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## HOW PRESIDENT BIDEN CAN FILL THE CENTRAL DISTRICT OF CALIFORNIA BENCH

*Carl Tobias* \*

President Joseph Biden confronts an enormous opportunity to seat highly qualified, mainstream federal judges in plenty of appeals court and district court openings which former President Donald Trump neglected to fill in his four-year term. The remarkable California trial level vacant emergency slots, particularly in the United States District Court for the Central District of California, are the United States' worst-case scenario and consummate promise. The Central District of California tribunal had experienced as many as *ten* lengthy open court slots among twenty-eight posts, but it encounters six today.

Trump incessantly boasted that confirming appellate court jurists comprised his administration's most outstanding success. The Republican President and Grand Old Party ("GOP") Senate majorities in the 115th and the 116th Congress dramatically eclipsed records by confirming fifty-four accomplished, extremely conservative, and particularly young circuit judges.<sup>1</sup> Nevertheless, these court of appeals confirmations actually inflicted substantial complications, especially affecting the plentiful district courts which faced approximately 150 vacancies regarding 677 positions.

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1. Press Release, White House, Off. of the Press Sec'y, President Donald Trump Has Delivered Record Breaking Results for the American People in His First Three Years in Office (Dec. 31, 2019); Carl Hulse, *With Wilson Confirmation, Trump and Senate Republicans Achieve a Milestone*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/24/us/trump-senate-judges-wilson.html> [<https://perma.cc/65HY-FZFH>]; Micah Schwartzman & David Fontana, *Trump Picked the Youngest Judges to Sit on the Federal Bench. Your Move, Biden.*, WASH. POST (Feb. 16, 2021), <https://www.washingtonpost.com/outlook/2021/02/16/court-appointments-age-biden-trump-judges-age> [<https://perma.cc/7W59-W4TB>].

The Central District is a quintessential example. The Administrative Office of the United States Courts (“AO”) recognizes that the court’s open slots are “judicial emergencies,” because most of the posts have been vacant for seriously protracted times or have involved significant caseloads. Indeed, this situation concomitantly obtains for the Eastern, Northern, and Southern Districts of California, which address an overwhelming fifteen emergency vacancies, comprising nearly half of the emergencies in the entire United States. Despite these pressing circumstances, former President Trump eschewed nominations altogether for the Central District throughout his first twenty months, waited another prolonged year before naming candidates for more openings, rejected affording a single choice for other positions, and failed to confirm one jurist ahead of September 2020. Both of the GOP upper chamber majorities actually left unclear precisely when nominees whom the Judiciary Committee had denied hearings would receive the sessions and exactly when the Senate would convene floor debates and confirmation votes for those nominees whom the committee had approved. The “crisis of unprecedented magnitude” became so acute that prior Chief Judge Virginia Phillips “implore[d] the Senate to act on the nominations [mustered], the President to nominate candidates [for the remaining] vacancies, and the Senate” to expeditiously confirm preeminent individuals for all of the Central District openings.<sup>2</sup>

The Central District has a virulent strain of the vacancies epidemic which wreaks havoc around the whole country. The Central District jurists are plainly the trial level justice system’s “workhorses,” because they must resolve gargantuan civil and criminal dockets. The openings impose tremendous pressure on this court’s judges, litigants, counsel, and court personnel. Accordingly, how Biden, Trump’s highly experienced replacement, and the California senators—Democrats Dianne Feinstein, the former Judiciary Committee Ranking Member, and newly-chosen Senator Alex Padilla—could expeditiously fill all six of the present Central District vacancies merits analysis.

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2. Letter from Central District of California Chief Judge Virginia Phillips to White House Counsel Patrick Cipollone, Senators Dianne Feinstein, Lindsey Graham, & Kamala Harris (Oct. 29, 2019) [hereinafter Phillips Letter]; see Letter from Eastern District of California Chief Judge Lawrence O’Neill to White House Counsel Cipollone and Senators Feinstein and Harris (Oct. 18, 2019) (making a similarly substantial, and perhaps more compelling, case for the Eastern District of California).

The piece initially canvasses the history of judicial appointments. Section two chronicles the practices which President Trump and the Republican Senate majorities deployed, perceiving that the President and the chambers concentrated on exceptionally rapid approval of conservative, young appellate court jurists yet failed to emphasize filling trial court openings. Former President Trump also ignored, deleted, or narrowed valuable traditions, including robust consultation of senators from jurisdictions which experience a plethora of vacancies. The segment then assesses confirmation strictures employed by the pair of GOP Senate majorities, detecting that the panels and the chambers jettisoned and restricted major venerable norms, while they seemingly disregarded rigorous, equitable procedures that had previously applied to committee hearings and chamber floor debates. However, meaningful Trump Administration consultation of Dianne Feinstein and Kamala Harris (then-senator and current Vice President), who appeared to robustly collaborate with the White House, supported the comparatively efficacious nomination regime, although substantially delayed confirmation system, accorded the initial three Central District nominees and prominent, moderate nominees whom the chief executive marshaled around 2019's close.

Section three reviews the implications of multiple Republican White House and Senate appointments practices, finding that the Central District ultimately endured up to nine more openings than at President Trump's 2017 inauguration. Judge Phillips recounted striking empirical data which trenchantly demonstrate the problems. For instance, the district court's active jurists serve "19 million people;" each jurist navigates and resolves a "case load of [almost 1,000] civil" matters.<sup>3</sup>

The fourth segment proffers numerous recommendations. Now that President Biden has deftly recalibrated Trump's selection processes and Democrats command a razor-thin Senate majority, because a significant number of Central District vacancies remain open, Biden must assiduously consult Senators Feinstein and Paddilla while cooperating with all of their colleagues and revitalizing salutary concepts on which earlier Presidents and Senates have capitalized and place talented, mainstream, diverse judges in the

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3. This particular statistic is "nearly double the national average." Phillips Letter, *supra* note 2. The Southern District of California's five vacancies could suggest that the tribunal's circumstances may be worse; however, the Central District of California openings are larger and most of the vacancies are more protracted. See *infra* notes 84, 89 and accompanying text.

six vacancies. The Democratic chamber majority ought to adopt constructive, proven devices, notably rigorous Judiciary Committee hearings and panel deliberations and robust chamber floor debates. These measures should productively eliminate or reduce the six existing Central District openings.

## I. CONTEMPORARY JUDICIAL SELECTION DIFFICULTIES

The applicable history warrants comparatively limited analysis in this piece, because a number of writers have considered the relevant background, and the current difficulties have enhanced relevance.<sup>4</sup> One significant attribute is the permanent vacancies dilemma, which results from enlarged federal court jurisdiction, dockets, and court slots. Another, the modern conundrum, is political and emanates from conflicting Senate and presidential control which began forty years ago.

### A. *Persistent Vacancies*

Congress dramatically increased federal court jurisdiction after the 1950s,<sup>5</sup> expanding civil suits and federalizing more criminal activity, parameters which intrinsically drove cases.<sup>6</sup> Legislators addressed rising dockets by creating seats.<sup>7</sup> Over the fifteen years before 1995, appointments times mounted.<sup>8</sup> For example, circuit nominations required twelve, and confirmations devoured three, months.<sup>9</sup>

The nomination and confirmation processes' large numbers of steps and substantial quantity of participants mean that delay

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4. Gordon Bermant, Jeffrey A. Hennemuth & A. Fletcher Mangum, *Judicial Vacancies: Examination of the Problem and Possible Solutions*, 14 MISS. COLL. L. REV. 319 (1994); WHITE BURKETT MILLER CTR. OF PUB. AFFS., REPORT OF THE COMMISSION ON THE SELECTION OF FEDERAL JUDGES (1996) [hereinafter MILLER REPORT].

5. MILLER REPORT, *supra* note 4, at 3; see Carl Tobias, *The New Certiorari and a National Study of the Federal Appeals Courts*, 81 CORNELL L. REV. 1264, 1268–70 (1996).

6. *E.g.*, Pub. L. No. 101-336, 104 Stat. 327 (1990); Pub. L. No. 103-322, 108 Stat. 1796 (1994).

7. 28 U.S.C. §§ 44, 133; ADMIN. OFF. OF THE U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (2022) [hereinafter JUDICIAL VACANCIES].

8. Bermant et al., *supra* note 4, at 323, 329–32.

9. *Id.* Nominations consumed twenty months and confirmations devoured six in the first year of President Bill Clinton's second term and of President George W. Bush's first term. Those years resembled President Barack Obama's first year and last two. Carl Tobias, *Curing the Federal Court Vacancy Crisis*, 53 WAKE FOREST L. REV. 883, 887 (2018).

comprises an inherent phenomenon.<sup>10</sup> Chief executives actively consult home state elected officials, pursuing instructive guidance on candidates, and senators tender preeminent submissions. The Federal Bureau of Investigation (“FBI”) provides extensive “background checks.” The American Bar Association (“ABA”) comprehensively examines and rates choices.<sup>11</sup> The Department of Justice (“DOJ”) thoroughly screens individuals and readies nominees for chamber assessments. The Judiciary Committee analyzes picks, schedules hearings, discusses candidates, and votes; those whom the panel reports might receive floor debates, when necessary, preceding final ballots.

