KEEP THE FEDERAL COURTS GREAT

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CONTENTS

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INTRODUCTION

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

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

Part I briefly recounts the history of the judicial selection process. Part II scrutinizes how candidate Trump aggressively focused attention on the federal courts—especially the United States Supreme Court and the thirteen appellate courts—by promising their improvement to help win his election in 2016 and cultivate public support for his presidency and reelection this November as well as how practically all Republican senators supported Trump's judicial selection initiatives. For example, candidate Trump insistently pledged that his administration would certainly make the bench great again—even though the judiciary has perennially been the crown jewel of American democracy and the envy of the world—by consistently recommending numerous conservative appeals court nominees and collaborating with Republican senators to confirm those individuals. Indeed, this administration and the 115th and 116th Senates have shattered virtually all records for confirming young appellate court judges who possess extremely conservative ideological viewpoints, specifically on critical matters, including executive power, the modern administrative state, and the "culture wars," such as voting rights, discrimination, and reproductive

freedom. These developments have occurred despite the neglect by the chief executive and the Senate of the multiplying trial court openings, the cascading emergency vacancies, and the plummeting confirmations of diverse nominees. The ramifications of Trump Administration and Republican Senate majority judicial selection are tellingly most palpable and deleterious in "blue" states, which Democratic senators represent.

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

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

Part III reviews the implications of judicial selection actions which President Trump and the Republican Senate majority have undertaken. This Part concludes that the White House and the upper chamber have definitely created records for appointing conservative, young, well qualified appellate court jurists but continue to underemphasize district court and emergency vacancies as well as minority nominations and confirmations. President Trump and Senator McConnell correspondingly remind the public that they have appointed numerous exceptionally conservative, young, and capable judges and capitalize on these successes to further their political agendas. However, both the chief executive and the Majority Leader systematically disregard their failures to place jurists in substantial trial court and emergency openings and to confirm minority judges, particularly in blue states. This Republican inaction undermines

presidential discharge of constitutional responsibility to nominate and confirm jurists, senatorial fulfillment of constitutional responsibility to advise and consent, and satisfaction of the judiciary's critical responsibility to expeditiously, inexpensively, and fairly decide voluminous caseloads. President Trump also continues railing at manifold jurists for dutifully overturning White House efforts to govern in ways that the chief executive believes will greatly improve his presidential reelection efforts. Those phenomena additionally politicize the federal courts and sharply undercut citizen respect for the presidency, the Senate, the judiciary, the nomination and confirmation processes, and the rule of law.

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

Republicans and Democrats should remember that 2020 comprises a presidential election year in which nominations and confirmations traditionally slow and can halt early in anticipation of a modified chamber and possibly a different chief executive. For instance, the GOP chamber members stopped President Obama's efforts to appoint appellate court jurists following mid-June 2012, as Republican senators did not agree to conduct floor debates or confirmation votes. Four years later, the GOP majority neglected to approve a single court of appeals judge after January or any district court jurist following July 6. Because 2020 constitutes a presidential election year, it should be a propitious occasion for Republican and Democratic lawmakers to strongly consider the 2020 adoption of bipartisan courts, which become effective over 2021, as neither party will be certain which may capture the presidency and the chamber and, therefore, would capitalize on the reform. A bipartisan judiciary would allow the party that lacks White House control to submit a percentage of nominees in specific jurisdictions across the country. This action might be combined with legislation authorizing sixty-five new district court and five new appellate court positions, as recommended by the Judicial Conference of the United States and premised substantially on relatively conservative approximations of current case and work loads for federal appellate courts and district courts. Tethering bipartisan courts and myriad new slots would extend both parties incentives to cooperate; increase bench diversity vis-à-vis ethnicity,

gender, sexual orientation, ideology and experience; and provide courts more judicial resources.

Another constructive approach could be altering the filibuster, which has been integral to the "confirmation wars" that have affirmatively plagued the judicial selection process for decades. This may encompass restoring sixty votes, rather than a majority, for cloture, which Senator Lindsey Graham (R-SC), the attorney who currently chairs the active Senate Judiciary Committee, provocatively remarked that he would favor, were the Senate to dutifully reinstitute a sixty-ballot threshold to invoke cloture regarding nominees during 2021. Closely related would be allowing filibusters only in "exceptional circumstances," such as when nominees lack sufficient intelligence, ethics, independence, or judicial temperament to be excellent jurists, an idea that performed comparatively efficaciously in 2005.

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

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

I. MODERN SELECTION PROBLEMS

The rise and development of the complications that plague modern federal judicial selection merit limited assessment in this Article. Other writers have

cogently surveyed the relevant history,[1] and the present situation enjoys greatest pertinence. One salient concern has been the permanent vacancies dilemma, which results from expanded federal court jurisdiction, litigation, and judgeships.[2] The second critical aspect, the current difficulty, is political and can be ascribed to contrasting presidential and Senate party control beginning around 1980.

A. *Persistent Vacancies*

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

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

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

[3] MILLER REPORT, *supra* note 1, at 3; *see* Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1268-70 (1996).

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

[5] *See, e.g.*, Court Security Improvement Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534; 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

[6] Bermant, Hennemuth & Mangum, *supra* note 1, at 323, 329-32; *see also* JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 103 (1995), https://www.uscourts.gov/sites/default/files/federalcourtslongrangeplan_0.pdf [https://perma.cc/9SN2-CDGT].

[7] *See* Bermant, Hennemuth & Mangum, *supra* note 1, at 323, 329-32 (contending that 1970-1992 appellate court vacancy rate was twice as high as before).

Bill Clinton's second term, and 2001, the beginning year of President George W. Bush's opening term.[8]

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

B. *The Contemporary Dilemma*

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

[8] *See* Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 904-08 (2005); Orrin G. Hatch, *The Constitution As the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL'Y 1035, 1037-38 (2009).

[9] *See* Bermant, Hennemuth & Mangum, *supra* note 1, at 321-22; Sheldon Goldman, *Obama and the Federal Judiciary*: *Great Expectations but Will He Have a Dickens of a Time Living up to Them?*, FORUM, Apr. 2019, at 9-12.

[10] *See generally* AM. BAR ASS'N, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS (1988).

[11] *See* THE FEDERALIST NO. 76, at 513 (Alexander Hamilton) (Jacob Cooke ed., 1961); *see also* MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL & HISTORICAL ANALYSIS 28 (paperback ed. 2003); SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 346-65 (1997).

[12] GOLDMAN, *supra* note 11, at 198; *see also* DAVID M. O'BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 20 (1988).

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

party lacking White House control might regain it and confirm judges fueled delay.

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

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[14] *See*, *e.g.*, *President Clinton Nominates Twenty-Two to the Federal Bench*, U.S. NEWSWIRE (Jan. 7, 1997); Press Release, Office of the White House Press Sec'y, Remarks by the President During Federal Judicial Appointees Announcement (May 9, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/05/20010509-3.html [https://perma.cc/A8T7-7MXN].

[15] Republican senators demanded that the Democratic President allow them to provide input, and some even proposed candidates. *See* Neil A. Lewis, *Clinton Has a Chance to Shape the Courts*, N.Y. TIMES, Feb. 9, 1997, at 30; *see also* 143 CONG. REC. 4,254 (1997) (statement of Sen. Biden).

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

[17] *See* Paul A. Gigot, *How Feinstein Is Repaying Bush on Judges*, WALL STREET J. (May 9, 2001, 12:01 AM), https://www.wsj.com/articles/SB989369905566856183; Neil A. Lewis, *Party Leaders Clash in Capitol Over Pace of Filling Judgeships*, N.Y. TIMES, May 10, 2002, at A33.

[18] *See* Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 744 (1996) (documenting that panel convened one appellate court nominee hearing each month that Senate was in session); *see also* 143 CONG. REC. 4,254 (Mar. 19, 1997) (statement of Sen. Biden) (claiming that Democrats conducted two appellate court nomination hearings each month during 1987 to 1994).

[19] Neil A. Lewis, *Bush and Democrats in Senate Trade Blame for Judge Shortage*, N.Y. TIMES, May 4, 2002, at A9.

[20] *See* Jennifer Bendery, *Republicans Still Find Ways to Stall Judicial Nominees Despite Filibuster Reform*, HUFFPOST (Feb. 8, 2014, 9:42 AM), https://www.huffpost.com/entry/republicans-judicial-nominees_n_4748528 [https://perma.cc/53LN-HKWD].

In recent administrations, these phenomena became substantially worse. During President Obama's tenure, Republican obstruction reached novel levels, a situation that was plainly demonstrated by the unprecedented rejection of D.C. Circuit Chief Judge Merrick Garland, President Obama's distinguished Supreme Court nominee.[21] Once Republicans assumed a chamber majority in 2015 and pledged to duly effectuate regular order again, they confirmed merely twenty Obama nominees, the fewest appellate and district court judges who received appointment since Harry Truman's presidency, which left more than 100 open judgeships following President Trump's inauguration.[22] Given how the GOP treated Obama nominees, it was predictable that Democrats might appear uncollegial by, for example, seeking cloture and roll call ballots on practically all Trump submissions.

