/fixgov/posts/2015/06/10-circuit-court-confirmations-wheeler>; see Toobin, *supra* note 39; *supra* notes 22-26 and accompanying text.

58. See sources cited *supra* note 56.

Stoll's March hearing proceeded smoothly,⁵⁹ yet the panel only voted her to the floor on April 23 where she languished for a number of weeks.⁶⁰ McConnell neglected to publicly declare when the superior prospect would be considered, but on June 4, he suggested that the GOP would halt final ballots on more Obama appeals court nominees.⁶¹ After press outlets reported this idea, a McConnell staffer proclaimed: "We're going to continue to do judges. [There's] not a shutdown. We probably will have a circuit court nominee."⁶²

On June 8, Reid accused the Majority Leader with drastic obstruction—namely rejecting chamber ballots for appellate picks, which contravened his duty—by invoking McConnell's floor speeches that pled for quick votes on all Bush 2008 circuit selections, while Reid alleged the GOP had yet to confirm one appellate possibility—"not even a consensus nominee such as Kara Stoll," and urged her prompt consideration.⁶³ As the Senate departed on the July 4 Recess without considering any person since late May, Leahy protested the inactivity, canvassed the dismal 2015 results and demanded expeditious votes for those on the floor, notably Stoll, which might have provoked her 95-0 July 7 ballot.⁶⁴ If few circuit aspirants win confirmation, this would flagrantly violate regular order because that would be unprecedented, while the Democratic majority helped approve ten Bush circuit jurists his ending two years.⁶⁵

59. *Hearing on Judicial Nominees Before the S. Comm. on the Judiciary*, 114th Cong. (Mar. 11, 2015).

60. *Executive Business Meeting Before the S. Comm. on the Judiciary*, 114th Cong. (Apr. 23, 2015).

61. See Steve Benen, *McConnell's Silent Governing Failure*, MSNBC (June 5, 2015), <http://www.msnbc.com/rachel-maddow-show/mcconnells-silent-governing-failure>; Nick Gass, *McConnell Vows to Slow Judicial Nominees*, POLITICO (June 5, 2015), <http://www.politico.com/story/2015/06/mitch-mcconnell-judicial-nominations-118674>.

62. Alexander Bolton, *McConnell Backs Away from Shutdown Talk*, THE HILL (June 6, 2015), <http://thehill.com/homenews/senate/244196-mcconnell-backs-away-from-judicial-shutdown-talk>.

63. 161 CONG. REC. S3849–50 (daily ed. June 8, 2015).

64. 161 CONG. REC. S4591 (daily ed. June 24, 2015). Leahy reiterated much data and the GOP duty. *Id.*; see *supra* notes 42–44, 50 and accompanying text; see also *id.* at S4678 (daily ed. July 7, 2015) (Stoll vote).

65. See *supra* notes 42, 46, 63–64 and accompanying text.

Restrepo's process tellingly illuminates stalling, as the fine, noncontroversial jurist waited more than 200 days for a hearing.⁶⁶ Obama chose Restrepo with the avid endorsement of Pennsylvania Senators Bob Casey (D) and Pat Toomey (R).⁶⁷ However, the Committee only set a hearing for June 10, principally because Toomey did not return his blue slip until May 14, although Casey furnished his in November.⁶⁸ Both Senators had previously designated Restrepo for the Eastern District bench, and the chamber felicitously approved the selection in a June 2013 voice vote.⁶⁹ The legislators promoted his elevation with a strong press release in which Toomey contended he would "make a superb addition to the Third Circuit."⁷⁰ Nevertheless, the aspirant was excluded from a May hearing on four trial level prospects.⁷¹ The day before that session, the press queried Toomey, who claimed he remained supportive and confident about 2015 confirmation.⁷² Grassley pledged he would set a hearing once Toomey provided the blue slip.⁷³ A panel aide said it was evaluating the nominee's back-

66. *Benched! History Shows "Regular Order" Means Appellate Court Confirmations*, ALLIANCE FOR JUSTICE, <http://www.afj.org/blog/benched-history-shows-regular-order-means-appellate-court-confirmations> (last visited Jan. 4, 2016).

67. Press Release, Office of Robert P. Casey, Jr., Casey, Toomey Applaud Nomination of Judge Luis Felipe Restrepo to U.S. Court of Appeals for the Third Circuit (Nov. 12, 2014), <http://www.casey.senate.gov/newsroom/releases/casey-toomey-applaud-nomination-of-judge-luis-felipe-restrepo-to-us-court-of-appeals-for-the-third-circuit>.

68. See 161 CONG. REC. S6369 (daily ed. Aug. 5, 2015). Saranac Spencer, *Toomey Submits Blue Slip, But Will Restrepo Get a Hearing?*, LEGAL INTELLIGENCER (May 19, 2015), <http://www.thelegalintelligencer.com/prINTERfriendly/id=1202726785818#>; Jonathan Tamari, *A Judicial Nominee Waits; Toomey Gets Blamed*, PHILA. INQUIRER (May 9, 2015), http://articles.philly.com/2015-05-09/news/61952388_1_toomey-luis-felipe-restrepo-president-obama.

69. 159 CONG. REC. S4516 (daily ed. June 17, 2013); Spencer, *supra* note 68. He was then a magistrate judge of this district. All modern Presidents elevate judges from lower courts. Tobias, *Senate Gridlock*, *supra* note 3, at 2258.