### B. *The Modern Dilemma*

The Constitution envisions that senators will halt misguided White House nominations, yet partisanship has sporadically plagued selection.<sup>12</sup> Politicization intensively soared when President Richard Nixon declared that he would muster “law and order” by tapping “strict constructionists,”<sup>13</sup> and especially previous to United States Court of Appeals for the District of Columbia Circuit Judge Robert Bork’s Supreme Court vote.<sup>14</sup> Partisanship spiked, while divided government and the idea that the party not controlling the executive would recapture the presidency and confirm jurists animated dilatory conduct. Moreover, slow nominations and confirmations explain the few appointments.<sup>15</sup>

In Barack Obama’s presidency, Republican senators ended collaboration, displayed by the unprecedented refusal to assess D.C. Circuit Chief Judge Merrick Garland, Obama’s distinguished

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10. Bermant et al., *supra* note 4; Sheldon Goldman, *Obama and the Federal Judiciary: Great Expectations but Will He Have a Dickens of a Time Living Up to Them?*, FORUM, Apr. 9, 2009.

11. ABA, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS (1983); *see infra* notes 27–28, 30, 57.

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

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

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

15. 1997 and 2001 selection exemplify this. Tobias, *supra* note 9, at 888–89 (analyzing Clinton and Bush judicial selection).

United States Supreme Court nominee.<sup>16</sup> After reassuming a chamber majority during November 2014, the GOP vowed to again implement “regular order,” which Democrats had putatively eroded once they had captured the majority in 2007. However, Republicans approved only twenty Obama nominees his last pair of years, the fewest since President Harry Truman; these elements meant that the country encountered 103 appellate court and district court openings upon Trump’s inauguration and the Central District experienced *five*; one vacancy was an emergency.<sup>17</sup>

## II. TRUMP ADMINISTRATION JUDICIAL SELECTION

### A. *Nomination Process*

In the 2016 presidential election campaign, Trump pledged to evaluate and seat ideological conservatives. He effectuated the promises by appointing three Justices—Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—and manifold similar circuit jurists, although Trump confirmed relatively few analogous district court nominees at first.<sup>18</sup> He broke circuit records for a President’s initial two years.<sup>19</sup>

The former President depended on some respected customs but violated or downplayed other traditions. For instance, he, like every modern President, assigned numerous responsibilities to the White House Counsel (Donald McGahn), related duties to the Department of Justice and crucial responsibility for district vacancies to in state politicians.<sup>20</sup> Trump emphasized appeals courts; when

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16. See, e.g., Robin Kar & Jason Mazzone, *The Garland Affair, What History and the Constitution Really Say About President Obama’s Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53 (2016); see also Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089 (2017).

17. California confronted four Ninth Circuit emergencies and one more district vacancy. JUDICIAL VACANCIES, *supra* note 7 (Confirmations, Emergencies (2015–2017)); 163 CONG. REC. S8,022-24 (daily ed. Dec. 14, 2017) (statements of Sens. Durbin, Feinstein, & Leahy); see Carl Tobias, *The Republican Senate and Regular Order*, 101 IOWA L. REV. ONLINE 12 (2016) (defining regular order which the Republican Senate majority vowed to, but did not, restore).

18. JUDICIAL VACANCIES, *supra* note 7 (Confirmations (2017–2020)).

19. Trump confirmed twelve circuit judges in 2017, eighteen in 2018, twenty in 2019 and four in 2020. *Id.*

20. Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2240 (2013); Michael Schmidt & Maggie Haberman, *McGahn, Solider for Trump and Witness Against Him, Leaves White House*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/us/politics/don-mcgahn-leaves-trump-administration.html> [<https://perma.cc/89WW-FP3N>] (documenting that McGahn’s tenure ended in October 2018 and Patrick Cipollone was Counsel over the remainder of Trump’s tenure).

approaching those, he focused on conservatism while applying the “short list” of potential Supreme Court prospects whom the Federalist Society assembled.<sup>21</sup> These notions continued governing White House judicial selection, because Leonard Leo, the Federalist Society’s Executive Vice President,<sup>22</sup> helped Trump stress circuits, which are tribunals of last resort for myriad cases, articulate broader policy than district courts, and issue rulings that cover a few states.<sup>23</sup>

However, Trump defied or altered valuable traditions. One was consulting politicians about home state openings, a convention that all Presidents employ. In Obama’s tenure, consultation enjoyed salient priority through the systematic deployment use of “blue slips,” which permitted no hearing unless *both* senators from jurisdictions returned them. Democrats alleged that McGahn negligibly consulted on appellate vacancies, while the White House Counsel replied that the Constitution omits the idea.<sup>24</sup> Most pertinently, Senators Feinstein and Harris contended that Trump failed to “adequately consult” about submissions—Daniel Bress, Patrick Bumatay, Daniel Collins, and Kenneth Lee—for openings at the Ninth Circuit which are allocated to California.<sup>25</sup> Yet, when

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21. Donald McGahn, *A Brief History of Judicial Appointments*, 60 WM. & MARY L. REV. ONLINE 105 (2019); Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on Federal Courts*, N.Y. TIMES, <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> [<https://perma.cc/GD5J-JWCG>] (Mar. 16, 2020); Charlie Savage, *Trump Is Rapidly Reshaping the Judiciary. Here’s How.*, N.Y. TIMES (Nov. 11, 2017), <https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html> [<https://perma.cc/JT7K-Z98E>].

22. Robert O’Harrow, Jr. & Shawn Boburg, *A Conservative Activist’s Behind-the-Scenes Campaign to Remake the Nation’s Courts*, WASH. POST (May 21, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts> [<https://perma.cc/QZN5-3849>]; Zoe Tillman, *After Eight Years on the Sidelines, This Conservative Group Is Reshaping the Courts Under Trump*, BUZZFEED NEWS (Nov. 20, 2017, 8:06 AM), <https://www.buzzfeednews.com/article/zoetillman/after-eight-years-on-the-sidelines-this-conservative-group> [<https://perma.cc/7N2G-N2LP>]; see Madison Alder, *Leonard Leo to Keep Judicial Advocacy Focus in New Venture*, BLOOMBERG L. (Jan. 7, 2020, 6:31 PM), <https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XG8GCB4000000> [<https://perma.cc/45YH-KHVC>].

23. Goldman, *supra* note 12; Tobias, *supra* note 20, at 2240–41; 163 CONG. REC. S8,022–24 (daily ed. Dec. 14, 2017) (statement of Sen. Feinstein).

24. Thomas Kaplan, *Trump Is Putting Indelible Conservative Stamp on Judiciary*, N.Y. TIMES (July 31, 2018), <https://www.nytimes.com/2018/07/31/us/politics/trump-judges.html> [<https://perma.cc/VF5P-HSEW>]; Zoe Tillman, *Here’s How Trump Is Trying to Remake His Least Favorite Court*, BUZZFEED NEWS, <https://www.buzzfeednews.com/article/zoetillman/heres-who-the-white-house-pitched-for-the-federal-appeals> [<https://perma.cc/CZ2H-43M3>] (Mar. 16, 2018, 9:06 AM).

25. Carl Tobias, *Filling the California Ninth Circuit Vacancies*, 92 S. CAL. L. REV. POSTSCRIPT 83, 91–95 (2019); Press Release, Harris on Nomination of Patrick Bumatay to the Ninth Circuit (Oct. 30, 2019); see *infra* note 48 (analyzing Bumatay’s confirmation



suggesting three able, rather mainstream Central District nominees over 2018 and five other prominent, consensus aspirants later, Counsel seemed to attentively consult the politicians, who adeptly relied on several bipartisan merit vetting commissions that aptly improved coordination.<sup>26</sup>

Another critical deviation from revered precedents was exclusion of the American Bar Association from selection initiatives. Presidents after Dwight Eisenhower, save George W. Bush, consistently invoked ABA examinations and ratings in denominating candidates. Obama refused to forward any possibility whom the bar committee deemed not qualified.<sup>27</sup> Trump submitted ten around the country with this ranking, but eight won appointment, while the ABA found most California applicants well qualified yet carefully declined to rate anyone not qualified.<sup>28</sup>

Trump deployed many vaunted procedures when sending trial level nominees to the chamber. For instance, like recent Presidents, he extracted assistance from home state officers while premising most nominations on competence to address substantial dockets, which California showed.<sup>29</sup> Many aspirants nationwide were

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process and senators' objections to him); Tobias, *supra* note 9, at 898 (documenting similar treatment of other Democratic senators from states with appellate vacancies); Maura Dolan, *Trump Has Flipped the 9th Circuit—and Some New Judges Are Causing a 'Shock Wave'*, L.A. TIMES (Feb. 22, 2020, 7:06 AM), <https://www.latimes.com/california/story/2020-02-22/trump-conservative-judges-9th-circuit> [<https://perma.cc/4LVG-4YFU>] (analyzing Trump California appointees' effects on the circuit).

26. *Hearing on Nominees Before the S. Comm. on the Judiciary*, 116th Cong. (Mar. 13, 2019) (statement of Sen. Feinstein); *infra* notes 35–37 and accompanying text.

27. Adam Liptak, *White House Ends Bar Association's Role in Vetting Judges*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/us/politics/white-house-american-bar-association-judges.html> [<https://perma.cc/WFF7-22SP>]; Charlie Savage, *Biden Won't Restore ABA Vetting Role*, N.Y. TIMES (Feb. 6, 2021), <https://www.nytimes.com/2021/02/05/us/politics/biden-american-bar-association-judges.html> [<https://perma.cc/23QZ-4H2S>]; 163 CONG. REC. S8,022-24 (daily ed. Dec. 14, 2017) (statements of Sens. Durbin, Feinstein, & Leahy) (touting American Bar Association input and Obama refusal to nominate not qualified picks); *Hearing on Nominees Before the S. Comm. on the Judiciary*, 116th Cong. (Oct. 30, 2019) (Sen. Mike Lee (R-UT) criticizing ABA and urging that its input cease).