II. TRUMP ADMINISTRATION JUDICIAL SELECTION

A. *Nomination Process*

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

[21] *See* Robin Bradley 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, 82-89 (2016); Carl Tobias, Commentary, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089, 1090-99 (2017).

[22] AM. BAR ASS'N, STATUS OF FEDERAL JUDICIAL VACANCIES, NOMINATIONS AND CONFIRMATIONS 103RD – 115TH CONGRESS (2017) [hereinafter VACANCIES AND CONFIRMATIONS], https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/statusofvacsnomscons.pdf [https://perma.cc/V8TW-Z2E9].

[23] AM. BAR ASS'N, THE TRUMP ADMINISTRATION: ARTICLE III VACANCIES AND CONFIRMATIONS (2020) [hereinafter TRUMP VACANCIES AND CONFIRMATIONS], https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/vacancies-and-confirmations-by-month.pdf [https://perma.cc/J9M8-GECS]; *see also* Tobias, *supra* note 21, at 1103; Tom McCarthy, *Trump's Judges: A Revolution to Create a New Conservative America*, GUARDIAN (Apr. 28, 2020, 5:00 AM), https://www.theguardian.com/us-news/2020/apr/28/donald-trump-judges-create-new-conservative-america-republicans [https://perma.cc/YHG3-NL4A]; Russell Wheeler, *Judicial Appointments in Trump's First Three Years: Myths and Realities*, BROOKINGS INST. (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/S64X-6HG4].

twenty more appointees in 2019, eclipsing nearly all modern Presidents' nomination success.[24]

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

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

[24] TRUMP VACANCIES AND CONFIRMATIONS, *supra* note 23; *see also* Tom McCarthy, *Why Has Trump Appointed So Many Judges – and How Did He Do It?*, GUARDIAN (Apr. 28, 2020, 5:05 AM), https://www.theguardian.com/us-news/2020/apr/28/explainer-why-has-trump-appointed-so-many-judges [https://perma.cc/RU5Y-T9KK]. President George W. Bush appointed six and President Obama confirmed three appellate court jurists across their initial years. *See* JUDICIAL CONFIRMATIONS IN THE 107TH CONGRESS, U.S. COURTS (2002), https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2002/01/confirmations/pdf [https://perma.cc/8RGG-GV7F]; *Judicial Confirmations for February 2010*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2010/02/confirmations/html [https://perma.cc/2DFT-R6YV] (last visited Sept. 14, 2020).

[25] *See* Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2240 (2013); Philip Rucker, Josh Dawsey & Ashley Parker, *Rare Setbacks in President's Effort to Alter the Judiciary*, WASH. POST, Dec. 19, 2017, at A1; Michael S. Schmidt & Maggie Haberman, *Top Lawyer For President Steps Down from Post*, N.Y. TIMES, Oct. 18, 2018, at A13.

[26] *See* Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 10, 2017), https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court; *see generally* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015); Donald F. McGahn II, *A Brief History of Judicial Appointments From the Last 50 Years Through the Trump Administration*, 60 WM. & MARY L. REV. ONLINE 105 (2019); Jeremy W. Peters, *New Litmus Test for Trump's Court Picks: Taming the Bureaucracy*, N.Y. TIMES, Mar. 28, 2018, at A1; Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *Trump Stamps G.O.P. Imprint on the Courts*, N.Y. TIMES, Mar. 15, 2020, at A1; Charlie Savage, *Courts Reshaped at Fastest Pace in Five Decades*, N.Y. TIMES, Nov. 11, 2017, at A1. Trump announced the new list in a White House ceremony. Press Release, Office of the White House Press Sec'y, Additions to the President Donald J. Trump's Supreme Court List (Sept. 9, 2020), https://www.whitehouse.gov/briefings-statements/additions-president-donald-j-

Federalist Society's Executive Vice President, Leonard Leo, continues to assist President Trump with judicial selection.[27] No earlier President has vested such massive authority in a nongovernmental entity, although the political organization did also furnish President George W. Bush considerable assistance.[28] President Trump clearly stresses the appeals courts—as they comprise tribunals of last resort for approximately ninety-nine percent of cases, articulate more policy than district courts, and issue opinions which cover several jurisdictions. Practically all of President Trump's appellate court appointees have been extremely conservative, young, and impressive.

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

trumps-supreme-court-list/ [https://perma.cc/96YM-LXWR]; *see* Dahlia Lithwick & Mark Joseph Stern, *Trump's Supreme Court Wishlist Won't Work This Time*, SLATE (Sept. 10, 2020, 6:41 PM), https://slate.com/news-and-politics/2020/09/trump-judges-list-2020.html [https://perma.cc/V898-RMZT]; Zoe Tillman, *Trump's New List of Supreme Court Nominees Includes a Judge Who Serviced in His White Housee and Three Republican Senators*, BUZZFEED NEWS (Sept. 9, 2020, 4:09 PM), https://www.buzzfeednews.com/article/zoetillman/trump-supreme-court-picks-2020-election-biden [https://perma.cc/8C8N-X7CF].

[27] 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/; Zoe Tillman, *After Eight Years on the Sidelines, This Conservative Group Is Primed to Reshape 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/FUC8-WH3Y]; *see* Jimmy Hoover, *Federalist Society Exec Leonard Leo Starts Consulting Firm*, LAW360 (Jan. 7, 2020, 9:20 PM), https://www.law360.com/articles/1232274/federalist-society-exec-leonard-leo-starts-consulting-firm (reporting that Leonard Leo stepped down as Federalist Society Executive Vice President but remained Co-Chair of Society's Board of Directors and President Trump's judicial selection advisor); DEBBIE STABENOW, CHUCK SCHUMER & SHELDON WHITEHOUSE, DEMOCRATIC POLICY & COMMC'NS COMM., CAPTURED COURTS: THE GOP'S BIG MONEY ASSAULT ON THE CONSTITUTION, OUR INDEPENDENT JUDICIARY, AND THE RULE OF LAW 18-36 (2020), https://www.democrats.senate.gov/imo/media/doc/Courts%20Report%20-%20FINAL.pdf [https://perma.cc/79NK-AV9C] (describing how Leonard Leo and Federalist Society choose federal judges and Leo's "$250 Million Dark Money Judicial Influence Machine").

[28] Jason DeParle, *Nomination for Supreme Court Stirs Debate on Influence of Federalist Society*, N.Y. TIMES, Aug. 1, 2005, at A12; Neil A. Lewis, *Conservative Lawyers Voice Abundant Joy*, N.Y. TIMES, Nov. 13, 2004, at A13; Donald McGahn, White House Counsel, Keynote Remarks at the Federalist Society's 2017 National Lawyers Convention (Nov. 17, 2017), https://www.c-span.org/video/?437462-8/2017-national-lawyers-convention-white-house-counsel-mcgahn [https://perma.cc/RE4G-K5X5] (denying that Trump Administration federal judicial selection effort was outsourced because Trump actually "insourced" that responsibility to McGahn).

administration has employed and is a chief reason for blue slips—has not been widely practiced by the Trump White House Counsel. Blue slips permitted hearings when *each* home state politician directly returned slips in Obama's presidency. Democratic senators alleged that McGahn engaged in limited or nominal active consultation regarding empty appeals court posts in their jurisdictions, while McGahn argued that consultation does not specifically appear in the text of the Constitution.[29] Senator Tammy Baldwin (D-WI) accused President Trump and the White House Counsel of marshaling Wisconsin Seventh Circuit nominee Michael Brennan without the required number of affirmative votes from a bipartisan merit selection panel, which had vigorously examined, interviewed, and suggested excellent judicial prospects whom the home state senators correspondingly recommended to the White House throughout three decades.[30] Senator Robert Casey (D-PA) dligently proposed several accomplished, mainstream Third Circuit candidates for White House analysis, but Casey asserted that the candidates whom he proffered received negligible consideration because the President had already mustered someone else, David Porter, to be the nominee.[31] A related illustration of President Trump's judicial selection measures was effectively provided by Senator John Kennedy (R-LA) who expressly contended during Louisiana Fifth Circuit nominee Kyle Duncan's hearing that McGahn had basically told him whom the nominee would be.[32]

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[29] *See* Thomas Kaplan, *With G.O.P. Senators Behind Him, President Puts His Stamp on Judiciary*, N.Y. TIMES, Aug. 1, 2018, at A15; Zoe Tillman, *Here's How Trump Is Trying to Remake His Least Favorite Court*, BUZZFEED NEWS (Mar. 15, 2018, 3:02 PM), https://www.buzzfeednews.com/article/zoetillman/heres-who-the-white-house-pitched-for-the-federal-appeals [https://perma.cc/S48J-HSG7]; McGahn, *supra* note 28. *But see* Robert Barnes & Ed O'Keefe, *Senate Republicans Likely to Change Custom That Allows Democrats to Block Judicial Choices*, WASH. POST (May 25, 2017), https://www.washingtonpost.com/politics/courts_law/senate-republicans-consider-changing-custom-that-allows-democrats-to-block-judicial-choices/2017/05/25/d49ea61a-40b1-11e7-9869-bac8b446820a_story.html (reporting that Leo claimed that McGahn consulted home state senators more than any previous White House Counsel).

