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## Recalibrating Judicial Renominations in the Trump Administration

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# *Recalibrating Judicial Renominations in the Trump Administration*

Carl Tobias\*

## *Abstract*

*Now that President Donald Trump has commenced the fifth month of his administration, federal courts experience 121 circuit and district court vacancies. These statistics indicate that Mr. Trump has a valuable opportunity to approve more judges than any new President. The protracted open judgeships detrimentally affect people and businesses engaged in federal court litigation, because they restrict the expeditious, inexpensive and equitable disposition of cases. Nevertheless, the White House has been treating crucial issues that mandate careful attention—specifically establishing a government, confirming a Supreme Court Justice, and keeping numerous campaign promises. How, accordingly, can President Trump fulfill these critical duties and his constitutional responsibility to nominate and, with Senate advice and consent, appoint judges?*

*This Article initially canvasses judicial appointments in the administration of President Barack Obama. The evaluation ascertains that Republican obstruction allowed the upper chamber to approve merely twenty jurists across the entire 114th Congress, leaving 105 empty seats and fifty-one expired nominations when the Senate adjourned on January 3, 2017. The Republican Senate majority's refusal to confirm a single jurist after July 6, 2016—encompassing three circuit nominees whom the Judiciary Committee approved with bipartisan support and twenty district court aspirants whom the committee voice voted without dissent—*

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\* Williams Chair in Law, University of Richmond. I wish to thank Margaret Sanner for valuable suggestions, Katie Lehnert for exceptional research and editing, the *Washington and Lee Law Review* Editors for exceptional editing, Leslee Stone for excellent processing as well as Russell Williams and the Hunton Williams Summer Endowment Fund for generous, continuing support. Remaining errors are mine alone.

*could portend that President Trump will renominate comparatively few of President Obama’s nominees. The Article then scrutinizes the consequences for the judiciary, the Senate, the President, and the country of confronting many judicial openings. The appeals and district courts require all of their judges to deliver justice, but President Trump addresses numerous troubling concerns—which include global matters, such as the Middle East and the South China Sea, and domestic problems, encompassing health care, economic inequality, and responding to a probe of Russia’s efforts to meddle in the 2016 United States elections—and tendered merely one lower court nominee prior to May 8. The last Part, thus, proffers suggestions to fill the numerous openings with a finely-tuned assessment of the persons nominated by emphasizing those who secured committee reports.*

#### *Table of Contents*

I. Introduction.....	11
II. Obama Administration Selection.....	12
III. Reasons for and Implications of Problematic Selection.....	15
IV. Suggestions for Renomination .....	17
A. Reasons to Renominate .....	18
B. How to Renominate .....	21
1. Twenty District Nominees with Committee Approval .....	21
2. Twenty-Four District Nominees Without Committee Approval .....	23
a. Eight Nominees with Hearings.....	23
b. Sixteen Nominees Without Hearings .....	24
3. Appeals Court Nominees .....	26
a. Three Nominees with Committee Approval.....	26
b. Four Nominees Without Hearings.....	28
V. Conclusion .....	30

*I. Introduction*

With President Donald Trump's recent assumption of the White House, there are currently 121 federal circuit and district court vacancies, which suggest that the nascent administration has the opportunity to confirm more judges than any incoming President. The empty seats harm companies and individuals participating in federal court lawsuits, as the open posts undermine the swift, economical and fair resolution of disputes, but the chief executive has been addressing critical issues that require serious attention—particularly creating a new government, appointing a Supreme Court Justice, Neil Gorsuch, to replace Justice Antonin Scalia, and fulfilling many campaign pledges. How, therefore, might President Trump discharge all of these crucial responsibilities *and* his constitutional duty to nominate and, with Senate advice and consent, appoint jurists?