28. *Ratings of Article III and Article IV Judicial Nominees*, ABA, [https://www.americanbar.org/groups/committees/federal\\_judiciary/ratings](https://www.americanbar.org/groups/committees/federal_judiciary/ratings) [<https://perma.cc/3KF5-DTER>] (providing the ABA Standing Committee on the Federal Judiciary's ratings for the 115th, 116th, and 117th Congresses (2017–2022)); Ann E. Marimow & Matt Viser, *Biden Moves to Make Mark on Federal Courts After Trump's Record Judicial Nominations*, WASH. POST (Feb. 3, 2021), [https://www.washingtonpost.com/local/legal-issues/biden-judge-nomination/2021/02/02/e9932f3a-6189-11eb-9430-e7c77b5b0297\\_story.html](https://www.washingtonpost.com/local/legal-issues/biden-judge-nomination/2021/02/02/e9932f3a-6189-11eb-9430-e7c77b5b0297_story.html) [<https://perma.cc/6RN3-58MY>] (Biden's approach).

29. Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9, 19 (2017). *But see* Seung Min Kim, *Trump's Judge Picks: 'Not Qualified,' Prolific Bloggers*, POLITICO (Oct. 17, 2017, 5:05 AM), <https://www.politi>

preeminent candidates who had fine ABA rankings,<sup>30</sup> although multiple choices withdrew and Trump urged GOP senators to oppose nominees who lacked capability.<sup>31</sup>

Trump ignored or deemphasized efficacious mechanisms. A predicament with trial level selection was not prioritizing the 150 vacancies in the rush to appoint manifold extremely conservative, young appellate court jurists.<sup>32</sup> Trump confirmed fewer judges in jurisdictions which Democrats represent, even though the states face immense emergencies, notably six across the Central District.<sup>33</sup> Trump refused to designate anyone for this court's ten open posts and three unfilled circuit slots arising in California previous to October 2018 or to approve a circuit jurist ahead of May in the following year; he recommended no one for five other Central District vacancies within a year or for two more later and realized district court appointments only upon 2020's end.<sup>34</sup>

In October 2018, Trump had suggested Bumatay, Collins, and Lee for Ninth Circuit open emergency positions and Stanley Blumenfeld, Jeremy Rosen, plus Mark Scarsi for Central District vacancies, and in early February 2019, he renominated Collins and Lee, offered Daniel Bress for the Ninth Circuit, resubmitted all three Central District picks, and renamed Bumatay to the Southern District.<sup>35</sup> In that mid-October, Trump resent Bumatay for the Ninth Circuit plus designated Fernando Aenlle-Rocha, Sandy Nunes Leal, and Rick Richmond for the Central District openings

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co.com/story/2017/10/17/trump-judges-nominees-court-picks-243834 [https://perma.cc/HY55-5F59].

30. District Judges Walter Counts and Karen Gren Scholer are exceptional illustrations. See *supra* notes 28–29

31. Tobias, *supra* note 9, at 894; Tom McCarthy, *Judge Not: Five Judicial Nominees Trump Withdrew—and Four Pending*, GUARDIAN (Mar. 10, 2019, 3:00 EDT), <https://www.theguardian.com/law/2019/mar/10/judge-not-five-judicial-nominees-trump-withdrew-and-four-pending> [https://perma.cc/E7VL-GPCD].

32. Emergencies soared from twelve to as many as eighty-six after the GOP assumed a Senate majority in January 2015. JUDICIAL VACANCIES, *supra* note 7 (Emergencies (2015–2022)).

33. California experienced vacancies in up to four appellate, and seventeen (now sixteen) district, court posts. *Id.*

34. Data demonstrate that Republicans elevated “red” over “blue” state priority. Russell Wheeler, *Judicial Appointments in Trump's First Three Years: Myths and Realities*, BROOKINGS (Jan. 28, 2020), <https://www.brookings.edu/blog/fixgov/2020/01/28/judicial-appointments-in-trumps-first-three-years-myths-and-realities/> [https://perma.cc/UM8V-U6PB] (“The Senate moved nominees in states with two GOP senators to confirmation in 217 median days. It took 412 days for nominees in two-Democratic-senator states.”).

35. Press Release, White House, Off. of the Press Sec'y, Twelve Nominations Sent to the Senate (Feb. 6, 2019) [hereinafter Feb. 6, 2019 Press Release] (naming Bress and renaming other two nominees to Ninth Circuit and Bumatay to Southern District).

with Adam Braverman plus Shireen Matthews for empty posts regarding the Southern District.<sup>36</sup> Later this fall, the President chose John Holcomb and Steve Kim for Central District vacancies, and Knut Johnson, Michelle Pettit, and Todd Robinson for Southern District openings.<sup>37</sup>

In 2019's end, the committee furnished Aenlle-Rocha, Blumenfeld, plus Scarsi hearings, but the chamber did not vote on the prospects until autumn 2020.<sup>38</sup> When Congress' first session adjourned, the Senate members directly returned the thirteen California nominees to the White House; in January 2020, Trump dutifully repropose the three nominees with hearings, yet delayed resubmitting ten more nominees before February 13 plus suggesting two Eastern District nominees until late May and June; therefore, nine waited on hearings that the Republican Party failed to set.<sup>39</sup>

A custom which Trump ignored or diluted was enlarging minority representation.<sup>40</sup> He instituted little action to pinpoint, canvass, nominate, and confirm accomplished, consensus ethnic minority, or lesbian, gay, bisexual, transgender, and queer ("LGBTQ"), candidates by, for instance, employing diverse appointments staff or requesting that lawmakers proffer numbers of

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36. Press Release, White House, Off. of the Press Sec'y, Eighteen Nominations Sent to the Senate (Oct. 17, 2019) (renaming Bumatay to the Ninth Circuit and naming five district picks).

37. Press Release, White House, Off. of the Press Sec'y, Nine Nominations Sent to the Senate (Nov. 21, 2019) (nominating Holcomb, Kim, Johnson, Pettit, and Robinson).

38. *Hearing on Nominees Before the S. Comm. on the Judiciary*, 116th Cong. (Nov. 13, 2019); *Hearing on Nominees Before the S. Comm. on the Judiciary*, 116th Cong. (Dec. 4, 2019); *Executive Business Meeting Before the S. Comm. on the Judiciary*, 116th Cong. (Mar. 5, 2020).

39. Senators held over none. 166 CONG. REC. S10 (daily ed. Jan. 3, 2020); see Press Release, White House, Off. of the Press Sec'y, Seven Nominations Sent to Senate (Jan. 9, 2020) (renaming three); Press Release, White House, Off. of the Press Sec'y, Eleven Nominations Sent to Senate (Feb. 13, 2020) (renaming ten); Press Release, White House, Off. of the Press Sec'y, Ten Nominations Sent to Senate (May 21, 2020) (naming Dirk Paloutzian to the Eastern District); Press Release, White House, Off. of the Press Sec'y, Eight Nominations Sent to the Senate (June 18, 2020) (same as to James Arguelles); *Hearing on Nominees Before the S. Comm. on the Judiciary*, 116th Cong. (June 17, 2020) (Holcomb, Matthews, & Robinson hearing); *Executive Business Meeting Before the S. Comm. on the Judiciary*, 116th Cong. (July 23, 2020) (approving three nominees); JUDICIAL VACANCIES, *supra* note 7 (Confirmations (2020)) (confirming four Central and one Southern District judges).

40. See, e.g., Stacy Hawkins, *Trump's Dangerous Judicial Legacy*, 67 UCLA L. REV. DISCOURSE 20 (2019); Carl Tobias, *President Donald Trump's War on Federal Judicial Diversity*, 54 WAKE FOREST L. REV. 531 (2019).

minority selections<sup>41</sup> In 228 circuit court and district court appointees, two comprise LGBTQ judges; thirty-two are persons of color.<sup>42</sup> In 260-plus aspirants nominated, only thirty-eight constitute ethnic minorities—seventeen Asian American, ten Black, one Jamaican, and ten Latinx, nominees.<sup>43</sup> Of particular California submissions, over half are men; nonetheless, Bumatay, Lee, Kim, and Matthews comprise Asian Americans, while Aenlle-Rocha plus Leal constitute Latinx suggestions and Bumatay is gay.<sup>44</sup>

### B. *Confirmation Process*

The confirmation process' deleterious elements resembled those of the nomination system in a few ways, primarily by eliminating or modifying conventions that have long operated efficaciously. Illustrative were amending the century-old blue slip practice and significantly changing hearing procedures. Over fall 2017, Chuck Grassley (R-IA), as then-panel Chair, fashioned an exception for individuals who lacked blue slips provided by two senators from jurisdictions with court of appeals vacancies, especially when opposition was apparently "political or ideological."<sup>45</sup> He changed the blue slip notion, to which each party had adhered during all eight of Obama's years—which comprised the most recent, salient precedent.<sup>46</sup> This situation deteriorated when the Chair processed nominees, although former President Trump had minimally consulted, as Grassley negligibly justified according the Chair (himself) responsibility to determine whether former President Trump

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

42. Ninth Circuit Judge Bumatay and Northern District of Illinois Judge Mary Rowland are the only LGBTQ jurists whom Trump nominated or appointed. JUDICIAL VACANCIES, *supra* note 7 (Confirmations (2017–2021)); *see sources cited supra* note 40.

43. Trump confirmed no Black to any U.S. circuit or California post. *See sources cited supra* notes 35–42, *infra* note 94.

44. In the Central District, Aenlle-Rocha and Leal are Latinx, she is the only woman and Kim is Asian American. Judges Lee and Bumatay are the only Trump Ninth Circuit minority appointees. *See sources cited supra* notes 35–37.