[30] Todd Ruger, *Grassley Moves on Judicial Nominee Over Baldwin's Objection*, ROLL CALL (Jan. 24, 2018, 5:04 AM), https://www.rollcall.com/2018/01/24/grassley-moves-on-judicial-nominee-over-baldwins-objections [https://perma.cc/UP4W-VR65].

[31] *See* Jonathan Tamari, *Pat Toomey Used Senate Tradition to Block an Obama Pa. Judicial Pick. GOP Leaders Won't Give Bob Casey the Same Deference*, PHILA. INQUIRER (July 17, 2018), https://www.inquirer.com/philly/news/politics/pat-toomey-used-senate-tradition-to-block-an-obama-judicial-pick-from-pa-gop-leaders-wont-give-bob-casey-the-same-deference-20180717.html [https://perma.cc/HQX4-Z4K9].

[32] *See* Todd Ruger, *Senate Republicans Steamroll Judicial Process*, ROLL CALL (Jan. 18, 2018, 11:33 AM), https://www.rollcall.com/2018/01/18/senate-republicans-steamroll-judicial-process [https://perma.cc/M69C-3QSN]. For similar White House Counsel treatment of New Jersey, Ohio, Oregon, and Washington senators, see Kaplan, *supra* note 29. For similar ideas regarding the White House Counsel and California and New York nominees,

Another crucial departure from longstanding precedent was the Trump Administration's determination to exclude the American Bar Association from an official role in the judicial selection process. All Presidents in office following Dwight Eisenhower, except for George W. Bush, comprehensively incorporated ABA evaluations and ratings when nominating candidates. President Obama, for example, distinctly refrained from marshaling a single prospect whom the bar association had granted a not-qualified ranking.[33] However, President Trump has mustered ten[34] who received not-qualified votes from a majority of members who serve on the ABA Standing Committee on the Federal Judiciary, even as three of those appellate court nominees and four of the district court nominees rather smoothly captured appointment.[35] McGahn purportedly was so critical of American Bar Association participation in the federal judicial selection process that the White House Counsel suggested nominees might forgo coordination with the organization's investigative actions.[36]

The White House employs more conventional techniques when nominating and confirming district court judges. For instance, President Trump, as most

see Carl Tobias, *Filling the California Federal District Court Vacancies*, 11 CALIF. L. REV. ONLINE 68, 74 (2020) [hereinafter Tobias, *California District Courts*]; Carl Tobias, *Filling the California Ninth Circuit Vacancies*, 92 S. CAL. L. REV. POSTSCRIPT 83, 92, 94 (2019) [hereinafter Tobias, *California Ninth Circuit*]; Carl Tobias, *Filling the New York Federal District Court Vacancies*, 76 WASH. & LEE L. REV. ONLINE 1, 8 (2019) [hereinafter Tobias, *New York District Courts*].

[33] *See* 163 CONG. REC. S8,022-24, S8,042 (daily ed. Dec. 14, 2017) (statements of Sens. Durbin, Feinstein & Leahy).

[34] *See* AM. BAR ASS'N STANDING COMM. ON THE FED. JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES: 116TH CONGRESS, https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/webratingchart-trump116.pdf [https://perma.cc/8FBK-RAQX] (last updated Sept. 8, 2020); AM. BAR ASS'N STANDING COMM. ON THE FED. JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES: 115TH CONGRESS [hereinafter 115TH ABA RATINGS], https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/web-rating-chart-trump-115.pdf [https://perma.cc/5JMH-Y7VV] (last updated Dec. 13, 2018).

[35] The seven include Eighth Circuit Judge Steven Grasz, District of Kansas Judge Holly Teeter, Western District of Oklahoma Judge Charles Goodwin, Eighth Circuit Judge Jonathan Kobes, Western District of Kentucky Judge Justin Walker, who is now a D.C. Circuit Judge, Ninth Circuit Judge Lawrence Van Dyke, and Eastern District of Missouri Judge Sarah Pitlyk. *See Judicial Confirmations for January 2019*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2019/01/confirmations [https://perma.cc/RN43-N2K4] (last updated Jan. 1, 2019); *Judicial Confirmations for August 2020*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2020/08/confirmations [https://perma.cc/9FEB-JLYJ] (last updated Aug. 1, 2020).

[36] *See* Adam Liptak, *White House Cuts A.B.A. Out of Judge Evaluations*, N.Y. TIMES, Apr. 1, 2017, at A16; Savage, *supra* note 26.

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

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

[37] 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.politico.com/story/2017/10/17/trump-judges-nominees-court-picks-243834 [https://perma.cc/7RTC-VWY3].

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

[39] *See* Jennifer Bendery, *Trump Judicial Nominee Drops Out After Embarrassing Hearing*, HUFFPOST (Dec. 18, 2017, 1:35 PM), https://www.huffpost.com/entry/donald-trump-judicial-nominee-matthew-petersen_n_5a37ec14e4b0ff955ad51e82 [https://perma.cc/B64X-JU9A]; Tom McCarthy, *Judge Not: Five Judicial Nominees Trump Withdrew – and Four Pending*, GUARDIAN (Mar. 10, 2019, 3:00 AM), https://www.theguardian.com/law/2019/mar/10/judge-not-five-judicial-nominees-trump-withdrew-and-four-pending [https://perma.cc/5BHH-AYEW]. *But see* Zoe Tillman, *Trump Had a Good Year Getting Judges Confirmed, but He's Still a Long Way from Reshaping the Courts*, BUZZFEED NEWS (Dec. 27, 2017, 12:47 PM), https://www.buzzfeednews.com/article/zoetillman/trump-had-a-good-year-getting-judges-confirmed-but-hes [https://perma.cc/3CBN-K7QE] (detailing Leo's defense of McGahn's vetting).

[40] The Administrative Office of the U.S. Courts premises judicial emergencies on protracted length and/or substantial caseloads. *See Judicial Emergency Definition*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies /judicial-emergency-definition [https://perma.cc/46UR-MDSU] (last visited Sept. 14, 2020).

[41] Judicial emergency vacancies increased from thirty-eight to seventy-three by the end of Trump's first year in office. *Compare Judicial Emergencies for January 2017*, U.S. COURTS,

which are represented by Democratic senators, even though many of the states confront immense emergencies.[42] Indeed, California and New York have encountered vacancies in as many as seventeen and sixteen circuit and district court positions respectively, all of which comprised emergencies in California. Nevertheless, the President neglected to send one candidate for twenty-three vacancies until May 2018[43] or a California appellate court or district court post before November of that year;[44] the administration has yet to appoint a California district court judge, and the White House and the Republican Senate majority have appointed comparatively few jurists to the myriad New York district court openings.[45]

Another constructive mechanism which President Trump and Republican senators have ignored or deemphasized has been improving minority judicial representation, in stark contrast to robust Democratic endeavors that substantially increase diversity.[46] For example, this White House apparently

https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/01/emergencies [https://perma.cc/78RA-HSH8] (last updated Jan. 1, 2017), *with Judicial Emergencies for January 2018*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/01/emergencies [https://perma.cc/B4K6-JZ7T] (last updated Jan. 1, 2018). *But see President Donald J. Trump Announces Nomination of Indiana Attorney James Sweeney to Fill Judicial Emergency*, WHITE HOUSE (Nov. 1, 2017), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-nomination-indiana-attorney-james-sweeney-fill-judicial-emergency [https://perma.cc/K2C9-7PQ4].

[42] Data verify the priority which Trump and the Republican Senate majority accord "red" states. *See* Wheeler, *supra* note 23 ("The Senate moved nominees in states with two Republican senators to confirmation in 217 median days. It took 412 days for nominees in two-Democratic-senator states."). *But see President Donald J. Trump Announces Ninth Wave of Judicial Nominees and Tenth Wave of United States Attorney Nominees*, WHITE HOUSE (Dec. 20, 2017), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-ninth-wave-judicial-nominees-tenth-wave-united-states-attorney-nominees/ [https://perma.cc/24Y3-CT93] (showing that Trump selected additional nominees from "blue" states).

[43] *See Judicial Vacancy List for June 2018*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/06/vacancies [https://perma.cc/5BRR-PA84] (last updated June 1, 2018) (sending first New York Second Circuit nomination to Senate on May 7 and first New York district court nominations on May 15).

[44] *See Judicial Vacancy List for December 2018*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/12/vacancies [https://perma.cc/79B7-Y7D6] (last updated Dec. 1, 2018) (sending first California judgeship nominations to Senate on November 13).

[45] *See Judicial Confirmations for January 2019*, *supra* note 35; *Judicial Confirmations for August 2020*, *supra* note 35.