This Article first evaluates judicial selection under President Barack Obama. The assessment shows that Republican obstruction meant that the upper chamber approved only twenty jurists during the whole 114th Congress, leaving 105 unfilled positions and fifty-one expired nominations upon its end. Grand Old Party (GOP) failure to confirm one judge after July 6, 2016—including three court of appeals prospects whom the Judiciary Committee reported with bipartisan support and twenty trial court aspirants whom the panel approved on voice votes without dissent—might indicate that President Trump will renominate relatively few nominees whom President Obama tendered. The Article then explores the implications for the courts, the Senate, the President, and the nation of having substantial numbers of judicial vacancies. Tribunals need all of their members to supply justice, yet President Trump directly confronts numerous problematic matters—which include international concerns, such as difficulties involving North Korea and Syria, and domestic complications, namely health care, employment and climate change—and tapped only a single nominee before May 8. The last Section, therefore, proffers solutions to fill the myriad empty posts with a finely-calibrated analysis of the individuals whose candidacies expired in early January by stressing those nominees who captured panel approval.

## II. Obama Administration Selection

The selection process functioned rather well during President Obama's first six years when the Democratic party held a chamber majority.<sup>1</sup> He assiduously consulted home state officers—particularly Republicans—seeking, and normally following, proposals of strong, mainstream, diverse nominees.<sup>2</sup> These initiatives promoted collaboration, as lawmakers from states having vacancies receive deference because they can halt processing through retention of “blue slips.”<sup>3</sup> Even with aggressive presidential cultivation, many did not cooperate by tendering able submissions.<sup>4</sup>

The GOP coordinated with regular hearings yet “held over” panel votes seven days for all except one in sixty-plus competent, moderate appellate choices.<sup>5</sup> Republicans slowly agreed on picks’ floor debates, when needed, and final ballots, relegating superb centrists to languish weeks until Democrats asked for cloture.<sup>6</sup> The

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1. I rely in this Section on Sheldon Goldman et al., *Obama's First Term Judiciary*, 97 JUDICATURE 7 (2013); Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233 (2013).

2. Goldman et al., *supra* note 1, at 8–17; Tobias, *supra* note 1, at 2239–40, 2253.

3. Ryan Owens et al., *Ideology, Qualifications, and Court Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347, 347; Tobias, *supra* note 1, at 2242.

4. Some home state politicians recommended a comparatively small number of individuals or none or delayed suggesting proposals. Goldman et al., *supra* note 1, at 17; *John Cornyn and Ted Cruz's Texas: A State of Judicial Emergency*, ALLIANCE FOR JUST., <http://www.afj.org/our-work/issues/judicial-selection/texas-epicenter-of-the-judicial-vacancy-crisis> (last updated Sept. 6, 2016) (last visited May 5, 2017) (on file with the Washington and Lee Law Review); see 161 CONG. REC. S6151 (daily ed. July 30, 2015) (statement of Sen. Schumer).

5. S. Judiciary Comm., *Exec. Business Mtg.* (Mar. 22, 2013); see Tobias, *supra* note 1, at 2242–43.

6. See Goldman et al., *supra* note 1, at 26–29 (analyzing how Republicans slowly agreed on nominee floor debates and votes which meant that superb nominees had languished for months awaiting ballots until Democrats pursued cloture); Tobias, *supra* note 1, at 2243–46 (assessing how Republicans delayed final consideration of appellate nominees for months, until Democrats invoked cloture).

GOP also pursued substantial roll call votes and plentiful debate time for capable, mainstream aspirants, who readily captured approval, thereby devouring extremely scarce chamber floor hours.<sup>7</sup> The procedures roiled appointments, leaving some ninety circuit and district court openings for nearly five years after September 2009.<sup>8</sup>

In the 2012 presidential election year, those Republican strategies continued to grow.<sup>9</sup> Delay prevailed, while final appellate ballots ceased in June. At President Obama's reelection, Democrats hoped for greater collaboration but cooperation failed to materialize and resistance skyrocketed the next year when he forwarded three exceptional, moderate, diverse prospects for the D.C. Circuit, the nation's second most important tribunal.<sup>10</sup> The GOP would not afford the candidates floor votes, while prolonged recalcitrance motivated Democrats' explosion of the "nuclear option" that restricted filibusters.<sup>11</sup> This allowed numerous appellate and district courts to encounter fewer vacancies at 2014's close.