70. See Press Release, Office of Robert P. Casey, Jr., *supra* note 67.

71. No nominee was picked before him. *Hearings on Judicial Nominees Before the S. Comm. on the Judiciary*, 114th Cong. (May 6, 2015).

72. Jennifer Bendery, *Pat Toomey Is Blocking His Own Judicial Nominee, for Some Reason*, HUFFINGTON POST (May 5, 2015) [hereinafter Bendery, *Pat Toomey Is Blocking*], http://www.huffingtonpost.com/2015/05/05/pat-toomey-luis-restrepo_n_7214790.html; Tracie Mauriello, *Confirmation Vote on Pennsylvania Jurist Awaits 'Blue Slip' From Toomey*, PITTSBURGH POST-GAZETTE (May 7, 2015), <http://www.post-gazette.com/local/2015/05/06/Toomey-holding-up-confirmation-of-Pennsylvania-jurist-he-supports/stories/2015/05060171>; Saranac Spencer, *Political Maneuvers Hold up Nominee for Third Circuit*, LEGAL INTELLIGENCER (May 6, 2015), <http://www.thelegalintelligencer.com/id=1202725590790?keywords=Spencer+%22Political+maneuvers%22&publication=The+Legal+Intelligencer>.

73. Bendery, *Pat Toomey Is Blocking*, *supra* note 72; Mauriello, *supra* note 72. Grassley's pledge and failure to broach an ongoing inquiry undercut Toomey's excuse for waiting six months.

ground under “regular order.”⁷⁴ On the chamber floor the day the May hearing occurred, Reid deftly repeated Toomey’s laudatory descriptions of Restrepo while asking if Pennsylvanians wonder why the lawmaker failed to explain the talented nominee’s slowing “by his own party.”⁷⁵

Toomey later denied he was stalling Restrepo, and declared the committee was analyzing him but would only conduct a hearing after that concluded and promised to return the blue slip then, unless pertinent concerns surfaced.⁷⁶ On May 14, Toomey yielded, producing his blue slip, ostensibly due to the inquiry’s end.⁷⁷ The June 10 panel hearing was seamless, as Toomey voiced powerful support and Restrepo clearly answered questions.⁷⁸ The candidate was held over yet won approval on a July 9 unopposed voice vote.⁷⁹ Given how long most 2015 nominees waited coupled with Grassley’s July tirade and McConnell’s cryptic discussion of his

74. Spencer, *supra* note 72 (emphasis added). She said members may hold blue slips until vetting ends, as questions can arise in that process. Mauriello, *supra* note 72; accord Jennifer Bendery, *Pat Toomey Insists He’s Not Holding up a Judicial Nominee He’s Holding up*, HUFFINGTON POST (May 13, 2015), http://www.huffingtonpost.com/2015/05/13/pat-toomey-judge-restrepo_n_7277332.html.

75. 161 CONG. REC. S2660 (daily ed. May 6, 2015); see *Hearings on Judicial Nominees Before the S. Comm. on the Judiciary*, 114th Cong. (May 6, 2015) (statement of Sen. Grassley).

76. Pat Toomey, *I Am Not Delaying Judge L. Felipe Restrepo*, PITT. POST-GAZETTE (May 18, 2015), <http://www.post-gazette.com/opinion/letters/2015/05/13/I-am-not-delaying-Judge-L-Felipe-Restrepo-s-3rd-Circuit-nomination/stories/201505130068>; see Tamari, *supra* note 68; see also *supra* notes 72–74 and accompanying text (discussing Toomey’s claims that he remained supportive of Restrepo, despite his failure to return the blue slip).

77. *Hearings on Judicial Nominees Before the S. Comm. on the Judiciary*, 114th Cong. (June 10, 2015); Tracie Mauriello, *Toomey Signs Off On Nominee for Federal Appeals Court*, PITT. POST-GAZETTE (May 14, 2015), <http://www.post-gazette.com/local/region/2015/05/14/Toomey-signs-off-on-nominee-for-federal-appeals-court/stories/201505140325>; Williams, *The GOP’s Judicial Logjam*, *supra* note 8 (reiterating criticism of GOP for delay).

78. Senators posing queries seemed satisfied. *Hearings on Judicial Nominees Before the S. Comm. on the Judiciary*, 114th Cong. (June 10, 2015); *Hearing Examining the Federal Regulatory System to Improve Accountability, Transparency, and Integrity Before the S. Comm. on the Judiciary*, 114th Cong. (June 10, 2015) (statement of Sen. Grassley urging 2015 circuit hearings and approvals to mirror 2007); Tracie Mauriello, *After Hearing, Philadelphia Judge Close to Third Circuit Confirmation*, PITT. POST-GAZETTE (June 11, 2015), <http://www.post-gazette.com/news/politics-nation/2015/06/11/After-hearing-Philadelphia-judge-close-to-3rd-Circuit-confirmation/stories/201506110112>.

79. *Executive Business Meeting Before the S. Comm. on the Judiciary*, 114th Cong. (June 25, July 9, 2015); see *Executive Business Meeting Before the S. Comm. on the Judiciary*, 114th Cong. (Apr. 23, 2015); *Executive Business Meeting Before the S. Comm. on the Judiciary*, 114th Cong. (Mar. 11, 2015).