[46] *See*, *e.g.*, Stacy Hawkins, *Trump's Dangerous Judicial Legacy*, 67 UCLA L. REV. DISCOURSE 20, 29-38 (2019); Carl Tobias, *President Donald Trump's War on Federal*

instituted negligible effort to identify, evaluate, nominate, and confirm racially or ethnically diverse or LGBTQ prospects. The administration did not, for instance, recruit and assign diverse staff to appointments endeavors, encourage home state politicians to recommend substantial numbers of minority candidates, nor propose a single African American court of appeals nominee.[47] Among President Trump's nearly 250 appellate court and district court nominees, only Northern District of Illinois Judge Mary Rowland and Ninth Circuit Judge Patrick Bumatay identify as LGBTQ and merely thirty-eight are people of color.[48]

B. *Confirmation Process*

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

In the autumn of 2017, Senator Chuck Grassley (R-IA), who served as the Chair of the Senate Judiciary Committee from January 2015 to January 2019, declared that the panel majority would formulate an exception to the blue slip

Judicial Diversity, 54 WAKE FOREST L. REV. 531, 547-62 (2019); Michael Nelson & Rachael Hinkle, *Trump Appoints Lots of White Men to Be Federal Judges. Here's Why It Matters.*, WASH. POST (Mar. 13, 2018, 7:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/12/trump-appoints-lots-of-white-men-to-be-federal-judges-heres-why-it-matters; Shira A. Scheindlin, *Trump's Judges Are a Giant Step Backward for America*, GUARDIAN (Apr. 28, 2020, 5:00 AM), https://www.theguardian.com/commentisfree/2020/apr/28/trump-judges-giant-step-backward-america [https://perma.cc/6JR8-4EWZ].

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

[48] *See* Tobias, *supra* note 46, at 555-57. President Trump and the Senate Republican majority have actually confirmed significantly fewer people of color. The twenty-nine-person list of confirmees includes: Amul Thapar, Ada Brown, Anuraag Singhal, Barbara Lagoa, Bernard Jones, David Morales, Fernando Rodriguez, James Ho, Jason Pulliam, Jill Otake, John Nalbandian, Karen Gren Scholer, Kenneth Lee, Martha Pacold, Michael Park, Milton Younge, Neomi Rao, Nicholas Ranjan, Patrick Bumatay, Raúl Arias-Marxuach, Richard Myers, Robert Molloy, Rodney Smith, Rodolfo Ruiz, Rossie Alston, Silvia Carreño-Coll, Stephanie Dawkins Davis, Diane Gujarati, and Terry Moorer. *See Judicial Confirmations for January 2019*, *supra* note 35; *Judicial Confirmations for August 2020*, *supra* note 35; John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RES. CTR. (July 15, 2020), https://www.pewresearch.org/fact-tank/2020/07/15/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ [https://perma.cc/8XFA-WHRP].

policy for appeals court nominees. The Chair remarked that hearings would be conducted for appellate court nominees, even if they lacked slips retained by two home state members, particularly when those senators opposed the nominees for "political or ideological" reasons.[49] This determination modified the blue slip notion that Republican *and* Democratic senators, including most compellingly Senator Grassley, comprehensively followed all eight years of President Obama's administration, without providing substantial persuasive support for the significant change.[50]

Practical application of the newly-created appellate court exception materialized with the committee's provision of a January 2018 hearing for Wisconsin Seventh Circuit nominee Michael B. Brennan whom President Trump proffered, even though the White House Counsel had only minimally consulted home state Democratic Senator Baldwin and the nominee lacked the required votes of a bipartisan merit selection commission, which had successfully proposed strong, well qualified, and mainstream federal court candidates for thirty years. The situation was exacerbated, because Grassley negligibly supported placing in the Chair (himself) abundant discretion for concluding whether the executive branch had "adequately consulted" about the particular nominee.[51] Grassley resolutely continued this approach by scheduling a committee hearing in May for Oregon Ninth Circuit possibility Ryan Bounds,[52] although McGahn consulted minimally with Oregon Democratic

[49] *Hearing on Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Nov. 29, 2017) (statement of Sen. Check Grassley, Chairman, S. Comm. on the Judiciary), https://www.judiciary.senate.gov/imo/media/doc/11-29-17%20Grassley%20Statement.pdf; 163 CONG. REC. S7,285 (daily ed. Nov. 16, 2017) (statement of Sen. Grassley); 163 CONG. REC. S7,174 (daily ed. Nov. 13, 2017) (statement of Sen. Grassley); *see also* Memorandum from the Senate Judiciary Comm. Majority to Members of the News Media (Nov. 2, 2017), https://www.judiciary.senate.gov/imo/media/doc/History%20of%20the%20Blue%20Slip.pdf [https://perma.cc/SJK9-7N4R].

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

[51] *See Exec. Bus. Meeting of the S. Comm. on the Judiciary*, 115th Cong. (Feb. 15, 2018) [hereinafter *Exec. Meeting Feb. 2018*] (statement of Sen. Grassley, Chairman, S. Comm. on the Judiciary), https://www.judiciary.senate.gov/imo/media/doc/02-15-18%20Grassley%20Statement.pdf [https://perma.cc/56GF-JDLA].

[52] *Hearing on Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (May 9, 2018); *see also Exec. Bus. Meeting of the S. Comm. on the Judiciary*, 115th Cong. (June 7, 2018) (approving nomination 11-10). *But see* 164 CONG. REC. S5,098 (daily ed. July 19, 2018) (withdrawing nomination).

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

Grassley acknowledged that blue slips were meant to ensure that Presidents meaningfully consult home state politicians while strenuously protecting senators' prerogatives regarding judicial selection and the profound interest of the electorate whom the legislators dutifully represent. The Iowa senator continued to honor slips for district picks, as has Senator Lindsey Graham (R-SC), when he succeeded Grassley as the Judiciary Committee Chair in January 2019.[54] However, Republican senators had persistently invoked slips to exclude highly qualified, moderate court of appeals nominees whom President Obama recommended across his eight-year tenure, many because of political or ideological reasons—the identical criteria which Grassley explicitly deemed illegitimate.[55]

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

[53] *See* Maxine Bernstein, *Oregon's U.S. Senators Say Federal Prosecutor Ryan Bounds Unsuitable for 9th Circuit Vacancy*, OREGONIAN (Feb. 12, 2018), https://www.oregonlive.com/portland/2018/02/oregons_us_senators_say_federa.html https://perma.cc/B4FF-9NLA]; Jimmy Hoover & Michael Macagnone, *9th Circ. Pick Forces Grassley to Choose*: *Trump or Tradition?*, LAW360 (Mar. 29, 2018, 3:43 PM), https://www.law360.com/articles/1025855/9th-circ-pick-forces-grassley-to-choose-trump-or-tradition; *see also* Carl Tobias, *Curing the Federal Court Vacancy Crisis*, 53 WAKE FOREST L. REV. 883, 892-93, 898 (2018) (analyzing more home state senators' disputes with White House over appellate court vacancies).

[54] *See* BLUE SLIP REPORT, *supra* note 50. Senator Lindsey Graham (R-SC), who became Chair in January 2019, vowed to follow Senator Grassley's policy. *Exec. Bus. Meeting of the S. Comm. on the Judiciary*, 116th Cong. (Feb. 7, 2019). For example, when Senator Kirsten Gillibrand (D-NY) retained her blue slip, a Northern District of New York nominee withdrew. *Eight Nominations and Three Withdrawals Sent to the Senate*, WHITE HOUSE (Sept. 19, 2019), https://www.whitehouse.gov/presidential-actions/eight-nominations-three-withdrawals-sent-senate/ [https://perma.cc/4AJ4-ERMF]; Robert Gavin & Mike Goodwin, *Gillibrand Blocked Judge's Nomination to the Federal Bench*, ALBANY TIMES UNION (Aug. 29, 2019, 6:18 PM), https://www.timesunion.com/news/article/U-S-Attorney-in-Albany-picked-for-federal-14397720.php [https://perma.cc/28NB-V59F].

[55] *See supra* text accompanying note 49. A number of Republican senators declined to even offer reasons for retaining blue slips. *See* Tobias, *supra* note 53, at 899 n.89.

conditions and with specific Republican permission.[56] Most troubling during Grassley's tenure as Chair was a hearing which featured two controversial appellate court aspirants, four district court nominees, and the American Bar Association representative, who comprehensively and clearly explained the strenuously challenged not-qualified rating which the bar association had granted a Trump Eighth Circuit nominee.[57] Indeed, the panel session was sufficiently packed that committee members lacked time for questioning any of the four district court prospects.[58]

Many hearings appeared to be rushed, while the sessions lacked that degree of care which is appropriate for nominees who will enjoy life tenure to decide compelling questions when confirmed.[59] With most nominees, the panel allotted committee members only five minutes when they presented questions. Certain nominees appeared to delay by reiterating multiple inquiries, while they deflected or evasively replied to queries which members posed. Illustrative were two Texas Fifth Circuit nominees, who testified in the aforementioned packed hearing, and several Texas district court selections.[60] Another example was the unwillingness of plentiful nominees to testify whether, once confirmed, the nominees anticipated recusing themselves in cases which addressed matters that

[56] 163 CONG. REC. S8,022-24 (daily ed. Dec. 14, 2017) (statements of Sens. Feinstein & Leahy). For example, President Obama nominated North Carolina Fourth Circuit confirmees Albert Diaz and James Wynn on the identical day and the Senate attempted to pair the nominees throughout the confirmation process. *See* Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2174-76 (2011). Graham conducted five hearings on February 13, March 13, September 25, October 16, and October 30, 2019 in which two nominees testified.