During 2015, when Republicans had captured a Senate majority,<sup>12</sup> already negligible cooperation further declined. GOP

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7. Tobias, *FORMAT* 1, at 2244; *supra* note 1, at 2244; *see* Juan Williams, *The GOP's Judicial Logjam*, THE HILL (July 27, 2015), <http://thehill.com/opinion/juan-williams/249196-juan-williams-the-gops-judicial-logjam> (last visited May 5, 2017) ("[I]n a politically polarized nation, Republicans have reason to keep an eye on the partisan make-up of the courts. That is just one of the many political backroom plots being played out in the Senate over control of the nation's courts.") (on file with the Washington and Lee Law Review).

8. *See Archive of Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> (last visited May 5, 2017) (providing vacancy information for years 2009–2014) (on file with the Washington and Lee Law Review).

9. Tobias, *supra* note 1, at 2246.

10. I rely here on Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L. J. 121 (2015); Jeffrey Toobin, *The Obama Brief*, NEW YORKER, Oct. 27, 2014, at 24.

11. The 113th Senate approved 130 judges. *Archive of Judicial Vacancies*, *supra* note 8 (providing vacancy information for years 2013–2014). Democrats had to file cloture on all pre-2015 nominees after the party exploded the nuclear option. 161 CONG. REC. S3223 (daily ed. May 21, 2015) (statement of Sen. Leahy) [hereinafter Leahy statement].

12. Jerry Markon et al., *Republicans Win Senate Control*, WASH. POST, Nov. 4, 2014; Jonathan Weisman & Ashley Parker, *GOP Takes Senate*, N.Y. TIMES,

leaders incessantly promised that they would again bring to the Senate “regular order,” the concept which applied before Democrats purportedly eroded the idea. Early in January, Senator Mitch McConnell (R-Ky.), the new Majority Leader, proclaimed: “We need to return to regular order.”<sup>13</sup> Senator Chuck Grassley (R-Iowa), who became the Chair of the Judiciary Committee, promised that the panel would vigorously and expeditiously canvass selections.<sup>14</sup> Despite manifold pledges, Republicans slowly provided individuals for Obama to consider, nominee hearings, committee ballots, chamber debates, when required, and final votes. Upon 2015’s conclusion, those phenomena meant that eight of nine appellate vacancies lacking nominees—that the Administrative Office of the U.S. Courts identified as emergencies—troubled jurisdictions which GOP members represented.<sup>15</sup> Senators confirmed *one* appeals court judge two years ago with a second in 2016, while the chamber approved only eighteen district court jurists in both years.<sup>16</sup>

2016 was a presidential election year when appointments conventionally slow and halt, but these factors were intensified by Republican refusal to process U.S. Court of Appeals for the District of Columbia Circuit Chief Judge Merrick Garland, President

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Nov. 5, 2014, at A1.

13. He kept reciting the mantra. 161 CONG. REC. S27 (daily ed. Jan. 7, 2015); *id.* at S2767 (daily ed. May 12, 2015). *But see id.* at S2949 (daily ed. May 18, 2015) (statement of Sen. Reid); Leahy statement, *supra* note 11.

14. S. Judiciary Comm., *Hearing on Nominees* (Jan. 21, 2015); David Catanese, *Grassley’s Gavel Year*, U.S. NEWS & WORLD REP. (Jan. 28, 2015), <https://www.usnews.com/news/articles/2015/01/28/chuck-grassleys-gavel-year?int=news-rec> (last visited May 5, 2017) (on file with the Washington and Lee Law Review).

15. They helped little, so Obama sent no 2015 pick and seven in 2016; none won approval. Emergencies are based on caseload magnitude and openings’ length. *Judicial Emergencies*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies> (last updated May 5, 2017) (last visited May 5, 2017) (showing the federal judicial vacancies classified as judicial emergencies from 2015–2016) (on file with the Washington and Lee Law Review).

16. *Archive of Judicial Vacancies*, *supra* note 8 (providing vacancy information for years 2015–2016); see Carl Tobias, *Confirm Judge Koh for the Ninth Circuit*, 73 WASH. & LEE L. REV. 449, 455-56 (2016) (describing the confirmation processes for the two appellate court nominees who secured 2016 confirmation).