45. 163 CONG. REC. S7,174 (daily ed. Nov. 13, 2017); *id.* at S7,285 (daily ed. Nov. 16, 2017); *Hearing on Nominees Before the S. Comm. on the Judiciary*, 115th Cong. (Nov. 29, 2017); *see* Carl Tobias, *Senator Chuck Grassley and Judicial Confirmations*, 104 IOWA L. REV. ONLINE 31 (2019) (assessing the role that Grassley played when he served as Chair from 2015–2018).

46. Chairs Grassley and Patrick Leahy (D-VT) strictly followed the blue slip policy for all lower court nominees throughout Obama's tenure. *Executive Business Meeting Before the S. Comm. on the Judiciary*, 115th Cong. (Feb. 15, 2018) (statements of Sens. Grassley & Leahy); *see* Carl Tobias, *Senate Blue Slips and Senate Regular Order*, 36 YALE L. & POL'Y REV. INTER ALIA (2018).

“adequately consulted.”<sup>47</sup> Grassley asserted that blue slips insure that the executive branch meticulously consults politicians from home states and protect the legislators’ judicial selection prerogatives, while he vowed to respect district court slips.<sup>48</sup> Pertinent were both of the California senators’ ardent rejection of nominees Bress, Collins, and Lee,<sup>49</sup> which Senator Lindsey Graham (R-SC), who became Chair in early 2019, labeled “ideological disputes.”<sup>50</sup>

The Republican majority was responsible for dilemmas encountered across the confirmation process, as the Grand Old Party members changed effective hearing requirements and traditions. One lengthy custom’s alteration was scheduling *fifteen* hearings for two circuit, and often four trial court, nominees absent Democrats’ permission; this contrasted with *three* analogous hearings throughout Obama’s eight years.<sup>51</sup> Perhaps most relevant to California were single hearings about Collins and Lee plus Bumatay and Lawrence VanDyke; none of the hearings occurred with the

47. *Executive Business Meeting*, *supra* note 46 (statements of Sens. Feinstein & Leahy); see sources cited *supra* note 24 (Republicans honoring very few blue slips); Tobias, *supra* note 46 (minimal precedent supports circuit exception).

48. See sources cited *supra* note 46. GOP senators did blue slip many accomplished, centrist Obama circuit nominees for political or ideological reasons, the very bases Grassley deemed illegitimate. See sources cited *supra* notes 17, 46.

49. *Hearing on Nominees Before the S. Comm. on the Judiciary*, 116th Cong. (Mar. 13, 2019) (Collins & Lee hearing); *Hearing on Nominees Before the S. Comm. on the Judiciary*, 116th Cong. (May 22, 2019) (Bress hearing); *Executive Business Meeting Before the S. Comm. on the Judiciary*, 116th Cong. (Apr. 4, 2019) (Collins & Lee approval); *Executive Business Meeting Before the S. Comm. on the Judiciary*, 116th Cong. (June 20, 2019) (Bress approval); JUDICIAL VACANCIES, *supra* note 7 (Confirmations (2019)). The senators opposed all, whose nominations expired, so Grassley never publicly treated Trump’s consultation. See sources cited *supra* note 25; 165 CONG. REC. S23 (daily ed. Jan 2, 2019). When Trump did not rename them, yet sent fifty more, some politicians and members of the press criticized the White House Counsel’s cooperation with the California senators, urging swift renomination. Opinion, *A Bad Judges Deal*, WALL STREET J. (Jan. 29, 2019, 7:21 PM), <https://www.wsj.com/articles/a-bad-judges-deal-11548807717> [https://perma.cc/7WAV-JL Y6]. This helped name Bress and renominate Collins and Lee to the Ninth Circuit and Bumatay to the Southern District; the senators opposed all three nominees. Press Release, Feinstein, Harris on Ninth Circuit Nominees (Jan. 30, 2019); Feb. 6, 2019 Press Release, *supra* note 35. When Bumatay was renamed to the circuit, the senators opposed this. Press Release, Harris on Nomination of Bumatay, *supra* note 25; Feb. 6, 2019 Press Release, *supra* note 35; *Executive Business Meeting Before the S. Comm. on the Judiciary*, 116th Cong. (Nov. 21, 2019) (statement of Sen. Feinstein). For Bumatay’s process, see *Hearing*, *supra* note 27; *Nov. 21 Executive Business Meeting*, *supra* (confirmation).

50. He vowed to follow Grassley’s slip policies for circuit and district vacancies. *Executive Business Meeting Before the S. Comm. on the Judiciary*, 116th Cong. (Feb. 7, 2019); sources cited *infra* note 52; see sources cited *supra* note 49; Press Release, White House, Off. of the Press Sec’y, Withdrawals Sent to the Senate (Sept. 19, 2019) (withdrawing nominee lacking slip).

51. These were *three* special circumstances, and Democrats enjoyed Republican permission. *E.g.*, Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2174–76 (2011); 163 CONG. REC. S8,022-24 (daily ed. Dec. 14, 2017) (statement of Sen. Leahy).

Democratic minority's consent.<sup>52</sup> The GOP insisted on such tightly packed hearings that senators had negligible time to ask queries;<sup>53</sup> these sessions lacked care for evaluating people who may realize life tenure.<sup>54</sup> Some nominees dissembled by repeating or deflecting questions and refusing to promise that they might dutifully recuse when cases treat issues that nominees had litigated or on which many hold distinctly extreme views.<sup>55</sup> Illuminating were numerous Trump appointees who have compiled exceedingly anti-LGBTQ records.<sup>56</sup>

One clear departure from regular order was Grassley's decision to reject waiting for ABA input ahead of hearings or votes, despite Feinstein's myriad calls for ABA ratings *before* the sessions. He argued that the external "political group" should not dictate the panel schedule.<sup>57</sup> Thus, most controversial picks secured party-line votes.<sup>58</sup> Once nominees received approval, similar dynamics limited rigorous inquiry: the Democratic minority needed cloture and roll call ballots for most nominees; both parties' members deployed lockstep voting; and exploding the "nuclear option" in 2013 meant that nominees won confirmation on majority ballots.<sup>59</sup> Other examples were ramming numbers of trial level jurists' debates with

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52. VanDyke was a controversial Ninth Circuit nominee for a Nevada vacancy. *Hearing, supra* note 26 (Collins & Lee hearing); *Hearing, supra* note 27 (Bumatay & VanDyke hearing); see Carl Tobias, *Keep the Federal Courts Great*, 100 B.U. L. REV. 196, 214 & n.56 (2020) (Graham holding five more 2019 similar hearings).

53. See sources *supra* note 52; *Executive Business Meeting Before the S. Comm. on the Judiciary*, 116th Cong. (Apr. 25, 2019) (documenting the minority's few resources).

54. See sources cited *supra* notes 24, 51–53; 163 CONG. REC. S8,022-24 (daily ed. Dec. 14, 2017) (statements of Sens. Feinstein & Leahy) (criticizing Republicans' lack of care).

55. Collins and Lee so acted, but Bress and Bumatay less so. *Hearing, supra* note 26; hearings cited *supra* note 49; *Hearing, supra* note 27; Ross Todd, *ABA 'Not Qualified' Rating and Blue Slips Dominate Hearing for Ninth Circuit Nominees*, RECORDER (Oct. 30, 2019, 1:32 PM), <https://www.law.com/therecorder/2019/10/30/aba-not-qualified-rating-blue-slips-dominate-hearing-for-ninth-circuit-nominees/?slreturn=20220207142212> [<https://perma.cc/4RFR-AM5X>]; see Dolan, *supra* note 25 (Collins' effect on the Ninth Circuit); 28 U.S.C. § 455 (recusal law).

56. LAMBDA LEGAL, COURTS, CONFIRMATIONS & CONSEQUENCES (2021); see Kristine Phillips, *Trump's Judicial Appointees Will Impact LGBTQ Rights Far Beyond Presidency, Group Says*, USA TODAY (Jan. 5, 2021, 4:29 PM), <https://www.usatoday.com/story/news/politics/2021/01/05/trump-judges-impact-lgbtq-rights-years-lambda-legal-says/4099483001> [<https://perma.cc/XE75-8CJN>].

57. *Hearing on Nominees Before the S. Comm. on the Judiciary*, 115th Cong. (Aug. 1, 2018) (statements of Sens. Grassley & Feinstein). The ABA only supplied input regarding four New York nominees on the hearing date but sent it later for two more nominees. *Id.*

58. Tobias, *supra* note 9, at 901 n.103; see *Executive Business Meeting, supra* note 38 (smoothly approving Central District nominees).

59. Carl Tobias, *Fill the D.C. Circuit Vacancies*, 91 IND. L. J. 121, 122 (2015). Cloture and roll call votes do stop weak nominees; majority confirmation votes approve strong ones. White House and Senate actions reflect who controls each.

Senate votes into minimal time before recesses over July and December 2019; each canvass realized de minimis notice.<sup>60</sup> The many nominees and their substantial records duly restricted Democrats' resources to prepare.<sup>61</sup> Senate debates' mixed quality resembled that in committee deliberations.<sup>62</sup>

Republicans prioritized appellate court over district confirmations, non-emergencies, and openings in red states while confirming able, conservative white males.<sup>63</sup> This dearth of attention was not warranted. Trial court appointees can be, and frequently are, the tribunal workhorses and resolve huge dockets. Emergencies connote relatively pressing situations, and Trump's constant political maneuvers and correspondingly senator party alignment should not have driven core judicial resource distribution. Minority jurists also provide numerous benefits.<sup>64</sup> These concerns were magnified by the need to fill Justice Antonin Scalia's Supreme Court vacancy and the 103 lower court openings at Trump's inauguration; Mitch McConnell (R-KY), the GOP leader, facilitated both.<sup>65</sup>

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60. 165 CONG. REC. S5,228-30 (daily ed. July 31, 2019); *id.* at S7,135 (daily ed. Dec. 18, 2019); *id.* at S7,188-91 (daily ed. Dec. 19, 2019); Schedule for Monday, July 29, 2019, U.S. SENATE DEMOCRATS (July 25, 2019, 5:07 PM), <https://www.democrats.senate.gov/2019/07/25/schedule-for-monday-july-29-2019> [<https://perma.cc/G95B-MX7E>]; Schedule for Thursday, December 19, 2019, U.S. SENATE DEMOCRATS (Dec. 18, 2019, 8:12 PM), <https://www.democrats.senate.gov/2019/12/18/schedule-for-thursday-december-19-2019> [<https://perma.cc/6GSP-DRFU>].