June 4 allusion to circuit votes, it is not surprising that Restrepo's final ballot was not conducted until January 11, 2016.⁸⁰

No defensible idea supports Restrepo's protracted delay, because Obama first made the jurist's nomination in 2014 for an emergency opening. His lengthy wait contrasts to Stoll, proposed the same day, who had a March hearing and April Committee report.⁸¹ Observers also insistently contended partisanship explained slow processing.⁸²

3. Summary of District and Appellate Processes

Reid and Leahy continuously and convincingly addressed Grassley's claims with applicable data on confirmations and hearings.⁸³ The Chair's figures were rather persuasive, especially when, for instance, he employed analogous metrics, but in some respects they can lack pertinence, as data support numerous concepts.⁸⁴ Essential is assiduously fulfilling the constitutional duty to express advice and consent and place talented, consensus aspirants in many vacancies, specifically emergencies.⁸⁵ The most relevant precedent is Democrats' 2007–08 effort, which confirmed almost seventy Bush court picks.⁸⁶ In sum, the 2015 processing record—approving one circuit and ten trial jurists—sharply contrasts to Democrats' work at a comparable juncture.

80. 161 CONG. REC. S8443 (daily ed. Dec. 7, 2015) (confirmation vote, but *not* Restrepo's); see John Tamari, *Senate Schedules Vote on Long-Delayed Pa. Nominee Restrepo*, PHILA. INQUIRER (Dec. 9, 2015, 9:22 PM), <http://www.philly.com/philly/blogs/capitolinq/Senate-schedules-vote-on-long-delayed-PA-nominee-Restrepo.html> (confirming the agreement on scheduling the January 11 vote); *supra* notes 59–64 (Stoll's wait); *supra* notes 44–50 (re-nominees with much GOP support took ninety days from panel to final votes).

81. See *supra* text accompanying notes 44–45, 50. She lacked his prior full inquiry, leaving unclear why he took 6 months, especially with his full 2013 canvass and later district court service.

82. Merely four district judges won 2015 approval in contrast to Democrats' helping confirm three circuit and fifteen district judges by April 2007. See 161 CONG. REC. S2104 (daily ed. Apr. 13, 2015) (statement of Sen. Leahy); Bendery, *supra* note 74.

83. See *supra* notes 33, 42–50 and accompanying text.

84. See Russell Wheeler, *Confirming Federal Judges During the Final Two Years of the Obama Administration: Vacancies up, Nominees down*, BROOKINGS: FIXGOV BLOG (Aug. 18, 2015, 8:00 AM), <http://www.brookings.edu/blogs/fixgov/posts/2015/08/18-obama-federal-judges-confirmation-wheeler>.

85. See *supra* notes 43, 46, 49, 63 and accompanying text. GOP senators proposed many nominees. See 161 CONG. REC. S2104–05 (daily ed. Apr. 13, 2015) (statement of Sen. Leahy).

86. Ten were circuit picks. See *supra* text accompanying note 42.

II. THE REASONS FOR AND IMPLICATIONS OF THE PROBLEMATIC SELECTION PROCESS

A. *Reasons*

The explanations for appointments' problematic condition are complex. Scholars and politicians robustly debate whether selection has always been troubled,⁸⁷ but a number trace the modern "confirmation wars" to the pitched fight about Judge Robert Bork's Supreme Court nomination three decades ago.⁸⁸ Writers contend the process is effectively on a downward trajectory summarized by partisanship and serial obstruction in which the parties ratchet down the regime, while both consider any concession unilateral disarmament.⁸⁹ For example, the most recent iteration derives from Republican accusations that Democrats stymied confirmations during the ending pair of Bush years and retaliated for that with unprecedented stalling in Obama's tenure.⁹⁰ Democratic frustration eventually provoked the nuclear option's invocation that spurred Republicans to contend Democrats had abrogated the rules.⁹¹ Mandating cloture on all prospects concomitantly fueled Democrats' endeavors that rapidly approved numerous jurists over 2014's lame duck session to which the GOP responded by profoundly delaying 2015 choices.⁹² In short, rampant partisanship and many severe paybacks seem to epitomize the process.

87. Michael Gerhardt & Michael Ashley Stein, *The Politics of Early Justice: Federal Judicial Selection, 1789-1861*, 100 IOWA L. REV. 551, 553 (2015); Orrin Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J. L. & PUB. POL'Y 1035, 1038-39 (2009); Jed Handelsman Shugerman, *The Golden or Bronze Age of Judicial Selection?*, 100 IOWA L. REV. BULLETIN 69, 70 (2015), http://ilr.law.uiowa.edu/files/ilr.law.uiowa.edu/files/ILRB_100_Shugerman.pdf.

88. See generally ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989) (explaining that Robert Bork's nomination was contentious); MARK GITENSTEIN, *MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT* (1992) (discussing the epic struggle that took place between senators, the press, staff, and civil liberty organizations over Robert Bork's nomination).

89. Doug Kendall, *The Bench in Purgatory: The New Republican Obstructionism on Obama's Judicial Nominees*, SLATE (Oct. 26, 2009), http://www.slate.com/articles/news_and_politics/jurisprudence/2009/10/the_bench_in_purgatory.html.

90. See *supra* notes 6-10 and accompanying text.

91. See *supra* notes 12-14 and accompanying text.

92. See *supra* notes 14-83 and accompanying text.

B. *Implications*

2015 inaction leaves the courts with seventy-one Article III judgeships empty, while the AO identifies emergencies for thirty-two circuit and district court positions, a statistic which Republicans permitted to double since January, including the vacancy that Restrepo could fill.⁹³ Open posts were essentially at ninety for much of the five years which commenced in August 2009; the courts were only able to experience the comparatively low figure of seventy-one vacancies *after* Democrats had unleashed the nuclear option which prevented Republicans from mounting successful filibusters.⁹⁴ However, 2015 inactivity can yield one hundred openings and perhaps fifty emergencies next year.