Obama's Supreme Court nominee.<sup>17</sup> Traditions have allowed fine, mainstream circuit nominees to enjoy votes after May, but that failed to happen during the 2016 presidential election year.<sup>18</sup> Confirming a sole appellate pick throughout 2015 with a second last January was nearly unprecedented: over 2007–2008, the Democratic majority helped confirm ten appeals court—and fifty-eight trial court—prospects whom President George W. Bush had recommended. During 1988, the Senate confirmed six circuit jurists whom President Ronald Reagan had denominated *and* High Court Justice Anthony Kennedy.<sup>19</sup> The inaction during President Obama's final year meant that there were 105 lower court vacancies and fifty-one expired nominations upon Trump's inauguration.<sup>20</sup>

### III. Reasons for and Implications of Problematic Selection

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17. Russell Wheeler, *The 'Thurmond Rule' and Other Advice and Consent Myths*, BROOKINGS (May 25, 2016), <https://www.brookings.edu/blog/fixgov/2016/05/25/the-thurmond-rule-and-other-advice-and-consent-myths/> (last visited May 5, 2017) (on file with the Washington and Lee Law Review); Michael Shear et al., *Obama Pick Opens Court Battle*, N.Y. TIMES, Mar. 17, 2016, at A1.

18. See generally Carl Tobias, *Confirming Circuit Judges in a Presidential Election Year*, 84 GEO. WASH. L. REV. ARGUENDO 160, 169 (2016); sources cited *supra* note 17. Delaying Judge Garland slowed these nominees. 162 CONG. REC. S1523 (daily ed. Mar. 16, 2016); S. Judiciary Comm., *Exec. Business Mtgs.* (Mar. 17, May 19, 2016) (statements of Sens. Leahy & Grassley).

19. In September 2008, the Democratic Senate majority undertook extraordinary efforts to conduct Judiciary Committee hearings and votes and floor debates and ballots, which resulted in the confirmation of ten of President Bush's district court nominees. *Archive of Judicial Vacancies*, *supra* note 8 (providing vacancy information for years 1988 and 2007–2008); see also Christopher Kang, *Republican Obstruction of Courts Could be the Worst Since the 1800s*, HUFFINGTON POST (Apr. 20, 2016), [http://www.huffingtonpost.com/christopher-kang/republican-obstruction-of\\_b\\_9741446.html](http://www.huffingtonpost.com/christopher-kang/republican-obstruction-of_b_9741446.html) (last visited May 10, 2017) (demonstrating how Republican obstruction has led to an almost historically low confirmation rate and the fewest appellate court confirmations since the 1800s).

20. *Archive of Judicial Vacancies: Year 2017*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017> (last visited May 10, 2017) (on file with the Washington and Lee Law Review).



The explanations for selection's problematic state are complicated,<sup>21</sup> yet many observers attribute the “confirmation wars” to D.C. Circuit Judge Robert Bork's Supreme Court appointment process.<sup>22</sup> They detect that the regime has collapsed, as manifested through corrosive politicization, systemic paybacks, and striking divisiveness wherein both parties ratchet up the stakes, plainly seen with persistent denial of High Court nominee Garland's assessment.<sup>23</sup>

The consequences are bleak. The radical inactivity since 2015 means that the judiciary experiences 121 lower court, and fifty emergency, openings.<sup>24</sup> The tribunals could only have a relatively small number of vacant positions in 2014 *after* Democrats had marshaled the “nuclear option” that confined filibusters.<sup>25</sup> Recent inaction, however, drastically propelled openings and emergencies by 2017, while considerably more judges will assume senior status or retire throughout the administration of President Trump.<sup>26</sup>

Delayed confirmations have numerous, critical adverse

21. The process seems considerably more complex today. *See generally* Michael Gerhardt, *The Politics of Early Justice*, 100 IOWA L. REV. 551 (2014); Orrin Hatch, *The Constitution as Playbook for Judicial Selection*, 32 HARV. J. L. & PUB. POL'Y 1035 (2009).

22. *E.g.*, MARK GITENSTEIN, MATTERS OF PRINCIPLE (1992); JEFFREY TOOBIN, THE NINE 18 (2007); *see also* DAVID O'BRIEN, JUDICIAL ROULETTE 20 (1988) (affording much earlier history).