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

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

[59] For lack of care, see 163 CONG. REC. S8,022-24 (daily ed. Dec. 14, 2017) (statements of Sens. Feinstein & Leahy).

[60] *E.g.*, *Hearing on Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (June 6, 2018); *Hearing on Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Apr. 27, 2018); *Hearing on Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Jan. 18, 2018); *see also* 163 CONG. REC. S8,022-24 (daily ed. Dec. 14, 2017) (statements of Sens. Feinstein & Leahy). *But see id.* S8,025 (statement of Sen. Cornyn).

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

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

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

[61] *Hearing on Nominations Before the S. Comm. on the Judiciary*, 116th Cong. (Sept. 25, 2019) (holding hearing for Sarah Pitlyk); *Hearing on Nominations Before the S. Comm. on the Judiciary*, 116th Cong. (Feb. 5, 2019) (holding hearing for Neomi Rao); Josh Gerstein, *Trump-Appointed Judge Won't Recuse from Dossier Case*, POLITICO (Feb. 16, 2018, 10:14 PM), https://www.politico.com/story/2018/02/16/trump-dossier-judge-recuse-416844 [https://perma.cc/9SP2-DPSD]. Federal law requires federal judges to recuse themselves when their "impartiality might be reasonably questioned," while the appearance of impartiality is sufficient. *See* 28 U.S.C. § 455 (2018).

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

[63] *E.g.*, *Exec. Meeting Feb. 2018*, *supra* note 51 (approving Judge Brennan); *Exec. Bus. Meeting of the S. Comm. on the Judiciary*, 115th Cong. (Nov. 30, 2017) (approving Judge Grasz). *But cf. infra* notes 64, 67 and accompanying text (showing that, when Trump nominates well qualified, maintream individuals, substantial numbers of Democratic senators vote to confirm those nominees).

[64] 159 CONG. REC. 17824-26 (2013) (employing "nuclear option"). In 2017, the Republican Senate majority margin was 51-49. It is now 53-47. When Trump nominates well qualified, mainstream individuals, substantial numbers of Democratic senators vote to confirm the nominees. For recent examples, see 166 Cong. Rec. D776 (daily ed. Sept. 10, 2020); *id.* at D769 (daily ed. Sept. 9, 2020); *see also infra* note 67 and accompanying text.

and even cramming six into one week after de minimis notice.[65] The multiple nominees, their mammoth records, and the late notice left Democrats insufficient resources to dutifully prepare.[66] More relevant in this examination was similar compression of district court nominee debates and ballots, particularly immediately before chamber recesses. For example, over both mid-December and late July 2019, thirteen nominees received confirmation, while, in October 2018, twelve won appointment following limited, and sometimes no, debate.[67] These initiatives had effects that were rather comparable to appointing court of appeals jurists.[68]

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

[65] Feinstein contended that 2017 notice came as senators were recessing for the week. *Exec. Bus. Meeting of the S. Comm. on the Judiciary*, 115th Cong. (Nov. 2, 2017) [hereinafter *Exec. Meeting Nov. 2017*].

[66] Feinstein proffered these notions. *Exec. Meeting Nov. 2017*, *supra* note 65; Ruger, *supra* note 32. The most appellate court judges whom Bush appointed in one week was three in June 2004 and 2005. *See Judicial Confirmations – 109th* Congress, U.S. COURTS (Jan. 1, 2006), https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2006/01/confirmations/pdf [https://perma.cc/ZZ7R-CARR]; *Judicial Confirmations – 108th* Congress, U.S. COURTS (Jan. 1, 2005), https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2005/01/confirmations/pdf [https://perma.cc/63ML-DFA7]. The most appeals court jurists whom President Obama confirmed was five in December 2010, when the Senate was preparing to recess at the Congress's conclusion and the nominees had waited extensive periods. *See Judicial Confirmations for January 2011*, U.S. COURTS (Jan. 1, 2011), https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2011/01/confirmations/html [https://perma.cc/AD4Z-R57Z]. Two appellate court judges were the most whom he appointed in other weeks.

[67] 165 CONG. REC. D1409-10 (daily ed. Dec. 19, 2019); *id.* at D1399 (daily ed. Dec. 18, 2019); *id.* at D939 (daily ed. July 31, 2019); *id.* at D932-33 (daily ed. July 30, 2019); 164 CONG. REC. D1133 (daily ed. Oct. 11, 2018). Indeed, the Democratic Senate minority did not even demand roll call ballots for some of these nominees, mainly because the individuals were well qualified, mainstream nominees.

[68] *See* sources cited *supra* notes 59-60. Stacking appellate court nominees' debates and ballots slows district court nominees' votes.

[69] *See supra* note 58.

efforts to comprehensvely evaluate nominees) that the GOP lawmakers drastically reduced the hours available to two.[70]

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

C. *Explanations For Nomination and Confirmation Problems*

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

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[70] 165 CONG. REC. S2,220 (daily ed. Apr. 3, 2019); Burgess Everett & Marianne Levine, *McConnell Preps New Nuclear Option to Speed Trump Judges*, POLITICO (Mar. 6, 2019, 5:05 AM), https://www.politico.com/story/2019/03/06/trump-mcconnell-judges-1205722 [https://perma.cc/6YYQ-UEVN]; Carl Hulse, *Ghost of Garland Lurks as G.O.P. Brandishes 'Nuclear Option' Again*, N.Y. TIMES, Feb. 21, 2019, at A14.

[71] *See supra* notes 22-29 and accompanying text.

[72] *See supra* notes 40-48.

[73] President Trump has appointed two Supreme Court Justices and fifty-three appellate court judges, *see* 166 CONG. REC. S28 (daily ed. Jan. 6, 2020), but seventy-eight district court vacancies and forty-two emergencies remain, *see Current Judicial Vacancies*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies [https://perma.cc/7TPC-XLLH] (last updated Sept. 14, 2020); *Judicial Emergencies*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies [https://perma.cc/T6ZJ-NZP5] (last updated Sept. 14, 2020).

[74] Privacy concerns, especially regarding candidates, may support limiting information. Tobias, *supra* note 21, at 1107. *But see Doing What He Said He Would*: *President Donald Trump's Transparent, Principled and Consistent Process for Choosing a Supreme Court Nominee*, WHITE HOUSE (Jan. 31, 2017), https://www.whitehouse.gov/briefings-

However, specific explanations might be derived from recent nomination and confirmation practices.

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

The White House also seems to underemphasize: (1) vacant trial court positions, conveying more responsibility for those nominations to home state politicians, (2) openings in jurisdictions with Democratic senators, (3) minority judicial representation, and (4) emergency vacancies in a substantial number of courts. This lack of attention is unwarranted because district jurists comprise the judiciary's workhorses and definitively resolve plenty of cases, senator party affiliation should clearly not affect the distribution of court judicial resources and thus justice's quality, minority jurists furnish numerous benefits, and emergency designations are only applied in the most troubling circumstances.[76] The appellate court focus could also reveal why district court nominees often lack the requisite qualifications: the Department of Justice and the White House Counsel Office employed insufficiently rigorous examinations, probably devoted comparatively minuscule resources to nominee scrutiny, and decidedly ignored many American Bar Association candidate ratings prior—and even subsequent—to nominations.[77]

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

statements/said-president-trumps-transparent-principled-consistent-process-choosing-supreme-court-nominee/ [https://perma.cc/XTW3-FENZ]; *Keeping His Promise*: *President Trump's Transparent, Consistent, and Principled Process for Choosing a Supreme Court Nominee*, WHITE HOUSE (July 9, 2018), https://www.whitehouse.gov/briefings-statements/keeping-promise-president-trumps-transparent-consistent-principled-process-choosing-supreme-court-nominee/ [https://perma.cc/R8CC-J7MY].

[75] *See supra* notes 26-28 and accompanying text.

[76] *See supra* notes 36, 39-42 and accompanying text; *infra* notes 90-93 and accompanying test; *see also* Wheeler, *supra* note 23.