61. *Executive Business Meeting Before the S. Comm. on the Judiciary*, 115th Cong. (Nov. 2, 2017); sources cited *supra* note 53; see Tobias, *supra* note 9, at 902 (noting that Bush never confirmed such a large number of circuit judges in his eight years as Trump did in one week and that Obama did so only once).

62. See sources cited *supra* notes 51–55. The Republican Senate seemed to find the thirty hours of post-cloture debate time for district nominees so unhelpful that the GOP sharply decreased them to two. 165 CONG. REC. S2,220 (daily ed. Apr. 3, 2019).

63. These priorities reflect the nominating regime. See sources cited *supra* notes 18–28, 32–44. White men are two of four California Ninth Circuit confirmees, and they were ten of fifteen district nominees.

64. See *supra* notes 40–44, *infra* notes 74–77 and accompanying text.

65. Charles Homans, *Mitch McConnell Got Everything He Wanted. But at What Cost?*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/magazine/mcconnell-senate-trump.html?searchResultPosition=1> [<https://perma.cc/5JYN-B4FK>]; Carl Hulse, *McConnell Has a Request for Veteran Federal Judges: Please Quit*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/us/politics/mcconnell-judges-republicans.html?searchResultPosition=5> [<https://perma.cc/8MP5-FWDR>]; Jane Mayer, *How Mitch McConnell Became Trump's Enabler-in-Chief*, NEW YORKER (Apr. 12, 2020), <https://www.newyorker.com/magazine/2020/04/20/how-mitch-mcconnell-became-trumps-enabler-in-chief> [<https://perma.cc/U5LD-67TZ>]; see Jane Mayer, *Why McConnell Dumped Trump*, NEW YORKER (Jan. 23, 2021), <https://www.newyorker.com/magazine/2021/02/01/why-mcconnell-dumped-trump> [<https://perma.cc/J8Q4-P5RD>]; *infra* notes 117–20 and accompanying text (COVID-19).

Those priorities enabled President Trump to secure the appellate court record his initial years. However, they left twenty-plus district nominees absent confirmation; rampant vacancies at 2017's conclusion and more upon the next two years' close; emergencies profoundly imploded; and chronically few blue state or minority appointments.<sup>66</sup> Central District open posts skyrocketed from five to ten; emergencies profoundly rose from one to ten.<sup>67</sup> Trump failed to approve a single prospect in the Central District before September of his last year, one 2018 possibility never received a hearing, and merely five in one dozen California nominees earned hearings over his final two years.

In the end, the makeup of California nominee packages showed ample reasons for Trump's dilatory proposal of most trial court nominees and why so many picks elicited lacked hearings. His White House seemingly proffered four California lawyers and seated them in Ninth Circuit empty positions, and the California senators apparently recommended most district prospects.<sup>68</sup> In short, Republicans quickly exacted several circuit judges' appointment from purported "trades" but seemed to delay, or renege on, confirming district picks.<sup>69</sup>

### III. IMPLICATIONS FOR THE CENTRAL DISTRICT

The selection process's assessment reveals that crucial notions which Trump and the two Republican Senate majorities implemented manifested numerous detrimental ramifications. These procedures left ten Central District vacancies that were all emergencies.<sup>70</sup> California realized seventeen trial level openings that

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66. For 2017, see sources cited *supra* notes 32–44, 62–64; JUDICIAL VACANCIES, *supra* note 7 (Confirmations, Emergencies (2017)). For 2018 and 2019, see JUDICIAL VACANCIES, *supra* note 7 (Confirmations, Emergencies (2018–2019)).

67. Trump selected eight Central District nominees, four of whom received hearings, and four California district nominees of color, two of whom earned hearings. See sources cited *supra* notes 34–37, 39, 42, 44, 66.

68. The California senators' retention of slips on four Trump California Ninth Circuit nominees and return of slips for most district picks suggest that he chose the former and the senators sent most district nominees. See *infra* notes 114–16.

69. For trades and "bipartisan" courts, see *infra* notes 101–12, 116–19. Trump also seemingly taunted the California senators by slowly renaming nominees on whom he and they had agreed. See sources cited *supra* notes 25, 34–37, 44, 66.

70. Most of the seventy-three district openings (thirty-two comprise emergencies) are in jurisdictions that Democrats represent and few Trump confirmees are diverse, as California acutely demonstrates. See sources cited *supra* notes 32–44.



implicated pressing emergencies until late 2020,<sup>71</sup> and now has fourteen, which certainly have impaired endeavors of district jurists, litigants, and counsel to promptly, inexpensively, and fairly treat rising cases.<sup>72</sup> Those judges decide abundant civil and criminal lawsuits, the second of which receives precedence under the Speedy Trial Act; the Central District addresses robust civil actions that comprise practically twice the United States average.<sup>73</sup>

Some parameters—six Central District emergency vacancies and very few minority confirmees—indicate the necessity to appoint jurists who offer more comprehensive representation. No Black was among twenty California appeals or trial court possibilities whom Trump sent. However, three of eight advanced in the Central District are minorities, yet the chamber approved merely one. Persons of color now encounter great representation as defendants in the criminal justice system and lack judicial representation. Central District residents have perennially been quite diverse, which suggests that minority bench representation warrants significant expansion. Diversity furnishes advantages.<sup>74</sup> People of color, women, and LGBTQ jurists offer trenchant views on complex questions regarding abortion, criminal law, and other daunting issues that federal courts resolve.<sup>75</sup> Diverse judges restrict ethnic, gender, and sexual orientation biases which undercut justice's delivery.<sup>76</sup> Jurists who reflect the United States distinctly increase public respect for the courts by showing that ample persons of color, women, and LGBTQ designees can serve efficaciously

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71. Emergencies, which were thirty-three in the U.S. and one in the Central District at Trump's ascension, remain similar in the United States and worse in the latter. *See supra* notes 17, 60, 70 (approving thirteen judges at December recess).

72. FED. R. CIV. P. 1; *see* 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).

73. Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Ensnared*, WALL STREET J. (July 23, 2011), <https://www.wsj.com/articles/SB10001424052748703749504576172714184601654> [<https://perma.cc/A9XH-99XT>]; Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, WALL STREET J. (Apr. 6, 2015, 2:09 PM), <https://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746> [<https://perma.cc/V8C3-9K4P>]; JUDICIAL VACANCIES, *supra* note 7 (Emergencies (2021)); *see infra* notes 120–22 (COVID-19 effects); letters cited *supra* note 2 (case data and pleas to swiftly fill emergencies).

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

75. Jennifer Peresie, Note, *Female Judges Matter: Gender and Decisionmaking in the Federal Appellate Courts*, 114 YALE L. J. 1759 (2005). *But see* Stephen J. Choi, Mitu Gulati, Mirya Holman & Eric A. Posner, *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504 (2011).

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

as judges.<sup>77</sup> No persuasive reason supports the failure to improve diversity. For example, manifold conservative, accomplished individuals of color, women, and LGBTQ people—notably Trump confirmees Bumatay, Lee, Barbara Lagoa, and Rodney Smith, combined with able, moderate Central District Judge Aenlle-Rocha, plus fine nominees Kim and Leal conjoined with Biden’s six—erode the idea that ethnic minority, female, and LGBTQ confirmees nullify merit.<sup>78</sup> Trump jurists and nominees clearly illustrated merit *and* diversity. He needed only to recognize this.

When the Republican chief executive and chamber ignored and deemphasized critical rules and conventions to swiftly appoint many conservative, young appellate judges, they eviscerated the discharge of constitutional responsibilities: (1) presidential duties to nominate and confirm accomplished trial court jurists and (2) senatorial responsibilities to comprehensively advise and consent. Vacancies’ huge quantity and protracted character undermine fulfillment of the judiciary’s duty to speedily, inexpensively, and equitably resolve plentiful cases.<sup>79</sup>

In sum, Trump promptly appointed myriad extremely conservative, young, talented appeals court jurists. Nonetheless, he and the chamber omitted and diluted valuable concepts that allowed trial court openings to attain record heights, which the six emergencies in the Central District epitomize. Therefore, the last part scrutinizes ways to reduce the court’s abundant emergency vacancies.

#### IV. SUGGESTIONS FOR THE FUTURE

Biden must capitalize on effective procedures; former President Trump actually did invoke a few efficacious practices. One was renaming to Central District openings his first three solid prospects whose nominations expired in early months of 2019 and 2020, but

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77. Sylvia Lazos, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1442 (2008); Jeffrey Toobin, *The Obama Brief*, NEW YORKER (Oct. 20, 2014), <https://www.newyorker.com/magazine/2014/10/27/obama-brief> [https://perma.cc/U4XG-XDG2].

78. Tobias, *supra* note 9, at 909; sources cited *supra* notes 42–44, *infra* notes 87, 89. Kim and Leal, whose nominations expired in January, would need panel hearings and votes and floor debates and ballots, if Biden renamed them.