23. The latest began with putative Republican retaliation for Democrats' alleged delay throughout Bush's final two years by purportedly stalling in Obama's tenure. Democrats then exploded the nuclear option and approved many judges. The GOP next ostensibly dramatically slowed all Obama nominees and applied the nuclear option to the Supreme Court. *See supra* text accompanying notes 2–19.

24. The latter quadrupled from twelve to fifty. *Archive of Judicial Vacancies: Year 2017, supra* note 20 (providing a list of 2017 judicial emergencies); *see* Eric Lipton & Jeremy Peters, *Conservatives Press Overhaul in the Judiciary*, N.Y. TIMES, Mar. 19, 2017, at A1.

25. *See supra* notes 10–11 and accompanying text.

26. *Archive of Judicial Vacancies: Year 2017, supra* note 20. Some appellate and district court judges will assume senior status or retire partly because of the custom that judges should be replaced by Presidents of the party that appointed them. Jonathan Adler, *How President Trump Will Shape the Federal Courts*, WASH. POST (Jan. 20, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/20/how-president-trump-will-shape-the-federal-courts/?utm\\_term=.25278c4bd6c2](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/20/how-president-trump-will-shape-the-federal-courts/?utm_term=.25278c4bd6c2) (last visited May 10, 2017) (on file with the Washington and Lee Law Review).

impacts.<sup>27</sup> They require nominees to leave careers on hold while preventing many talented aspirants from even contemplating the bench.<sup>28</sup> Courts address daunting challenges that result from ample caseloads and protracted vacancies,<sup>29</sup> and tardy Senate analyses deprive courts of necessary judicial resources and myriad litigants of justice.<sup>30</sup> Those effects also distinctly undercut citizen respect for the selection process and the federal government branches.<sup>31</sup>

In sum, this portrait shows the judicial selection process' degraded nature—which crafting a government, seating a Justice, and responding to the investigations of links between the Trump presidential campaign and Russia by the special counsel and congressional committee might compound—and the profound need for submissions' rapid confirmations.

#### *IV. Suggestions for Renomination*

The President and the Senate have constitutional duties to assure that the co-equal judicial branch possesses adequate resources to discharge its constitutional responsibilities. Major precedent, which directly supports prompt approvals, should clearly apply.<sup>32</sup> Because the circuit and district courts require all

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27. Tobias, *supra* note 1, at 2253; Leahy statement, *supra* note 11.

28. Andrew Cohen, *In Pennsylvania, the Human Costs of Judicial Confirmation Delays*, ATLANTIC (Sept. 9, 2012), <https://www.theatlantic.com/politics/archive/2012/09/in-pennsylvania-the-human-costs-of-judicial-confirmation-delays/261862/> (last visited May 10, 2017) (on file with the Washington and Lee Law Review); Lipton & Peters, *supra* note 24.

29. *Archive of Judicial Vacancies: Year 2017*, *supra* note 20.

30. JOHN ROBERTS, YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2010); Tobias, *supra* note 1, at 2253; Jennifer Bendery, *Federal Judges are Burned Out, Overworked and Wondering Where Congress Is*, HUFFINGTON POST (Sept. 30, 2015), [http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies\\_us\\_55d77721e4b0a40aa3aaf14b](http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_us_55d77721e4b0a40aa3aaf14b) (last updated Oct. 1, 2015) (last visited May 10, 2017) (on file with the Washington and Lee Law Review).

31. Tobias, *supra* note 1, at 2253.

32. *See supra* notes 18–19 (stating that confirmations are considerably easier to secure at a presidency's outset than at a presidency's conclusion); *infra* note 41 (same).

of their jurists when delivering justice—but President Trump confronts additional burdensome tasks—this Section explores how to fill the vacancies with a meticulously-calibrated assessment of the fifty-one nominees who lacked final votes by renominating specific choices.

The White House must institute and employ devices on which contemporary Presidents have relied. The administration should persistently consult home state elected officials and perhaps defer to their recommendations while seeking proposals of several impressive, consensus designees for all openings with thorough explanations for legislators' prioritization. The White House must concomitantly negotiate with every Republican *and* Democratic home state senator to identify, and make the nomination of, the best possible individuals while cooperating with those senators and all of their Senate colleagues to provide comprehensive, prompt and fair confirmation processes.