Slow confirmations have many deleterious impacts.⁹⁵ They require fine, uncontroversial nominees to place lives and careers on hold and dissuade myriad remarkable candidates from entertaining bench service.⁹⁶ Protracted Senate assessment deprives tribunals of judicial resources which they critically need, impedes prompt, economical and fair case disposition, imposes substantially greater pressure on already overburdened jurists and compels litigants to wait years on resolution.⁹⁷ These detrimental effects have also undermined citizen regard for selection and the government's coordinate branches.⁹⁸ The above propositions suggest that proposals for improving confirmations warrant scrutiny.

93. FEDERAL JUDICIAL VACANCIES (2015), *supra* note 56; 161 CONG. REC. S2029-30 (daily ed. Mar. 26, 2015) (statement of Sen. Leahy); see Joe Palazzolo, *In Federal Courts, the Civil Cases Pile up*, WALL ST. J. (Mar. 6, 2015), <http://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746>.

94. See sources cited *supra* notes 12–14, 39, 44.

95. See *Senate Gridlock*, *supra* note 3, at 2253; 161 CONG. REC. S3223 (daily ed. May 21, 2015) (statement of Sen. Leahy).

96. Kendall, *supra* note 89; Todd Ruger, *Nominees Are Living on Hold*, NAT'L L. J. (Dec. 17, 2012), <http://www.nationallawjournal.com/id=1202581557603/Nominees-are-living-on-hold?slreturn=20151106194656/>; see Andrew Cohen, *In Pennsylvania, the Human Costs of Judicial Confirmation Delays*, THE ATLANTIC (Sept. 9, 2012), <http://www.theatlantic.com/politics/archive/2012/09/in-pennsylvania-the-human-costs-of-judicial-confirmation-delays/261862/>.

97. See U.S. COURTS, YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2010); *id.* (1997, 2002); Tobias, *Senate Gridlock*, *supra* note 3, at 2253; Jennifer Bendery, *Federal Judges Are Burned Out, Overworked and Wondering Where Congress Is*, HUFFINGTON POST (Sept. 30, 2015), http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_55d77721e4b0a40aa3aaf14b; Wheeler, *supra* note 84.

98. See Cohen, *supra* note 96 (explaining the “real-life consequences of delay” due to “justice delayed syndrome”); Palazzolo, *supra* note 93 (noting citizens’ discontent with civil cases piling up due to slow judicial appointment process); Ruger, *supra* note 96 (describing judicial appointment delay as having large impact on public).

III. SUGGESTIONS FOR THE FUTURE

The appointment of merely eleven court nominees in 2015 and other problematic phenomena show that the process will face serious complications over the 2016 presidential election year. Most important, approvals can gradually slow and come to a halt, and the judiciary could have nearly one hundred unfilled positions, almost half emergencies, were 2015 inaction to continue. Accordingly, Obama, the chamber, and members should now pledge to fulfill the shared constitutional duty for appointments, thus providing the bench sufficient resources to deliver justice, with meaningful cooperation throughout the nomination and confirmation procedures. GOP senators and party leaders ought to effectuate the regular order construct again by carefully deploying multiple ideas used at the close of Bush's Administration, reinstituting strategies that expedite consideration and formulating new promising concepts, which directly fill the ample vacancies with highly qualified centrists.⁹⁹

All selection participants must canvass and implement numerous ways of ending or tempering the "confirmation wars." Integral will be stopping or ameliorating the vicious cycle of paybacks and strident, counterproductive partisanship which the majority's rhetoric and corresponding delay exemplify, namely the June suggestion by McConnell that few appellate nominees would receive confirmation and Grassley's petulant July denial of chamber votes until fall. Strikingly ironic about 2015 GOP conduct was the failure to even match approvals in numbers of recent presidential election years.¹⁰⁰

A. *Selection in Modern Presidential Election Years*

Because 2016 is one such year, for which peculiar conventions have developed, relatively diverse approaches could enjoy success. A major tradition has been that the nomination and confirmation processes slow, particularly at second terms' conclusion, and ultimately grind to a halt.¹⁰¹ This custom is mainly based on respect

99. For many specific ideas, see Shenkman, *supra* note 44, at 298–311; Tobias, *Senate Gridlock*, *supra* note 3, at 2255–65.

100. See 161 CONG. REC. S3849–50 (daily ed. June 8, 2015) (statement of Sen. Reid); Carl Tobias, *Filling Judicial Vacancies in a Presidential Election Year*, 46 U. RICH. L. REV. 985, 996 (2012); Everett & Kim, *supra* note 38.

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for voter preferences expressed in the November elections and for incoming chief executives and senators, who deserve the opportunity to proffer candidates and contribute advice and consent.