[77] For how emphasis on filling appellate court vacancies showed why some district nominees were weak, see *supra* note 40-41; see also *supra* note 34 (appellate court not qualified ratings). For Justice Department and Counsel deficiencies, see *supra* notes 34-35, 38, 62 and accompanying text.

administration infighting putatively exacerbated.[78] President Trump apparently lacks understanding of the federal courts, separation of powers, the rule of law, and judicial selection, propositions illuminated by (1) his scathing criticisms of numerous jurists who authored rulings which complicated his political efforts and (2) the constant White House and Justice Department initiatives to nominate and confirm myriad judges who could dependably sustain presidential activities—notable examples were commencing substantial construction on border fences without congressional authorization and dismantling the modern administrative state.[79] The President's castigation of jurists and courts as "Obama judges" became so incendiary and excessive that United States Supreme Court Chief Justice John Roberts directly responded by praising the jurists for their valiant service and famously proclaiming: the United States does "not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."[80] These propositions were magnified by the desperate necessity to fill the Supreme Court vacancy that resulted from Justice Antonin Scalia's death and the 103 open circuit and district

[78] *See generally* DAVID FRUM, TRUMPOCRACY: THE CORRUPTION OF THE AMERICAN REPUBLIC (2018); BOB WOODWARD, FEAR: TRUMP IN THE WHITE HOUSE (2018). Newspapers cover this daily. *E.g.*, Peter Baker, *Turmoil at Top As the Disloyal Are Swept Out*, N.Y. TIMES, Feb. 23, 2020, at A1; Jennifer Rubin, Opinion, *Trump Doesn't Do Much Other Than Create Chaos*, WASH. POST (Apr. 17, 2020, 7:45 AM), https://www.washingtonpost.com/opinions/2020/04/17/trumps-bark-is-always-worse-than-his-bite/.

[79] Olivia Paschal, *Read President Trump's Speech Declaring a National Emergency*, ATLANTIC (Feb. 15, 2019), https://www.theatlantic.com/politics/archive/2019/02/trumps-declaration-national-emergency-full-text/582928/; *see* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Seige*, 131 HARV. L. REV. 1, 33-46 (2017); *In His Own Words*: *The President's Attacks on the Courts*, BRENNAN CTR. JUST. (June 5, 2017), https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts [https://perma.cc/4K6V-J7JJ] (early examples). For recent examples, see Peter Baker, Katie Benner & Sharon LaFraniere, *Barr's Irritation Mounts As Boss Claims to Be Chief Law Officer*, N.Y. TIMES, Feb. 19, 2020, at A1; George T. Conway III, *Trump Made a Baseless Attack on Two Justices; Here's Why He Did It*, WASH. POST (Mar 1, 2020), https://www.washingtonpost.com/opinions/2020/03/01/george-conway-trump-ginsburgsotomayor-supreme-court/.

[80] Adam Liptak, *Roberts Rebukes Trump for Swipe At 'Obama Judge,'* N.Y. TIMES, Nov. 22, 2018, at A1; *see* Peter Baker, *Trump Assails Supreme Court in a Startling Turn*, N.Y. TIMES, Feb. 26, 2020, at A1; David Fontana & Christopher Krewson, *Can the Supreme Court Learn to Speak Up for Itself?*, WASH. POST (Feb. 26, 2020) http://www.washingtonpost.com/magazine/2020/02/26/can-supreme-court-learn-speak-up-itself/?arc404=true.

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

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

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

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[81] Michael A. Cohen, *Mitch McConnell, Republican Nihilist*, N.Y. REV. BKS. (Feb. 25, 2019, 7:00 AM), https://www.nybooks.com/daily/2019/02/25/mitch-mcconnell-republican-nihilist/ [https://perma.cc/G8Gl-2J2R]; Charles Homans, *Opportunity Cost*, N.Y. TIMES, Jan. 27, 2019, at MM35; Jane Mayer, *Enabler-in-Chief*, NEW YORKER, Apr. 20, 2020, at 54.

[82] *See supra* notes 49-55 and accompanying text.

[83] *See supra* note 54 and accompanying text; *Exec. Meeting Feb. 2018*, *supra* note 51 (statements of Sens. Crapo, Feinstein and Leahy). For the assignment of appellate court judgeships to states, see Tobias, *supra* note 56, at 2171-74; *infra* note 125 and accompanying text.

[84] *See supra* text accompanying notes 55-63. Committee hearings, discussions, and votes certainly do warrant improvement.

[85] *See supra* notes 62, 62-68. The panel needs ABA input before votes and the Senate needs less stacking of nominees.

[86] Lockstep voting suggests that more effective selection practices may not significantly improve the appointments process or the vacancy crisis. *See supra* note 63 (no negative Republican panel vote); 163 CONG. REC. S7,351 (daily ed. Nov. 28, 2017) (one negative Republican vote).

III. CONSEQUENCES

The nomination and confirmation processes' descriptive assessment reveals that the practices which President Trump and the Senate employ have deleterious ramifications. Cogent metrics are the lack of a single appeals court opening and the sixty-five district court vacancies, forty-one of which involve emergencies. Many of the district court vacancies emanate from jurisdictions that Democrats mainly represent and show a problematic dearth of minority confirmees and nominees.[87] Upon the President's inauguration, there were 103 appellate court and district court openings, forty-two implicating emergencies, numbers that continued to grow even while active judges' inclination to leave active status narrows.[88]

The substantial vacancies, excessive percentages consisting of emergencies and clustered in districts and jurisdictions represented by Democrats, together with their prolonged character and constricted minority representation, have numbers of specific adverse effects. The figures increase pressures imposed upon numerous trial court jurists—the only judges whom many federal court litigants encounter—in their efforts to swiftly, inexpensively, and equitably resolve civil and criminal suits.[89] District court jurists are the justice system's workhorses, resolving most civil lawsuits and criminal dockets, while criminal prosecutions realize precedence under the Speedy Trial Act. Numerous protracted unfilled slots frustrate minority party home state politicians who can receive blame for the lengthy vacancies, while they also deprive the electorate and litigants of court judicial resources which they need and senators of political patronage.[90]

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

[87] *See supra* notes 41-48 and accompanying text.

[88] District emergencies still remain worse; total vacancies remained worse until October 2019. *Judicial Confirmations for August 2020*, *supra* note 35; *see* Wheeler, *supra* note 23; Russell Wheeler, *Trump's 1st State of the Union: Is He Really Reshaping the Federal Judiciary?* BROOKINGS INST. (Jan. 25 2018), https://www.brookings.edu/blog/fixgov/2018/01/25/trumps-1st-state-of-the-union-is-he-really-reshaping-the-federal-judiciary/ [https://perma.cc/C9ES-P9BX].

[89] FED. R. CIV. P. 1; *see generally* Patrick Johnston, *Problems in Raising Prayers to the Level of Rules*: *The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325 (1995) (describing the deployment and history of rule one of the Federal Rules of Civil Procedure and the provision's admonition regarding expeditious, inexpensive and fair dispute resolution).

[90] 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#:~:text=Civil%20suits%20such%20as%20Mr,and%20civil%20rights%2C%20among%20others.; *see* John Emshwiller & Gary Fields, *Federal Offenses: As Criminal Laws Proliferate, More Ensnared*, WALL STREET J., July 23, 2011, at A1.

crucial necessity to place significantly more judges who are diverse in empty slots. President Trump's neglect of minority representation has numerous problematic impacts. The federal courts are one important locus of the justice system where individuals of color, especially Black, Latinx, and Indigenous people, can be overrepresented in the criminal justice system and experience limited representation on the bench. The Trump Administration's minimal attention to enhancing diversity has been a lost opportunity for improving the quality of justice for litigants, numbers of whom can appear before federal jurists more often.

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

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

[91] Theresa M. Beiner, *The Elusive (but Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 610-15 (2003); Jennifer L. Peresie, Note, *Female Judges Matter*: *Gender and Collegial Decisionmaking in the Federal Appeals Courts*, 114 YALE L.J. 1759, 1776-86 (2005). *But see* Stephen J. Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504, 526 (2011) (analyzing female federal judges' decisionmaking and finding that their determinations do not differ substantially from decisionmaking of their male colleagues).

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

[93] Sylvia R. Lazos Vargas, *Only Skin Deep?*: *The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1442-43 (2008); Jeffrey Toobin, *The Obama Brief*, NEW YORKER, Oct. 27, 2014, at 24; Carl Tobias, *Appointing Lesbian, Gay, Bisexual, Transgender and Queer Judges in the Trump Administration*, 96 WASH. U. L. REV. ONLINE 11, 14-16 (2018).

[94] *See supra* notes 47-48. President Trump confirmed many accomplished, conservative women, including Seventh Circuit Judge Amy Coney Barrett and Sixth Circuit Judge Joan

color, women and LGBTQ individuals nominated and confirmed to date show that President Trump has nominated and confirmed plentiful candidates who offer conservative viewpoints *and* merit. He need only capitalize on this salient potential.

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

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

Larsen. *51 Judges Named by Trump*, N.Y. TIMES (Mar. 14, 2020), https://www.nytimes.com/2020/03/14/us/appellate-judges-trump-appointees.html.

[95] Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161, 1178-90 (2019); Orrin Hatch, *Protect Senate's Important 'Advice and Consent' Role*, THE HILL (Apr. 11, 2014, 8:00 AM), https://thehill.com/opinion/op-ed/203226-protect-the-senates-important-advice-and-consent-role [https://perma.cc/J88E-S6Z3]. This can even erode public trust in judges' decisions. The comparatively brief service of President Trump's appointees frustrates the analysis of the jurists' competence, but some observers have documented concerns by evaluating Trump appellate court judges' decisionmaking. PEOPLE FOR THE AM. WAY, CONFIRMED JUDGES, CONFIRMED FEARS: THE CONTINUING HARM CAUSED BY CONFIRMED TRUMP FEDERAL JUDGES 1-2 (2019); Maura Dolan, *Rapid Changes Strain the 9th Circuit*, L.A. TIMES, Feb. 22, 2020, at A1; McCarthy, *supra* note 23; *see also* Kimberly Wehle, *A Conservative Judge Just Slapped the Trump Administration's Treatment of Poor People*, POLITICO (Feb. 22, 2020, 7:00 AM), https://www.politico.com/news/magazine/2020/02/22/judges-are-the-new-compassionate-conservatives-116653 [https://perma.cc/2AEB-CXWK] (finding conservative Republican appointees rule against Trump).