#### *A. Reasons to Renominate*

Several persuasive reasons can support renominating many of the accomplished, mainstream candidates whose nominations did expire in early January. First, renomination would preserve scarce time, money, and energy, which must be devoted to restarting the nomination process. For instance, the twenty district court candidates already have American Bar Association (ABA) evaluations with ratings, Federal Bureau of Investigation (FBI) background checks and committee investigations, hearings, and voice vote approvals without dissents, so that nearly all of the picks will only require chamber debates, when merited, and floor ballots. The existing situation indicates that the notion proffered will be rather easy to implement. For example, the White House Counsel, Donald McGahn, might only query home state politicians to determine whether they remain supportive of the nominees, action which must carefully proceed in any event before President Trump undertakes nomination.

Second, the substantial number of vacancies, many of which are quite protracted, show the compelling need to quickly fill the maximum possible openings. This initiative would relieve

pressures on already overburdened courts and judges, enabling both to discharge their constitutional responsibilities for delivering justice and the White House to pursue numerous other salient priorities.

President Obama correspondingly selected the twenty five, mainstream trial level nominees principally for their intelligence, diligence, ethics, independence, and balanced judicial temperament, especially their capability to manage and resolve substantial caseloads, rather than ideology.<sup>33</sup> GOP lawmakers concomitantly suggested and powerfully supported a majority of the nominees.<sup>34</sup> Even the three very competent, moderate appellate designees were nominated mainly for reasons divorced from ideology, phenomena witnessed in bipartisan support for their committee approval.<sup>35</sup>

Renomination would correspondingly diversify the federal judiciary, because five of the twenty renominees will bring ethnic diversity while ten comprise women and two in three circuit renominees would provide ethnic or gender diversity.<sup>36</sup> Renomination, accordingly, will afford critical symbolic and practical impacts. Diverse jurists enhance court rulings by supplying different perspectives and can sharply restrict

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33. Michael Shenkman, *Decoupling District from Circuit Judge Nominations*, 65 ARK. L. REV. 217, 226–29 (2012); Carl Tobias, *The Transformation of the Thurmond Rule in 2016*, 66 EMORY L. J. ONLINE 2001, 2009 (2016).

34. Of the twenty district court nominees who secured 2016 panel approval, eleven would fill vacancies in states which at least one Republican senator represents. *E.g.*, *infra* notes 44–46, 51, 58 (providing numerous examples of jurisdictions which have at least one Republican senator).

35. S. Judiciary Comm., *Exec. Business Mtgs.* (May 18, July 14, Sept. 15, 2016) (Judiciary Committee approval of Donald Schott 13–7, Jennifer Klemetsrud Puhl by voice vote and Lucy Koh 13–7); *see infra* notes 65–69 (providing examination of 2016 Senate consideration of Donald Schott, Jennifer Klemetsrud Puhl and Lucy Koh).

36. One of the diverse district court nominees would afford sexual orientation diversity. *Archive of Judicial Vacancies: Year 2016*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2016> (last visited May 10, 2017) (on file with the Washington and Lee Law Review); *see* Lisa Keen, *GOP Blockade of Obama Judicial Nominees Snares Openly Gay Candidate*, KEEN NEWS SERV. (July 21, 2016), <http://www.keennewsservice.com/2016/07/21/gop-blockade-of-obama-judicial-nominees-snares-openly-gay-candidate/> (last visited May 10, 2017) (on file with the Washington and Lee Law Review).

prejudices which subvert justice.<sup>37</sup> Diversity also bolsters public confidence about the courts when they reflect America.<sup>38</sup> Moreover, confirming diverse judges could allow Trump to honor promises that his administration will represent all of the members who comprise American society.<sup>39</sup>

Another crucial factor is equity. Developments unrelated to strong qualifications, including the presidential election year, substantially increased politicization of the judicial appointments process, and unprecedented obstruction regarding the fifty-one lower court submissions and Chief Judge Garland, precluded their full consideration. The circuit and district court picks warrant consideration for renomination because of the numerous sacrifices which they have made throughout the nomination and confirmation processes by foregoing opportunities and placing careers and lives on hold.