The tradition has allowed consideration of many accomplished, consensus trial level nominees into most autumns but rarely through lame duck sessions. For example, the chamber approved twenty-two Bush *père* choices in 1992 after June; seventeen of President Bill Clinton's over 1996 following June with eight after June 2000; a pair of Bush submissions later than June in 2004 combined with eight recommendations after this month over 2008; and fourteen Obama candidates across 2012.¹⁰² Those data could reveal Democratic Presidents' nominees fared better, yet many variables such as nomination timing, which party held a chamber majority and the review's narrow scope, complicate analysis.¹⁰³

The tradition concomitantly permits strong, moderate appellate nominees to garner votes past the Memorial Day Recess, but occasionally later. A dramatic illustration was Stephen Breyer whose First Circuit nomination Ted Kennedy (D-Mass.) persuaded Strom Thurmond (R-S.C.) to promote after Ronald Reagan's 1980 defeat of President Jimmy Carter.¹⁰⁴ More recently, the Senate approved eleven Bush *père* circuit aspirants during 1992 (six following June); two of Clinton's in January 1996 with eight across 2000 (one later than June); while five Bush choices won approval over 2004 and four were confirmed in 2008 (none after that month either year).¹⁰⁵ Five Obama 2012 jurists were appointed, but no candidate after mid-June.¹⁰⁶ These figures show that

AND CONFIRMATION OF LOWER FEDERAL COURT JUDGES IN PRESIDENTIAL ELECTION YEARS (2008); Russell Wheeler, *Judicial Confirmations: What Thurmond Rule?*, 45 BROOKINGS 1 (Mar. 2012), http://www.brookings.edu/~media/research/files/papers/2012/3/judicial-wheeler/03_judicial_wheeler.pdf.

102. U.S. COURTS, ARCHIVE OF JUDICIAL VACANCIES (1992, 1996, 2000, 2004, 2008, 2012), <http://www.uscourts.gov/judges-judgeships/judicialvacancies/archive-judicial-vacancies>; *id.* (2002, 2010, 2014) (approving 20 Bush, and 19 and 23 Obama, picks in mid-term lame duck sessions); ARCHIVE OF JUDICIAL VACANCIES, *supra* note 9; Wheeler, *supra* note 101.

103. Wheeler, *supra* note 101, at 4 (identifying variables); see RUTKUS & SCOTT, *supra* note 101, at 3–4, 51–53.

104. SHELDON GOLDMAN, PICKING FEDERAL JUDGES 261 (1997); RUTKUS & SCOTT, *supra* note 101, at 7–8.

105. U.S. COURTS, ARCHIVE OF JUDICIAL VACANCIES (1992, 1996, 2000, 2004, 2008), <http://www.uscourts.gov/judges-judgeships/judicialvacancies/archive-judicial-vacancies>; Wheeler, *supra* note 101.

106. McConnell agreed on no final votes after June 12, making five able, consensus

both parties' nominees met similar resistance, yet the GOP needs to greatly enhance the pace should it hope to equal the late Bush years' performance.

In short, much consensus attends the conventions that nomination and confirmation processes slow and eventually halt in presidential election years, while circuit appointments conclude sooner, involving fewer approvals. However, considerable disagreement remains about the traditions' exact contours, including when appointments could taper off and stop, while McConnell recently conceded that "there isn't any particular official or unofficial cutoff date."¹⁰⁷ Those phenomena explain why the customs apparently have been different over time, honored in the breach and employed to capture partisan advantage.

B. *Traditional Selection Measures*

In this milieu, numerous tools can apply with more or less success. Politicians ought to seriously consider reinstituting a number of traditional measures, which proved efficacious during the last two Bush years, but that achieved checkered 2015 results witnessed by GOP inactivity.¹⁰⁸ General examples abound. The President should continue assiduously consulting and quickly nominating prominent, mainstream candidates whom numerous home state officers diligently propose. Lawmakers must again respect the convention of abundantly deferring to home state colleagues and Obama, who has cultivated the legislators, heeded their preferences and sent a number of people Republicans tendered or whom they favored.¹⁰⁹ Other general customs are the duties to keep moving able, consensus suggestions at a presidency's close and voting on cohorts of the aspirants near recesses, yet these conventions seem to be honored in the breach, and the 2015

picks wait until 2013. See ARCHIVE OF JUDICIAL VACANCIES (2012), *supra* note 9; *infra* text accompanying note 119.

107. Jennifer Bendery, *Mitch McConnell Will Finally Let Some Judges Get Confirmed Next Year*, HUFFINGTON POST (Dec. 15, 2015, 7:45 PM), http://www.huffingtonpost.com/entry/republicans-obama-judicial-nominees_567055e0e4b0e292150f6690; see RUTKUS & SCOTT, *supra* note 101, at 3–4, 51–53; Wheeler, *supra* note 101, at 1.

108. The GOP must expedite with more hearings and faster panel and floor votes on consensus nominees. See *infra* notes 132–36. However, 2015 inaction shows the ideas lack promise for 2016. See *supra* notes 52, 61.

109. Goldman et al., *supra* note 3, at 16–17; Carl Tobias, *Justifying Diversity in the Federal Judiciary*, 106 NW. U. L. REV. COLLOQUY 283, 296 (2012). GOP senators who differ with Obama can suggest preferable choices.

experience in Committee, but particularly on the floor, was unpromising.¹¹⁰

Many specific notions also could apply. The President should even more insistently consult senators from jurisdictions where open posts surface to accelerate nominations' pace. Those officials must supplement cooperation by especially promptly submitting numerous accomplished, uncontroversial prospects.¹¹¹ Merit selection panels, which canvass, interview and effectively choose applicants for vacant court seats in Pennsylvania, Texas, and other states have provided help, but the commissions and lawmakers whom they advise can act slowly.¹¹² Thus, politicians need to closely scrutinize diverse, promising models, such as the California and Wisconsin panels that efficiently yielded numerous capable aspirants over Bush's tenure,¹¹³ while concomitantly fine-tuning initiatives.