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

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

IV. SUGGESTIONS FOR THE FUTURE

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

A. *Near-Term Suggestions*

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

[96] 163 CONG. REC. S8,021-23 (daily ed. Dec. 14, 2017) (statement of Sen. Leahy); *see* Emily Bazelon, *The Originalists*, N.Y. TIMES, Mar. 1, 2020, at MM26; Frank Bruni, Opinion, *Democrats Are Bound for Disaster*, N.Y. TIMES, Feb. 23, 2020, at SR3. *See generally* STABENOW, SCHUMER & WHITEHOUSE, *supra* note 27.

state court judges, and (3) talented, consensus district jurists to federal appellate courts. This mechanism is pragmatic, as the selections have compiled easily available, complete records and provide significant pertinent experience.[97] Valuable illustrations comprise Northern District of Texas Judge Gren Scholer and Southern District of Alabama Judge Moorer, whom President Trump elevated to district courts.[98]

Another practical notion would be renominating a few of the twenty capable, moderate, and conservative, Obama district court nominees who in 2016 earned committee approval yet lacked confirmation votes.[99] This suggestion promotes comparatively swift appointment because most renamed nominees must only capture committee and confirmation ballots.[100] President Trump has already deployed renomination with fifteen Obama nominees, including Western District of Texas Judge Walter Counts and Eastern District of New York Judge Gary Richard Brown. Many of the nominees have secured confirmation, but others whom President Obama also designated, including Inga Bernstein, Julien Neals and Florence Pan, can expand minority representation and fill numerous lengthy district court openings.[101]

President Trump also may contemplate instituting, stressing, revitalizing, or enhancing a number of productive actions that he has either ignored or diluted. One would be to meaningfully consult home state senators about potential

[97] 28 U.S.C. § 631 (2018). For elevating district court judges whom the Senate has already confirmed once, see Elisha Carol Savchak et al., *Taking It to the Next Level: The Elevation of District Judges to the U.S. Courts of Appeals*, 50 AM. J. POL. SCI. 478, 479-80 (2006); Tobias, s*upra* note 53, at 910-11.

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

[99] The Senate did not confirm President Obama's district nominees because the Republican majority steadfastly refused to schedule confirmation votes. Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9, 18-19 (2017).

[100] Most home state senators will return blue slips, as they already did once. *See id*. For those nominees who need another hearing, their prior panel, FBI, and ABA reviews will only require updating.

[101] Other examples of Obama nominees whom the Senate confirmed under President Trump are District of Idaho Judge David Nye, Western District of Oklahoma Judge Scott Palk, and District of South Carolina Judge Donald Coggins. *See id* at 21-22 (documenting twenty-eight other Obama 2016 nominees, including recently confirmed Eastern District of New York Judge Diane Gujarati, who lacked committee approval, whom Trump may rename); *Judicial Confirmations for January 2019*, *supra* note 35; *Judicial Confirmations for August 2020*, *supra* note 35.

nominees, which constitutes a major purpose for blue slips.[102] Assiduous White House cultivation of politicians, especially those who rely on astute selection panels to submit competent individuals, expedites nominations and confirmations. An illuminating example was mustering the nomination of three excellent, mainstream Northern District of Illinois picks whom both home state senators powerfully favored and the committee smoothly reported.[103] Therefore, effective consultation will not invariably yield the strongest Republican or Democratic preferences, but it might speed nominations and confirmations and perhaps resolve disputes that have eroded the process and interparty cooperation.[104]

The administration should concomitantly reevaluate its decision to overemphasize the confirmation of conservative appeals court jurists, which now constitutes the principal reason for the sixty-five district court openings, forty-one of which comprise emergencies. The administration should comprehensively analyze plentiful concepts that will effectively reduce the surfeit of district court vacancies, many constituting emergencies. For instance, the appointments team might employ a regime which concentrates on the needs of *all* courts. One helpful alternative may be prioritizing the nomination of people who could offer relief to the forty-one emergencies.[105] The team could emphasize the substantial openings in districts and the courts with rather large percentages of vacant seats, mainly districts in California and New York.[106] Stressing those jurisdictions and certain others—especially Illinois, Massachusetts, New Jersey, and Washington courts—would ameliorate the lack

[102] *See supra* notes 29-32 and accompanying text.

[103] For the comparatively smooth approval of Judge Rowland, Judge Pacold, and Judge Seeger, see Carl Tobias, *Filling the Illinois Federal District Court Vacancies*, 47 PEPP. L. REV. 115, 119-21 (2019); *see also Fifteen Nominations and Two Withdrawals Sent to the Senate*, WHITE HOUSE (Feb. 12, 2020), https://www.whitehouse.gov/presidential-actions/fifteen-nominations-two-withdrawals-sent-senate/#:~:text=NOMINATIONS%20SENT%20TO%20THE%20SENATE,Julia%20Akins%20Clark%2C%20term%20expired. [https://perma.cc/2NMK-L237] (nominating three more similar nominees to fill all Illinois vacancies). *But see Judicial Confirmations for January 2019*, *supra* note 35; *Judicial Confirmations for August 2020*, *supra* note 35 (showing on May 21, 2019, President Trump only sent the Senate the three Illinois nominees whom the committee later approved, in addition to seven New York and four Obama nominees, even though President Trump had renamed fifty others whose nominations expired on January 2, 2019, in that month).

[104] *See* Kaplan, *supra* note 29 (similar Ohio and Washington disputes); *supra* notes 30-31, 52-53 and accompanying text (showcasing Oregon and Wisconsin disputes with White House Counsel); sources cited *supra* note 32 (California and New York disputes).

[105] *See* sources cited *supra* notes 40-45, 74.

[106] *See* sources cited *supra* notes 32, 43-45.

of nominees from jurisdictions represented by Democrats.[107] President Trump can do this by providing home state officials with greater responsibility for detecting, recruiting, and proposing numerous superb candidates whom the President can then nominate.[108]

The White House should correspondingly reassess its mistaken choice to directly exclude the American Bar Association from the official responsibility for performing candidate and nominee inquiries and delivering rankings, because Presidents since the 1950s, except President George W. Bush and Trump, have clearly depended upon the ABA's massive network of incisive evaluators, impressive expertise, and careful, instructive ratings.[109] Moreover, deployment of ABA examinations and rankings during candidate *pre-nomination* investigations might restrict the embarrassment suffered by President Trump's choices whom the ABA assigns not qualified ratings.[110] The eventual confirmation of most people who drew this not qualified ranking indicates that the American Bar Association does efficaciously alert selection participants to ostensible concerns about nominees, even if the Senate ultimately confirms the nominees.[111] Should the President insist on forgoing official ABA recommendations, White House Counsel may at least permit some candidates and nominees to collaborate with the ABA in the entity's meticulous evaluation of choices as the American Bar Association prepares its cogent ratings.[112]

Furthermore, the administration needs to implement efforts that will increase federal appellate court and district court diversity because expanded minority representation furnishes a number of advantages.[113] The White House should elevate the importance of diversity while communicating to selection participants and citizens that President Trump believes greater minority representation has ample importance. The White House Counsel should lead this endeavor by actively conveying that diversity's accentuation deserves priority similar to conservatism.

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

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

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

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

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

[112] *See supra* note 35. *But see supra* note 34.

[113] *See supra* notes 89-93 and accompanying text.

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

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

B. *Longer-Term Suggestions*

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

[114] Tobias, *supra* note 21, at 1107; *see* sources cited *supra* notes 63-64; John Gramlich, *Federal Judicial Picks Have Become More Contentious, and Trump's Are No Exception*, PEW RES. 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/SW93-A5SS]. *But see supra* notes 64, 67 and accompanying text (Democratic senators concurrence on some confirmation votes).