Finally, renominating President Obama's selections would allow President Trump to cultivate Democrats, whose active cooperation will be essential to filling the immense lower court vacancies. Renominations would permit President Trump to address the downward spiraling counterproductive appointments regime while carefully treating the partisan divisiveness which undermines selection. Renominations might persuade Democrats to eschew retaliation for the unprecedented GOP denial of any review to Chief Judge Garland or of final votes to seven competent, moderate appellate nominees whom Obama chose last year and the dismal number of 2015 and 2016 confirmations.<sup>40</sup> President

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37. Tracey George, *Court Fixing*, 43 ARIZ. L. REV. 9, 18–25 (2001); Tobias, *supra* note 1, at 2249.

38. Sylvia Lazos, *Only Skin Deep ?* 83 IND. L. J. 1423, 1442 (2008); Tobias, *supra* note 1, at 2249.

39. *Read Donald Trump's Full Inauguration Speech*, TIME (Jan. 20, 2017), <http://time.com/4640707/donald-trump-inauguration-speech-transcript/?iid=sr-link1> (last updated Jan. 24, 2017) (last visited May 10, 2017) (on file with the Washington and Lee Law Review); *I Will Be President for All Americans' - Transcript of Donald Trump's Victory Speech*, L.A. TIMES (Nov. 9, 2016), <http://www.latimes.com/politics/la-na-pol-trump-election-night-speech-20161108-story.html> (last visited May 10, 2017) (on file with the Washington and Lee Law Review).

40. Tobias, *supra* note 1, at 2249. Some observers deem the Supreme Court vacancy a "stolen seat" or Democrats' treatment of Justice Neil Gorsuch retaliation. Editorial, *Neil Gorsuch and the Supreme Court*, N.Y. TIMES,

Bush afforded relevant May 2001 precedent with a conciliatory approach by deftly renominating President Bill Clinton's unconfirmed appellate submissions in his first package of designees.<sup>41</sup>

### *B. How to Renominate*

#### *1. Twenty District Nominees With Committee Approval*

The emphasis of renomination should be the twenty trial level nominees who captured panel approval. These candidates are very capable, mainstream nominees, and GOP home state politicians suggested, and powerfully supported, quite a few of them. The candidates deserve presumptive renomination, unless home state political leaders directly register opposition or the White House decides that the administration has convincing reasons to object. Trenchant illustrations abound.

The quintessential example is the District of Idaho—which encounters rising cases with a lone active judge and a senior jurist who is eighty-three—because President Trump actually included Judge David Nye, Obama's 2016 talented, consensus aspirant, in Trump's first batch of nominees on May 8.<sup>42</sup> Judge Nye captured a July 2016 panel report, yet the Majority Leader denied the jurist a 2016 final ballot.<sup>43</sup> Idaho GOP Senators Mike Crapo and Jim Risch had declared that they would urge President Trump to renominate

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Feb. 1, 2017, at A26; Editorial, *The GOP Stole Merrick Garland's Supreme Court Seat*, L.A. TIMES, Jan. 31, 2017.

41. President Clinton recess appointed Chief Judge Roger Gregory to the Fourth Circuit and nominated Judge Barrington Parker to the Second Circuit. Neil Lewis, *Bush Appeals for Peace on His Picks for the Bench*, N.Y. TIMES, May 10, 2001.

42. White House, Office of the Press Sec'y, President Donald J. Trump Announces Judicial Candidate Nominations (May 8, 2017); Betsy Z. Russell, *First Slate of Trump Judicial Nominees Due Out Today, and Idaho Judge Nye's Included* (May 8, 2017), <http://www.spokesman.com/stories/2017/may/08/first-slate-of-trump-judicial-nominees-due-out-tod/> (last visited May 10, 2017). For the Idaho District's rising cases and its judges, see S. Judiciary Comm., *Hearing on Nominees* (June 21, 2016); see also Press Release, White House, Office of the Press Sec'y, President Obama Nominates Judge David Nye to Serve on the U.S. District Court (Apr. 5, 2016).