79. See sources *supra* notes 71–73. Nonstop ideological emphasis in selection can make the bench resemble the political branches and erode trust in it, the Senate, and President. *Executive Business Meeting Before the S. Comm. on the Judiciary*, 116th Cong. (Mar. 7, 2019); Tonja Jacobi, *The New Oral Argument*, 94 NOTRE DAME L. REV. 1161 (2019); Hulse, *supra* note 65; Ruiz et al., *supra* note 21.

Trump swiftly renewed them.<sup>80</sup> This device is efficient; the picks had intensive committee, FBI, and ABA surveys, which merely required cursory updating, and easily-discovered, complete records, while the nominees needed to win only panel and floor votes.<sup>81</sup> The idea could be efficacious. The district must now secure all jurists whom Congress presently authorizes to increase justice. Fairness mandates that nominees have speedy chamber review, all constituents of presidential-home state legislator trades be honored, and controversial political machinations and concomitantly senator party affiliation not dictate judicial resource dissemination.<sup>82</sup> Because an overwhelming majority of citizens selected Biden and Harris as the President and Vice President, the national leaders must have cultivated, and seemingly did avidly consult, Feinstein and Padilla regarding the Central District vacancies.<sup>83</sup> The country's leaders and the California senators could have employed with, and perhaps did apply to, four Trump prospects who lacked confirmations nuanced examinations, which include how excellent and mainstream they seem, how close in time are elections, plus how necessary is supplementing the complement of active Central District jurists.<sup>84</sup>

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80. See *supra* notes 35–39 (renaming nominees in early 2019 and 2020 and confirming those nominees in late 2020).

81. No Trump district renominees whom he or Obama had first named, who had prior hearings, needed more. None of the four other Trump Central District nominees who lacked approval had a hearing. Tobias, *supra* note 9, at 911; *infra* notes 83–85 and accompanying text.

82. See *supra* notes 25, 35–37, 64 and accompanying text, *infra* notes 113–15 and accompanying text. Trades only work when Presidents and senators respect them. Burgess Everett & Marianne Levine, *Hawley Rattles Republicans as He Derails GOP Judge*, POLITICO (June 12, 2019, 9:17 PM), <https://www.politico.com/story/2019/06/12/josh-hawley-republican-judges-1362687> [<https://perma.cc/3EZ3-9LWT>]. If Trump, Feinstein, and Harris entered a trade deal, that deal did expire on January 20, 2021 and did not bind Biden.

83. Harris's Senate work on judicial selection and her new vice-presidential role mean she can help, but Harris is extremely busy while Feinstein and Padilla at first rather slowly suggested picks. Madison Alder, *California District Courts in 'Emergency' Await Biden Nominees*, BLOOMBERG (July 28, 2021, 4:46 AM), <https://news.bloomberglaw.com/us-law-week/california-district-courts-in-emergency-await-biden-nominees> [<https://perma.cc/UY22-FAP6>]; Tal Kopan & Bob Egelko, *Federal Court Vacancies Put Pressure on Senators, President Biden*, S.F. CHRON. (June 4, 2021), <https://www.sfchronicle.com/politics/article/Federal-court-vacancies-put-pressure-on-senators-16225699.php> [<https://perma.cc/NU7B-5XWU>]; Andrew Kragie, *Long-Waiting Calif. Bench Gets 7th Vacancy in Southern Calif.*, LAW360 (July 12, 2021, 4:15 PM), <https://www.law360.com/articles/1402221> [<https://perma.cc/4FB2-8GTB>]; Katie Rogers, *Harris Meets Macron, Signaling a 'New Era' After Sub Snub, Both Say*, N.Y. TIMES, <https://www.nytimes.com/2021/11/10/world/europe/france-kamala-harris-macron.html> [<https://perma.cc/JDF8-QPU6>] (Nov. 12, 2021).

84. The four Trump nominees seem well qualified and mainstream and the district need appears urgent. However, Biden or the California senators disagreed or had different priorities, because none of the Trump nominees has become a Biden Central District nominee.

Biden ought to analogously contemplate renaming additional prominent, moderate district court nominees whom President Obama astutely chose and the committee reported, yet the Republican Senate majority denied appointment throughout 2016.<sup>85</sup> This procedure can expedite approval, because many of these nominees need to capture only panel and confirmation ballots.<sup>86</sup> Trump resent fifteen Obama aspirants whom the Senate confirmed, and more, exceptionally capable nominees whom Obama proposed, such as Superior Court Judge Mark Young, a Central District nominee, might accentuate diverse representation or fill federal trial court openings, which Biden appreciates, because the initial nominees he diligently marshaled for district court vacancies plaguing Colorado, the District of Columbia, and New Jersey comprised Obama nominees.<sup>87</sup>

Another constructive model on which Trump relied and that Biden deploys, especially with California Ninth Circuit and district court vacancies, is elevating numbers of preeminent state court jurists and impressive consensus Magistrate Judges whom district jurists appoint for eight-year terms to district courts and similar federal district judges to appellate courts. The concept is pragmatic and fair, because the nominees compile accessible, comprehensive records and could directly supply much pertinent expertise.<sup>88</sup> Illuminating are Biden's Central District nominees as well as Trump

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Press Release, White House, Off. of the Press Sec'y, President Biden Names Seventh Round of Judicial Nominees (Sept. 8, 2021); Press Release, White House, Off. of the Press Sec'y, President Biden Names Eighth Round of Judicial Nominees (Sept. 30, 2021); Press Release, White House, Off. of the Press Sec'y, President Biden Names Eleventh Round of Judicial Nominees (Dec. 15, 2021). *But see* Press Release, White House, Off. of the Press Sec'y, President Biden Names Thirteenth Round of Judicial Nominees (Jan. 19, 2022); Press Release, Eleventh Round, *supra* (documenting Biden's renomination of Trump nominees Jennifer Rearden and Hector Gonzalez to the Eastern District of New York). Senators Feinstein and Padilla deployed bipartisan merit selection panels that have served effectively. Tobias, *supra* note 20, at 2256; sources cited *supra* notes 26, 83.

85. Tobias, *supra* note 29, at 18. The passage of considerable time since Obama nominated them probably should warrant additional hearings.

86. *Id.* at 18–19; *see supra* note 81 (panel, FBI, and ABA analyses only need updating).

87. 167 CONG. REC. S3,971-72 (daily ed. June 8, 2021) (confirming Julien Neals & Regina Rodriguez); *id.* at S6,634 (daily ed. Sept. 23, 2021) (confirming Florence Pan). Judge Young won 2016 panel approval. Diane Gujarati, an Obama nominee, and Trump appointee, and twenty-plus other 2016 nominees lacked approval. Tobias, *supra* note 29, at 21–22. This technique is pragmatic and fair; the measure facilitates confirmation and nominees have waited for years.

88. 28 U.S.C. § 631; *see supra* note 81 (same as to records); Tobias, *supra* note 9, at 910 (assessing elevation from federal and state courts); *supra* notes 35–36, 38–39 (analyzing California nominees' processes); Press Releases, Seventh, Eighth, & Eleventh Rounds, *supra* note 84 (documenting deployment of selection for three California Ninth Circuit nominees).

appointees Superior Court Judges Aenlle-Rocha plus Blumenfeld, who enjoyed late 2019 hearings, but Republicans stalled the latter jurists' confirmation across more than nine months, Kim and Leal whom the chamber failed to process, and New Jersey Magistrate Judge Zahid Quraishi.<sup>89</sup>

Biden should dutifully revive or improve policies which former President Trump ignored, violated, or downplayed. Biden actively consults, and should continue avidly consulting, home state politicians; this mechanism facilitates nominations and confirmations and is blue slips' chief purpose.<sup>90</sup> Useful may have been felicitously renaming and nominating several mainstream Central District picks.<sup>91</sup> Senators' assiduous cultivation will not always elicit the strongest preferences of Democrats and Republicans but the practice can yield more nominations and resolve disputes that could undercut selection and party cooperation.<sup>92</sup> These attributes suggest the possible need to resume consideration of the several accomplished, moderate Central District nominees whom Republicans refused votes and other superb, mainstream prospects, should the chamber not confirm any Biden nominee, or when Central District openings arise in the future. Biden ought to now counter Trump's swift appointment of fifty-plus conservative, able, young appellate court judges by reviewing ideas to decrease the empty slots. For instance, Biden can prioritize talented, moderate aspirants who remedy six Central District emergencies<sup>93</sup> and plentiful

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89. *See supra* note 39; 167 CONG. REC. S4,027-29, S4,032 (daily ed. June 10, 2021) (documenting Quraishi as third Biden appointee); Press Releases, Seventh, Eighth & Eleventh Rounds, *supra* note 84 (naming diverse federal and state judges; three for Ninth Circuit and two each for Central and Southern Districts); *supra* notes 36, 38, 42-44, 85-87 (more Trump examples).

90. *See supra* notes 24-26, 35-37, 45-50 (assiduous Trump White House consultation on Central District, but not Ninth Circuit, vacant posts).

91. *See supra* notes 26, 35-37. *But see supra* note 84.

92. *See supra* notes 24-25, 33-35, 47-48 (assessing judicial appointments disputes between the Trump White House Counsel and Democratic senators from California and other states).