Senators also could move very expeditiously when judges proffer notice of intent to assume senior status and cautiously anticipate future empty positions by, for instance, respectfully communicating with jurists once they become eligible.¹¹⁴ Another concept is a mechanism enlisted in states that possess split delegations, notably Pennsylvania, which enables the senator from that party lacking the White House to submit able candidates.¹¹⁵ Other profitable solutions include presenting Obama multiple submissions and clearly ranking preferences, which enlarge his flexibility and cabin the necessity to start anew when Obama differs on the lone pick sent, a luxury the United States cannot afford in presidential election years.¹¹⁶

110. See *supra* notes 28–54, 57, 60–86, 108 and accompanying text.

111. See *supra* notes 3–4, 21–27 and accompanying text.

112. Jessica M. Karmasek, *Members of Texas Judicial Evaluation Committee Announced*, LEGAL NEWSLINE (Apr. 17, 2013), <http://legalnewsline.com/stories/510515096-members-of-texas-judicial-evaluation-committee-announced>; Borys Krawczeniuk, *Toomey, Casey Unveil Selection Process for Federal Judges*, STANDARD SPEAKER (Apr. 27, 2011), <http://standardspeaker.com/news/toomey-casey-unveil-selection-process-for-federal-judges-1.1138220>; see *supra* note 24; see also *supra* notes 66–69 and accompanying text.

113. Tobias, *Senate Gridlock*, *supra* note 3, at 2256. But see ARCHIVE OF JUDICIAL VACANCIES (2010–15), *supra* notes 9, 56 (showing Wis. 7th Cir. vacancy open since 2010).

114. 28 U.S.C.A. § 371 (2012) (eligible if sixty-five and fifteen years service); see David Stras & Ryan Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453 (2007); Tobias, *Senate Gridlock*, *supra* note 3, at 2256.

115. Toomey picks one in four whom Casey and he suggest. PENNSYLVANIANS FOR MODERN COURTS, *Western District May Be Filled in 2015* (Mar. 2015); see *supra* note 69; sources cited *infra* note 142.

116. GOP senators more often send one. Joseph Morton, *Obama Nominates Omaha*

If GOP lawmakers remain unreceptive to White House cultivation by acting slowly or forwarding minuscule possibilities,¹¹⁷ Obama could designate with no Republican delegation support; however, this proves unproductive.¹¹⁸ The Administration can also strike compromises about the kind of accomplished, moderate nominees whom Obama prefers. For example, he could rely more upon diversity vis-à-vis (1) age by championing older selections, as with Circuit Judge Andrew Hurwitz, the last 2012 confirmee;¹¹⁹ (2) ideology or party affiliation, especially Republicans or Independents, namely a few Toomey candidates;¹²⁰ (3) experience, such as prosecutors or civil defense lawyers;¹²¹ and (4) confirming administration, specifically Bush, with Circuit Judge Henry Floyd's elevation.¹²² All modern Presidents capitalize on the last tradition.¹²³ For instance, Obama has aptly nominated some of his lower court appointees, like Judges Gregg Costa and Robert Wilkins,¹²⁴ and even certain jurists three predecessors approved, a dynamic gesture of bipartisanship.¹²⁵ Obama might correspondingly invoke "trades," which he apparently employed in filling lengthy Georgia vacancies.¹²⁶ Obama can as well use confrontational tools, which hold senators responsible by publishing the

Attorney Rossiter to Federal Bench in Nebraska, OMAHA WORLD HERALD (June 12, 2015), http://www.omaha.com/news/crime/obama-nominates-omaha-attorney-rossiter-to-federal-bench-in-nebraska/article_7517dc5c-1084-11e5-9f03-eb447e9aaa07.html. But see Tobias, *Senate Gridlock*, *supra* note 3, at 2251.

117. See *supra* notes 4, 22–26 and accompanying text.

118. He rarely uses it, as home state GOP members can retain blue slips and end processing. Goldman et al., *supra* note 3, at 16–18; Tobias, *Senate Gridlock*, *supra* note 3, at 2261; see *supra* notes 65, 71–72, 75–76.

119. 158 CONG. REC. S4108 (daily ed. June 12, 2012) (Hurwitz was sixty-six); 149 CONG. REC. S12,127 (daily ed. Sept. 29, 2003) (Carlos Bea was sixty-eight when Bush tapped him).

120. See, e.g., 158 CONG. REC. S8380 (daily ed. Dec. 21, 2012) (Judge Matthew Brann); 160 CONG. REC. S1747 (daily ed. Mar. 26, 2014) (Judge Edward Smith).

121. For appointee experiential data, see ALLIANCE FOR JUSTICE, BROADENING THE BENCH (2015).

122. 157 CONG. REC. S6027 (daily ed. Oct. 3, 2011). Obama elevated Justice Sonia Sotomayor, whom Bush *père* named to the S.D.N.Y. and Clinton elevated to the Second Circuit. 155 CONG. REC. S9063 (daily ed. Aug. 6, 2009); 138 CONG. REC. S12,417 (daily ed. Aug. 11, 1992); 144 CONG. REC. S11,310 (daily ed. Oct. 2, 1998).