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

The presidential and Senate elections in November 2020 make this year propitious. One compelling reason for this season's promise is the salient tradition, variously described as the Thurmond or Leahy Rule by the respective parties, which clearly states that the nomination and confirmation processes inexorably slow and ultimately halt early in presidential election years.[115] The principal support for this convention is dutifully honoring the will of the people expressed in the November presidential and Senate elections. The most notorious instances of this concept's perversion were the Republican Senate majority's unprecedented peremptory refusal to even consider Supreme Court nominee Garland in 2016 and confirmation of only two appellate court and eighteen district court nominees in President Obama's last half term. This Republican obstruction sharply contrasts to the Democratic Senate majority's confirmation of ten appellate court, and fifty-eight trial court, judges in President Bush's final two years.[116] The rule's asymmetrical deployment by Republicans has made the rule increasingly controversial, although excessive Republican capitalization on the idea to severely undercut the Democratic Party suggests

[115] Carl Tobias, *Transforming the "Thurmond Rule" in 2016*, 66 EMORY L.J. ONLINE 2001, 2002-04 (2016); *see* Carl Hulse, *Over the Objections of Democrats, G.O.P. Pushes to Name Judges*, N.Y. TIMES, Apr. 29, 2020, at A24 (explaining that McConnell has vowed to fill all federal court vacancies in the 2020 presidential election year and during coronavirus pandemic). The Senate Majority Leader has brashly proclaimed that his motto is "leave no vacancy behind." Alex Swoyer, *Mitch McConnell on Judges*: *My Motto for the Year is 'Leave No Vacancy Behind'*, WASH. TIMES (Feb. 11, 2020), https://www.washingtontimes.com/news/2020/feb/11/mitch-mcconnell-judges-my-motto-year-leave-no-vaca/.

[116] Carl Tobias, *The Republican Senate and Regular Order*, 101 IOWA L. REV. ONLINE 12, 14-16 (2016). *But see* Carl Hulse, *McConnell's Pitch to Veteran Judges*: *Please Quit*, N.Y. TIMES, Mar. 17, 2020, at A1 (indicating that McConnell is urging judges whom Republican Presidents appointed to resign or assume senior status in 2020, so that Trump can replace them); Felicia Sonmez, *Graham Urges Senior Judges To Step Aside Before November Election So Republicans Can Fill Vacancies*, WASH. POST (May 28, 2020), https://www.washingtonpost.com/politics /graham-urges-senior-judges-to-step-aside-before-november-election-so-republicans-can-fill-vacancies/2020/05/28/4b014d78-a0fc-11ea-b5c9-570a91917d8d_story.html (explaining that Graham is making similar plea).

that fairness would necessitate the rule's vigorous enforcement during this year.[117]

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

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

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

[118] For numerous longer-term concepts that may remedy or ameliorate the confirmation wars, see Michael L. Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 298-311 (2012); Tobias, *supra* note 25, at 2255-65.

[119] *See* Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 687-88 (2003); Carl Tobias, *Fixing the Federal Judicial Selection Process*, 65 EMORY L.J. ONLINE 2051, 2056-57 (2016).

[120] The New York senators initially allowed one of four and most recently one of three nominees under Senators Alfonse D'Amato (R-NY) and Daniel Patrick Moynihan (D-NY). 143 CONG. REC. 4,253 (1997) (statement of Sen. Biden); *see also* Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 297-99 (1999).

[121] Press Release, Patrick Toomey, Senator, U.S. Senate, Senators Casey and Toomey Continue Bipartisan Agreement on District Court Vacancies (Mar. 10, 2017), https://www.toomey.senate.gov/?p=news&id=1896 [https://perma.cc/Y6P6-6JAL].

one in four trial court nominees.[122] Lawmakers from quite a few other jurisdictions, encompassing California, Illinois and Washington, have effectuated rather similar approaches.[123]

Varying procedures control in the fifty states and would comprise matters for discussion among the jurisdictions' legislators and between them and the President.[124] The percentage of nominees whom the party that does not control the White House may submit should be of particular importance.[125] In split delegations, important factors may be whether the Republican or Democratic senator and the executive will initially rank candidates and what critical differences there are between the lawmakers and the President. A salutary option could be permitting the senators to agree while forwarding one candidate at a time until the executive concurs, as these ideas embody contemporary practice and constitutional phraseology.[126]

A number of tribunals, especially the U.S. District Court for the District of Columbia, may require omission, as the District of Columbia lacks senators and the White House traditionally heads this nomination process.[127] Because court of appeals vacancies rarely occur and the courts include a few states, the bipartisan judiciary apparently works most effectively for tribunals with numerous states.[128] Nevertheless, perceptions that seating jurists is quite politicized, complex, and crucial—because appellate court opinions enunciate substantially more policy and have greater importance—suggest that excluding

[122] *See* sources cited *supra* note 119. Illinois employed an analogous regime when the delegation had one Democratic and one Republican senator, and Democratic Senators Dick Durbin and Tammy Duckworth retain the system. Press Release, Dick Durbin, Senator, U.S. Senate, Durbin: White House Nominates Two to Fill Federal Judicial Vacancies in Northern District (Aug. 5, 2014), https://www.durbin.senate.gov/newsroom/press-releases/durbin-white-house-nominates-two-to-fill-federal-judicial-vacancies-in-northern-district [https://perma.cc/ZR3T-DBR3]; *see supra* note 103 and accompanying text.

[123] Tobias, *supra* note 53, at 916.

[124] *See* sources cited *supra* note 119.

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

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

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

[128] Even the Ninth Circuit, which is the largest appellate court, has openings every two decades in Alaska, Hawaii, Idaho, and Montana. Each appellate court's states must have at least one active judge. 28 U.S.C. § 44(c) (2018).

the current appellate court selection process from the biparisan judiciary construct would be appropriate.

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

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

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

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

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

[132] Senator Biden was invoking "trades" which Republican senators proposed to President Clinton. 143 CONG. REC. 4,253 (1997) (statement of Sen. Biden). President Obama and Georgia Republican senators Saxby Chamblis and Johnny Isakson used trades when they could not agree on nominees. Daniel Malloy, *The Delegation Georgians in D.C.*, ATLANTA J.-CONST., May 3, 2015, at 13A.

confirmation wars that have paralyzed appointments since 2009, so a bipartisan judiciary which honors the Constitution might appeal to Democrats and Republicans.[133] Initiating this solution seems relatively complicated, but lawmakers may comparatively easily remedy or temper a number of potential concerns.[134]

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

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

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

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

[136] *Senate Compromise on Judge Nominations*, N.Y. TIMES, May 24, 2005, at A18; *see* Michael Gerhardt & Richard Painter, "*Extraordinary Circumstances*": *The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform*, 46 U. RICH. L. REV. 969, 970-71 (2012).

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

C. *More Dramatic Suggestions*

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

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

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

[138] *See* sources cited *supra* note 70.

[139] I rely in this paragraph and below on the ideas of Christopher Kang, who spearheaded many of President Obama's judicial selection initiatives. Jeremy Stahl, *Republicans Are Abolishing 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/6KSH-QKNE].

[140] Kang contends that Democratic senators have been less assertive in championing their preferred candidates with President Trump than Republican senators were with President Obama. *Id*.

[141] Everett & Levine, *supra* note 70 (documenting Republican rejection of a similar proposal); Stahl, *supra* note 139; *see also* sources cited *supra* note 21 (explaining that Republican Senate majority denied Garland and four Obama circuit nominees consideration in 2016 and denied three nominees confirmation votes).

appellate court vacancies among the 179 judgeships can persuade Republicans to acquiesce on appeals courts.[142]

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

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

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

[143] *See* sources cited *supra* note 132, 139.

[144] *See* sources cited *supra* note 42.

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

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

[147] Grassley claimed that Feinstein agreed to the hearing which Democrats said violated the committee rules. *Oct. 24 Hearing*, *supra* note 57; *Exec. Bus. Meeting of the S. Comm. on*

caucus to assemble viable compromises have not been particularly effective because specific Republican legislators and their caucus appeared more concerned about extracting copious benefits from violating or restricting practically all Senate rules and customs.[148] Therefore, although boycotts could publicize and illuminate the corrosive effects of the deteriorating judicial selection process—which the Republican Senate majority's recalcitrance accentuates—boycotts' harmful impacts can apparently eclipse their advantages.[149]

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

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

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

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

[150] *See* Matt Flegenheimer, *Democrats Strategize G.O.P. - Style Hardball to Get Judges Seated*, N.Y. TIMES, June 29, 2020, at A15; Carl Hulse, *Democrats to Say Courts Need Structural Reforms*, N.Y. TIMES, Aug. 1, 2020, at A16; Ed Kilgore, *Republicans Have Politically Weaponized Judicial Appointments. Democrats Need To Do Likewise*, NEW YORK MAG. (May 6, 2020) https://nymag.com/intelligencer/2020/05/republicans-politically-weaponized-judicialappointments.html [https://perma.cc/8ULT-PV9W]; Amanda Marcotte, *Trump Has Laid Waste to the Federal Courts – Can Any of the Democratic Candidates Fix It?*, SALON.COM (February 9, 2020, 3:00 PM) https://www.salon.com/2020/02/09/trump-has-laid-waste-to-the-federal-courts—can-any-of-the-democratic-candidates-fix-it/

CONCLUSION

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

[https://perma.cc/3EUP-T9ZT]; Matt Stevens, *Trump Has Reshaped the Judiciary. Here's How the 2020 Democrats Would Address That.*, N.Y. TIMES (Feb. 8, 2020) https://www.nytimes.com/2020/02/08/us/politics/democrats-courts-trump.html; Christopher Springman, *A Constitutional Weapon for Biden to Vanquish Trump's Army of Judges*, NEW REPUBLIC (Aug. 20, 2020), https://newrepublic.com/article/158992/biden-trump-supreme-court-2020-jurisdiction-stripping.