93. California also had three Ninth Circuit vacancies, which Biden and the Senate Democrats have recently filled with highly experienced Judges Lucy Koh, Gabriel Sanchez and Holly Thomas. JUDICIAL VACANCIES, *supra* note 7 (Confirmations (2021-2022)); *see supra* notes 33-34, 63-67.

related California vacancies;<sup>94</sup> this would duly rectify the lack of ideological balance and blue state nominees and confirmees.<sup>95</sup>

Biden has committed to diversity's substantial expansion, as his initial nominee groups, especially for California, his record-breaking nominations and confirmations, and Biden's promise to nominate the first Black woman to the Supreme Court illustrate.<sup>96</sup> More representation offers advantages which diverse, fine Ninth Circuit Judges Lee and Bumatay plus Trump's well respected Central District ethnic minority nominees aptly typify.<sup>97</sup> Biden should continue increasing representation and must convey to the public and selection participants that he clearly seeks enlarged diversity and that wider representation has priority. This importuning's focus has been White House Counsel staff, the DOJ, the panel, and copious senators. Feinstein and Harris—who carefully emphasized diversity by pursuing and suggesting numerous highly competent minority individuals—and Padilla ought to keep employing those activities.<sup>98</sup> The White House Counsel should continue interviewing and proffering candidates whom the senators recommend for the existing and future openings without nominees and persuade Biden to seriously contemplate forwarding the picks. He may then name the aspirants while convincing the Senate to powerfully support and quickly confirm them and Trump's capable, mainstream nominees who lacked thorough processing. In short, Biden and the chamber must evaluate near-term ideas which might fill all

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94. California currently possesses sixteen, New York five, and New Jersey and Washington two each, district emergencies. All four of the jurisdictions have two Democratic senators. JUDICIAL VACANCIES, *supra* note 7 (Emergencies (2022)).

95. Biden should continue relying on home state senator recommendation of able picks. *See supra* notes 29–31, 68.

96. Carl Hulse & Michael D. Shear, *Biden Names Diverse Nominees for the Federal Bench*, N.Y. TIMES, <https://www.nytimes.com/2021/03/30/us/politics/biden-judges.html> [https://perma.cc/ER3E-9LCN] (June 14, 2021); Press Release, White House, Off. of the Press Sec'y, President Biden Announces Intent to Nominate 11 Judicial Candidates (Mar. 30, 2021); *see supra* note 84 (issuing more slates with many California nominees, like the first); Press Release, Remarks by President Biden on the Retirement of Supreme Court Justice Stephen Breyer (Jan. 27, 2022) (pledging to nominate the first Black woman to the Supreme Court).

97. Most of the California vacancies had nominees (six were diverse), but all openings needed to be filled and only Lee, Bumatay, and Aenlle-Rocha won approval. Striking is no Black, and one gay, California nominee. *See supra* notes 44, 74–76; Letter from White House Counsel Dana Remus to U.S. Senators (Dec. 22, 2020) (urging diverse candidate recommendations).

98. They might want to support Trump nominees Kim and Leal whom the Senate failed to review. For the senators' efforts and more ideas to expand diversity, see Carl Tobias, *Appointing Lesbian, Gay, Bisexual, Transgender and Queer Judges in the Trump Administration*, 96 WASH. U. L. REV. ONLINE 11, 20–22 (2018); *supra* note 83.

current and future Central District vacancies and temper the non-stop confirmation wars.<sup>99</sup>

2022 may be past time for adopting numbers of efficacious solutions that could permanently enhance the faltering rules and customs.<sup>100</sup> Biden and Congress might alter the current system with a “bipartisan judiciary” that allows the party without the White House to submit a percentage of candidates.<sup>101</sup> The New York senators first devised this idea.<sup>102</sup> Pennsylvania affords a modern example.<sup>103</sup> What California recently deployed also can be viewed as a bipartisan court approach. For instance, Trump confirmed accomplished, young conservatives to four Ninth Circuit openings which arose from California, and the California senators proposed most trial-level choices. The nomination measures operated rather efficaciously, but slowly, yet the appointments practices for numerous Central and significant other California district vacancies performed less well.<sup>104</sup>

Lawmakers should tether a bipartisan judiciary with legislation that authorizes comparatively many Central District posts.<sup>105</sup> This action would institute Judicial Conference recommendations for the Senate and House, which the federal court policymaking arm

99. Examples were Trump’s rare consultation and slow nomination and renomination, Democrats’ requests for cloture and roll call votes on most nominees, and both parties’ lock-step voting. Tobias, *supra* note 20, at 2240; see John Gramlich, *Federal Judicial Picks Have Become More Contentious, and Trump’s Are No Exception*, PEW RSCH. CTR. (Mar. 7, 2018), <https://www.pewresearch.org/fact-tank/2018/03/07/federal-judicial-picks-have-become-more-contentious-and-trumps-are-no-exception> [https://perma.cc/W38J-JVRW]; *supra* notes 24–25, 37, 45–48, 59, 62, 66–67.

100. For more longer-term suggestions, see Michael Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 298–311 (2012); Tobias, *supra* note 20, at 2255–65.

101. Michael Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 688 (2003); Carl Tobias, *Fixing the Federal Judicial Selection Process*, 65 EMORY L.J. ONLINE 2051 (2016). Democrats might reject this concept, as they won a Senate majority, albeit barely. They may insist that diversity elements, regular order, and ideological balance, be restored first.

102. The senator whose party lacked the presidency chose one in three or four possibilities. Tobias, *supra* note 9, at 915.

103. California, New York, Illinois, and Washington employ similar regimes. *Id.* at 916; see *supra* notes 35–37, 44, 69.

104. In early 2019 Trump renamed three 2018 Central District picks, in autumn sent ten Central and Southern District nominees, and in spring 2020 nominated two Eastern District picks. All awaited confirmation until late 2020 when the Senate confirmed one Southern, and four Central, District judges and two vacancies never had nominees. *Executive Business Meeting*, *supra* note 38; see *supra* notes 35–37, 39, 69, 101 (offering additional specific ideas on bipartisan courts and trades).

105. U.S. JUDICIAL CONF., REPORT OF THE PROCEEDINGS OF THE JUDICIARY CONFERENCE OF THE UNITED STATES 23–24 (2021); Tobias, *supra* note 59, at 140.

derives from conservative work and caseload estimates that will improve resources for jurists.<sup>106</sup> These activities should become effective over 2022 or subsequently.<sup>107</sup> Yoking bipartisan courts and *fifteen* new Central District positions would reap significant benefits. They will supply both parties ample incentives to collaborate; jurists who provide diverse ethnicity, gender, sexual orientation, ideology, and experience; and courts substantial necessary judicial resources. 2022 passage and installation over subsequent years would constrict either party's unfair advantage, but implementation may necessitate caution<sup>108</sup> because execution might be complex.<sup>109</sup> Republicans have favored analogous strategies in each house's Judiciary Committee.<sup>110</sup> If Democrats and Republicans do not agree,<sup>111</sup> they may explore a California-specific judgeships regime. For instance, Feinstein and politicians from states with substantial numbers of cases and comparatively few jurists earlier introduced judgeship legislation that might decidedly relieve acute docket pressures.<sup>112</sup>

Should those concepts prove unproductive, as Republicans frustrate Democrats' efforts,<sup>113</sup> the nascent majority could apply rather dramatic remedies. One notion involves the circuit blue slip exception that Democrats will retain until they dutifully restore more appellate ideological balance.<sup>114</sup> Were numerous Republican

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106. U.S. JUDICIAL CONF., *supra* note 105. For comprehensive judgeships bills introduced in the 117th Congress, see S. 2535, 117th Cong. (2021); H.R. 2586, 117th Cong. (2021); H.R. 4885, 117th Cong. (2021).

107. When both of the parties agree *before* elections, neither knows which will benefit. See Tobias, *supra* note 101.

108. Tobias, *supra* note 9, at 917–18 (scrutinizing issues that bipartisan courts may create).

109. Congress can effectively address most concerns. *Id.* at 918. Some customs, including floor votes on many accomplished, consensus district nominees at recesses, may help restore regular order. Tobias, *supra* note 17, at 31; *supra* note 60.

110. *Hearing on New Judgeships Before the H. Courts Judiciary Subcomm.* (Feb. 24, 2021); see *Nov. 21 Executive Business Meeting*, *supra* note 49 (Chair Graham favoring); Thomas Berry, *The U.S. Needs More Federal Judges*, WALL STREET J. (Mar. 9, 2021, 12:39 PM), <https://www.wsj.com/articles/the-u-s-needs-more-federal-judges-11615311539> [<https://perma.cc/C5H4-L SN4>]; *supra* notes 105–06.

111. Slowly renaming three Central District nominees and consulting on, and nominating, fifteen more California picks showed that Republicans undercut Democrats' national selection work and many rules and customs. *But see supra* note 96.

112. S. 2014, 112th Cong. (2011) (proposing four new Eastern, three Texas, and two Arizona, district judgeships); S. 3321, 116th Cong. (2020) (five Arizona posts); see S. 2535, 117th Cong. (2021), *supra* note 106 (fifteen Central, and four Eastern, posts).

113. See *supra* note 109; Marimow & Viser, *supra* note 28 (discussing Republicans' unnecessary delay of Garland's Attorney General confirmation).