123. Tobias, *Senate Gridlock*, *supra* note 3, at 2258; see *supra* notes 68–69, 122 and accompanying text.

124. 160 CONG. REC. S283 (daily ed. Jan. 13, 2014) (Wilkins); *id.* at S3125 (daily ed. May 20, 2014) (Costa).

125. For example, Bush appointed Floyd, and Bush *père* and Clinton named Sotomayor. See *supra* note 122.

126. That was controversial. See *supra* note 26; Tobias, *Senate Gridlock*, *supra* note 3, at 2251 (nominating from state in a circuit other than one where a vacancy occurs, as this is a custom, not a rule). But see 28 U.S.C.A. § 44(c) (Supp. 2014).

status of pre-nomination negotiations or mustering nominations for all open slots, which could dramatize and publicize how chronic vacancies eviscerate justice.¹²⁷

Obama should in turn expedite the process before and once home state politicians send choices. Illustrative would be according nominations higher priority or greater resources.¹²⁸ Moreover, the chief executive should hasten American Bar Association candidate analyses, Federal Bureau of Investigation background checks, and White House evaluations and nominations of the persons selected.¹²⁹ The President also must continue seeing ideology narrowly and emphasizing merit by comprehensively pursuing and naming superb, mainstream nominees.¹³⁰ Because most of his prospects have been competent and uncontroversial, Obama should not have to choose between proposing the type of submissions whom he prefers and filling court vacancies at 2016's commencement, as that salutary custom has governed early in many Presidents' eighth year, a system which the Bush initiative epitomizes.¹³¹

For its part, the Committee should provide greater numbers of hearings with more nominees while offering faster discussions and ballots.¹³² The Committee ought to survey additional productive notions that foster comparatively efficient review. A helpful approach, which Orrin Hatch (R-Utah) practiced when Judiciary Chair during the Bush years, was mounting abbreviated hearings for talented, centrist nominees.¹³³ One illustration of this measure was the June 10 session for Restrepo and two district nominees, which entailed less than one hour with probing queries and frank, complete responses.¹³⁴ Another solution that merits careful

127. Shenkman, *supra* note 44, at 299–300; Tobias, *Senate Gridlock*, *supra* note 3, at 2261; *supra* note 118.

128. Goldman et al., *supra* note 3, at 11–13; see Tobias, *Senate Gridlock*, *supra* note 3, at 2250–51.

129. A study found the many steps take time. See Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319, 332–333 (1994); Tobias, *Senate Gridlock*, *supra* note 3, at 2235.

130. Tobias, *Filling Judicial Vacancies in a Presidential Election Year*, *supra* note 100, at 995.

131. See *supra* notes 9, 44; see also *supra* text accompanying notes 102, 105.

132. See *supra* notes 27–37 and accompanying text.

133. Tobias, *Senate Gridlock*, *supra* note 3, at 2263; Neil A. Lewis, *Senate Panel Backs Appeals Court Nominee*, N.Y. TIMES (Jan. 30, 2003), <http://www.nytimes.com/2003/01/30/politics/30CND-JUDG.html>.

134. *Hearings on Judicial Nominees Before the S. Comm. on the Judiciary*, 114th Cong.

investigation would be holding discussions and votes the first time the panel considers nominees, specifically for emergencies, rather than delaying them a week, as happened with more than 350 Obama candidates, in particular Restrepo.¹³⁵

The Majority Leader needs to substantially expand floor debates and ballots. For instance, he could reestablish a valuable procedure which Democrats applied over Bush's concluding years: having final votes regarding every strong, moderate district nominee on the floor before prolonged recesses, as Leahy cogently urged, and maybe clear them near the 2016 Memorial Day, July 4, or August Recesses.¹³⁶ McConnell concomitantly ought to illuminate his June discussion of appellate candidates, because appointing very small numbers over a President's last years would be unprecedented.¹³⁷ Should he remain unresponsive, Democrats can attempt protesting with unanimous consent requests to hold expeditious final votes, which succinctly publicize and dramatize obstruction's harmful impacts, yet Republicans flatly denied two reasonable July 2015 Democratic petitions urging floor ballots on recommendations.¹³⁸

C. *Pragmatic Politics*

Even if the constitutional duty of furnishing advice and consent and the responsibility to a coordinate branch for delivering adequate judicial resources do not persuade the GOP to collaborate more, some pragmatism, self-interest and political realities should dictate compliance with numerous traditional, modest approaches. For example, the party's sizeable presidential field inspires little confidence that anyone from this group will become the next chief executive, while over 2016 Republicans will defend twice as many chamber seats as the opposition.¹³⁹ These prognos-

(June 10, 2015); *supra* text accompanying note 29; Shenkman, *supra* note 44, at 303–05 (urging abolishing hearings that add little substance and changing questionnaires to omit “completeness traps”).

135. *See supra* notes 6, 34–37, 80 and accompanying text.

136. *See supra* notes 44, 46–47.

137. He did allow Stoll's July 7 final vote. *See supra* notes 61–64 and accompanying text.

138. *See supra* note 52 and accompanying text. If delay persists, Democrats can apply rather dramatic, confrontational notions. Obama may use the bully pulpit to hold the GOP accountable. Senators might protest with panel session boycotts. *See supra* notes 105, 109; *infra* note 145 and accompanying text.

139. Chris Cillizza, *10 Senate Seats Most Likely to Switch Parties in 2016*, WASH. POST

tications suggest, for instance, that Republicans could prefer a number of the fine, mainstream nominees Obama will marshal at his tenure's conclusion to submissions whom a new Democratic President might appoint, especially should Republicans not maintain the chamber. If the GOP wins the presidency, the figures above show Democrats will probably capture the Senate, which means the less the Republican party cooperates now the more likely that action will spark Democratic conduct as problematic or worse once 2017 begins.¹⁴⁰

D. *More Dramatic, Controversial Approaches*

Nevertheless, were GOP senators to resist Democrats' overtures or reject collaboration, Obama may actually consider additional dramatic, controversial alternatives. He can rely on the bully pulpit to hold GOP legislators accountable for slowly choosing picks, tendering few aspirants or delaying the confirmation regime following nomination or make openings an election issue.¹⁴¹ The chief executive and lawmakers can agree to drastically revamp the system through inauguration of a bipartisan judiciary whereby the party lacking executive control might designate specific percentages of nominees, a technique several legislators have adopted.¹⁴² Congress may package this idea with bills authorizing seventy-three judgeships, which could take effect over 2017, thus advantaging neither party.¹⁴³

(June 7, 2015), https://www.washingtonpost.com/politics/10-senate-races-most-likely-to-sw-itch-parties-in-2016-elections/2015/06/07/d9215fbc-0d13-11e5-9726-49d6fa26a8c6_story.html; Heather Haddon, *Presidential Battle Fuels Republican Worries over Senate*, WALL ST. J. (Dec. 23, 2015, 7:41 PM), <http://www.wsj.com/articles/presidential-battle-fuels-republican-worries-over-senate-1450917553>; James Hohmann & Elise Viebeck, *Trump Leads in Polls Because GOP Primary Voters Don't Value Electability*, WASH. POST (Aug. 4, 2015), <https://www.washingtonpost.com/news/powerpost/wp/2015/08/04/the-daily-202-trump-lead-s-in-polls-because-gop-primary-voters-dont-value-electability/>.

140. Even if Republicans win the presidency and chamber, Democrats may adopt pay-back strategies akin to concepts the GOP used in Obama's first six years. See *supra* notes 3–83 and accompanying text.

141. See David Stras & Ryan Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1902–06 (2008) (discussing the benefits of “going public” and using the “bully pulpit” to ensure a smooth path to confirmation for judicial nominees); Tobias, *Senate Gridlock*, *supra* note 3, at 2261.

142. See Michael Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 688 (2003); Carl Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 790 (2010); *supra* text accompanying notes 68, 115.

143. Tobias, *Filling the D.C. Circuit Vacancies*, *supra* note 12, at 140; *supra* note 43 and accompanying text. If selection fails to improve, more judgeships will not help.

If the situation becomes egregious, comparatively radical devices might be indicated. For example, Obama always can recess appoint designees, yet he wisely refrained from capitalizing on that notion because thorny legal and political concerns trouble the solution's application.¹⁴⁴ Democratic members could also boycott committee nomination hearings and meetings, while the caucus may analogously treat chamber floor activity, thereby confounding attempts to conduct panel and Senate business.¹⁴⁵

E. *The Judiciary*

Finally, the Constitution assigns the political branches greater responsibility for selection than the courts, but they might apply numerous mechanisms. For instance, Chief Justices William Rehnquist and John Roberts deployed Year-End Reports to explain how openings directly undercut the courts and harm litigants while reprimanding both parties for stalling confirmations.¹⁴⁶ Individual jurists or the bench as a whole, through entities, notably the Judicial Conference, may publicly and dramatically register opposition to delay in selection. For example, particular jurists or institutions have criticized, and should continue emphasizing, the pressures which numbers of vacancies impose and even testify before Congress or lobby it and each legislator on matters like increased judgeships.¹⁴⁷ Nonetheless, certain actions might elicit concerns about separation of powers or judicial independence, specifically over the presidential election year.¹⁴⁸

144. Stras & Scott, *supra* note 141, at 1906; *Senate Gridlock*, *supra* note 3, at 2261.

145. *See supra* note 138 and accompanying text. These may slow Obama nominees.

146. YEAR-END REPORTS, *supra* note 97.

147. *See supra* notes 44, 97, 143 and accompanying text. Some judges enjoy cordial relations with senators and urge them to fill vacancies. Tobias, *Filling Judicial Vacancies in a Presidential Election Year*, *supra* note 100, at 1003.

148. Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 316–17 (1999); *see* Tobias, *Filling the Judicial Vacancies in a Presidential Election Year*, *supra* note 100, at 1002. Unorthodox ideas, such as changing life tenure or electing judges, can apply but need legislation or constitutional amendment and, thus, are not feasible for 2016. Carl Tobias, *Dear President Bush: Leaving a Legacy on the Federal Bench*, 42 U. RICH. L. REV. 1041, 1054 (2008).

CONCLUSION

If minuscule 2015 confirmations—resembling the few approvals seen during presidential election years—represent the new majority’s definition of regular order, this nascent leadership inspires *de minimis* confidence about 2016 court appointments. Especially ironic has been that the regular order trope suffuses much GOP discourse, even while the party has continued to undermine this order in the approval system. Recalcitrance and not honoring the chamber’s duty have acutely undercut the coordinate judiciary’s attempts to fulfill essential constitutional responsibilities. Thus, during 2016, Obama and senators must again implement regular order derived from traditions used over recent presidential election years, namely district confirmations until autumn and the conventional appointments record compiled across 2007–08. Only then may the courts better deliver justice.