114. See *supra* notes 45–48 (discussing circuit exception); *supra* note 27 (discussing Biden essentially keeping Republican ABA role); Jeremy Stahl, *Republicans Are Abolishing*



politicians to continue displaying recalcitrance, Democrats may recognize an exception for district slips.<sup>115</sup>

A related potential solution is trades.<sup>116</sup> For example, the California nominee packages' actual composition indicated that former President Trump and each California senator proffered some prospects.<sup>117</sup> Trump confirmed four appellate court jurists opposed by the lawmakers, who apparently suggested most trial-level nominees.<sup>118</sup> However, "judgetrading" might have deleterious impacts. The circuit picks whom Trump recommended lacked blue slips, but the nominees won prompt appointment. The President neglected to muster nominees for many Central District vacant seats before autumn 2019 or two more openings ever, tardily renamed the Central District aspirants whom the White House first chose in October 2018 and confirmed no jurist until late 2020.<sup>119</sup>

Another problem is the coronavirus' rampant spread around the Central District which makes pressing endeavors to sharply reduce its vacancies. The pandemic directly exacerbated already strained tribunal conditions, although prognosticating how the raging, unpredictable COVID-19 may inflict adverse effects on court dispositions remains unclear.<sup>120</sup> It can generate additional new cases and stall the existing docket's resolution, which might correspondingly promote backlogs, as the delta and omicron variants' invasions show.<sup>121</sup> The Central District has responded with

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*Judicial Appointments Norms Again*, SLATE (Feb. 22, 2019, 1:08 PM), <https://slate.com/news-and-politics/2019/02/trump-judicial-appointments-mcconnell-democrats-chris-kang.html> [https://perma.cc/NGM6-ATQA] (discussing other dramatic ideas).

115. Carl Hulse, *Durbin, New Judiciary Chair, Warns Republicans on Blocking Judges*, N.Y. TIMES (Mar. 1, 2021), <https://www.nytimes.com/2021/03/01/us/politics/durbin-senate-judiciary-garland.html> [https://perma.cc/4VYW-MFT3] (Durbin alluding to possible district court blue slip exception); see *supra* notes 48, 50 and accompanying text (noting that Republicans did honor district court blue slips).

116. See *supra* notes 35–37, 69, 101.

117. Trades, bipartisan courts, and the above paragraph's ideas overlap. See *supra* notes 100–14.

118. The four confirmees are very conservative; district nominees were more centrist. See *supra* notes 36–37, 68–69.

119. See *supra* notes 37, 48, 68–69; Tobias, *supra* note 20, at 2260 (discussing judgetrading). Slowly processing California district nominees effectively meant that the Senate confirmed no nominee until September 2020. See *supra* note 39.

120. ADMIN. OFF. OF THE U.S. COURTS, CONDUCTING JURY TRIALS DURING THE PANDEMIC (2020); ADMIN. OFF. OF THE U.S. COURTS, COURTS BEGIN TO CONSIDER GUIDELINES FOR REOPENING (2020); ADMIN. OFF. OF THE U.S. COURTS, COURTS SUSPENDING JURY TRIALS AS COVID-19 CASES SURGE (2020).

121. Maura Dolan, *U.S. Court Upholds COVID-19 Delays in Criminal Trials, Citing Half a Million Lives Lost*, L.A. TIMES (Apr. 23, 2021, 7:48 PM), <https://www.latimes.com/california/story/2021-04-23/appeals-court-upholds-pandemic-delays-criminal-trials> [https://perma.cc/NQS9-WTE4]; see Alan Feuer, Nicole Hong, Benjamin Weiser & Jan Ransom, N.Y.'s

numerous emergency procedures to address specific complications that arose.<sup>122</sup> Illustrative was postponing certain Speedy Trial Act deadlines to combat abundant backlogs that the court anticipated when the virus previously subsided.<sup>123</sup> However, the circumstances are fluid, which may require the Central District to prescribe other rigorous strictures as conditions actually evolve.

Finally, the confirmation process seemingly necessitated particular adjustments, which included remote hearings that were meant to counter the virus, which senators adopted over 2020.<sup>124</sup> Nevertheless, the pandemic's 2021 slowing allowed the panel to conduct live hearings almost every fourteen days that Congress was in session, while analogous hearings have essentially continued during this year.<sup>125</sup> Yet, the precipitous rise of the delta and

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*Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html> [https://perma.cc/42JN-GGRR]; Greg Land & Amanda Bronstad, *Can We Talk? Eyeing COVID-Clogged Dockets, Judges Push Civil Cases to Settle*, LAW.COM (June 30, 2021, 5:37 PM), <https://www.law.com/2021/07/30/can-we-talk-eyeing-covid-clogged-dockets-judges-push-civil-cases-to-settle/> [https://perma.cc/X6EK-4FMJ].

122. Central District of California, COVID-19 Technology Use (2021); Central District of California, CARES Act Extension (2021); Central District of California, Phased Reopening (2021); see Luke Money, Rong-Gong Lin II & Howard Blume, *California to Lift School Mask Mandate After March 11*, L.A. TIMES (Feb. 28, 2022, 3:19 PM), <https://www.latimes.com/california/story/2022-02-28/california-to-lift-school-mask-mandate-after-march-11> [https://perma.cc/FZR7-425T]. For these and other courts' tools, see ADMIN. OFF. OF THE U.S. COURTS, COURTS DELIVER JUSTICE VIRTUALLY AMID THE CORONAVIRUS OUTBREAK (2020); ADMIN. OFF. OF THE U.S. COURTS, JUDICIARY PREPAREDNESS FOR CORONAVIRUS (2020).

123. Letter from Central District of California Chief Judge Virginia Phillips to Ninth Circuit Chief Judge Sidney Thomas (Apr. 6, 2020); Judicial Council of the Ninth Circuit, Order, In re Approval of the Judicial Emergency Declared in the Central District of California (2020); see Central District of California, Order Concerning Phased Reopening of the Court (2020); Central District of California, Order Concerning the Extension of the Coronavirus Public Emergency Operations Plan (2021).

124. The Senate conducted comparatively few 2020 hearings, but the chamber confirmed forty-one district judges. JUDICIAL VACANCIES, *supra* note 7 (Confirmations (2020)); *Hearing*, *supra* note 39 (discussing how the June California Trump nominee hearing lacked rigor partly because it was remote); see S. Res. 548, 116th Cong. (2020) (remote voting); Paul Kane, *Caution Dictates How Tradition Bound Senate Adapts to Coronavirus Pandemic*, WASH. POST (May 9, 2020), [https://www.washingtonpost.com/powerpost/caution-dictates-how-tradition-bound-senate-adapts-to-coronavirus-pandemic/2020/05/08/768c4084-916a-11ea-9e23-6914ee410a5f\\_story.html](https://www.washingtonpost.com/powerpost/caution-dictates-how-tradition-bound-senate-adapts-to-coronavirus-pandemic/2020/05/08/768c4084-916a-11ea-9e23-6914ee410a5f_story.html) [https://perma.cc/W275-62PM]. *But see* TODD GARVEY, CONG. RES. SERV., LSB10447, CONSTITUTIONAL CONSIDERATION OF REMOTE VOTING IN CONGRESS (2020).

125. *E.g.*, *Hearing on Nominees Before the S. Comm. on the Judiciary*, 117th Cong. (Apr. 28, 2021); *Hearing on Nominees Before the S. Comm. on the Judiciary*, 117th Cong. (July 28, 2021); *Hearing on Nominees Before the S. Comm. on the Judiciary*, 117th Cong. (Oct. 6, 2021); *Hearing on Nominees Before the S. Comm. on the Judiciary*, 117th Cong. (Oct. 20, 2021); *Hearing on Nominees Before the S. Comm. on the Judiciary*, 117th Cong. (Jan. 12, 2022); *Hearing on Nominees Before the S. Comm. on the Judiciary*, 117th Cong. (Feb. 1, 2022); *Hearing on Nominees Before the S. Comm. on the Judiciary*, 117th Cong. (Feb. 16, 2022). The October 20 hearing featured Biden Central District nominees Superior Court

omicron variants suggests that legislators might carefully attempt to predict new concerns and deploy finely calibrated analyses, which balance myriad salient health considerations and the need for in-person committee hearings and Senate confirmation votes.<sup>126</sup>

### CONCLUSION

Former President Donald Trump and the two Republican chamber majorities during his tenure aggravated the confirmation wars. The Central District of California acutely exemplified the nationwide conundrum, illuminated by stalled reproposal of most 2019, and multiple 2018, Trump Central District nominees and consensus prospects' remarkably dilatory marshaling for the remaining open slots which lacked nominees. Therefore, President Joseph Biden and the chamber must immediately alleviate the court's desperate straits by appointing prominent, centrist nominees to the six present vacancies. When future openings materialize, or should the chamber fail to confirm any of the current nominees, Biden and the Senate ought to consider expeditiously resubmitting and confirming qualified Trump designees on whom Biden, Vice President Kamala Harris, and California Senators Dianne Feinstein and Alex Padilla concur or recruiting, scrutinizing, naming, and confirming other able, moderate diverse individuals for the new vacancies or unfilled openings. These ideas promise to curtail America's worst-case scenario and provide constructive guidance for bipartisan judicial selection across the country.

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Judges Maame Ewusi-Mensah Frimpong and Hernán Vera. The January 12 hearing featured Superior Court Judge Fred Slaughter. The February 1 hearing featured U.S. Magistrate Judge Kenly Kiya Kato and Superior Court Judge Sunshine Suzanne Sykes. The February 16 hearing featured Superior Court Judge Sherilyn Peace Garnett. *See supra* note 96.

126. Senate rules allow proxy committee votes yet bar floor proxy cloture and confirmation votes, so leaders should treat issues that close votes create in the evenly divided Senate before members must be absent. *See supra* note 124; Chris Cameron & Emily Cochrane, *Senator Ben Ray Luján Recovering After Suffering Stroke*, N.Y. TIMES (Feb. 1, 2022), <https://www.nytimes.com/2022/02/01/us/politics/ben-ray-lujan-stroke.html> [<https://perma.cc/GF8C-PS5U>]; *see also* ALM Staff, *Courts Everywhere Are Masking Up and Watching Out Over Delta Variant Spread*, LAW.COM (July 30, 2021, 2:50 PM), <https://www.law.com/nationalawjournal/2021/07/30/courts-everywhere-are-masking-up-and-watching-out-over-delta-variant-spread> [<https://perma.cc/7FUC-PZ9H>].