43. S. Judiciary Comm., *Exec. Business Mtg.* (July 14, 2016).

Judge Nye because of the tribunal's dire problems.<sup>44</sup> Similarly illustrative was the White House's May 8 renomination of Scott Palk, a well qualified Western District of Oklahoma selection whom President Obama had nominated, and who secured a smooth committee hearing and panel approval.<sup>45</sup>

Senators Bob Casey (D) and Pat Toomey (R) have offered remarks similar to those proffered by Senators Crapo and Risch, which involved Pennsylvania's Western District that confronts four judicial emergency vacancies.<sup>46</sup> Judges Susan Paradise Baxter and Marilyn Horan, who were fine 2015 nominees, easily secured panel approval, but the GOP failed to conduct floor votes last year.<sup>47</sup> The senators have intimated that they may ask Trump to renominate Judge Paradise Baxter and Judge Horan for two of the four Western District of Pennsylvania vacancies; however, President Trump neglected to include the jurists or any other nominees for those openings in his first package of nominees.<sup>48</sup>

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44. Rob Hotakainen, *Another Judicial Vacancy Goes Unfilled as Senate Leaves*, MCCLATCHY DC (Oct. 3, 2016), <http://www.mcclatchydc.com/news/politics-government/congress/article105727226.html> (last visited May 10, 2017) (on file with the Washington and Lee Law Review); Betsy Z. Russell, *Crapo, Risch Standing By Judge Nye Nomination, Hoping for Senate Vote Soon*, SPOKESMAN-REV. (Nov. 14, 2016), <http://www.spokesman.com/stories/2016/nov/14/crapo-risch-standing-by-judge-nye-nomination-hopin/> (last visited May 10, 2017) (on file with the Washington and Lee Law Review).

45. However, the White House did not renominate Suzanne Mitchell, an experienced Magistrate Judge, whom Obama had also nominated for the Western District, even though she enjoyed a smooth hearing and a committee voice vote without dissent like Palk. Nolan Clay, *OU Assistant Dean Nominated to be Federal Judge*, OKLAHOMAN (May 8, 2017), <http://newsok.com/ou-assistant-dean-nominated-to-be-federal-judge/article/5548429>; see sources cited *supra* note 42; *Hearing on Nominees*, S. COMM. ON THE JUDICIARY (Apr. 20, 2016); *Exec. Business Mtg.*, S. COMM. ON THE JUDICIARY (May 19, 2016).

46. See *Archive of Judicial Vacancies: Year 2017*, *supra* note 20 (listing emergencies); Ed Palattella, *Nomination Process Reset for Erie Federal Judgeship*, ERIE TIMES-NEWS, Feb. 28, 2016.

47. See *supra* note 46; Press Release, White House, Office of the Press Sec'y, President Obama Nominates Seven to Serve on the U.S. District Courts (July 30, 2015); S. Judiciary Comm., *Exec. Business Mtg.* (Jan. 28, 2016).

48. Palattella, *supra* note 46; see sources cited *supra* note 42 (sources for President Trump's first group of nominees).

The examples assessed are representative, but the other fifteen nominees deserve serious consideration for renomination. The situations are equally compelling and the nominees as strong in the C.D. Cal., D. D.C., D. Haw.,

*2. Twenty-Four District Nominees Without Committee Approval**a. Eight Nominees With Hearings*

The five nominees whom President Obama tapped for judicial emergency vacancies in Texas merit serious consideration for re-nomination.<sup>49</sup> Three prospects, Walter Counts, Edwin Frost, and Irma Carrillo Ramirez, are highly experienced Magistrate Judges; Karen Gren Scholer has practiced as a very competent litigator and been a dynamic Texas state court judge; and James Hendrix has impressive federal prosecutorial experience.<sup>50</sup> Senator John Cornyn (R-Tx.), who ably chaired the nominees' autumn 2016 hearing, praised their qualifications, urging fast confirmation, and Senator Ted Cruz (R-Tx.) proffered analogous ideas.<sup>51</sup> The members who questioned nominees seemed pleased with their responses during the session and to written queries posed.<sup>52</sup> Grassley failed to schedule a committee ballot, however, despite Cornyn's pledge and numerous opportunities to convene meetings which spanned the remainder of 2016.<sup>53</sup> Because the nominees are superb, mainstream choices whom the legislators had proposed and vigorously supported and Texas desperately needs the emergencies filled, Cornyn and Cruz ought to instigate their renomination, although President Trump did not place any of the five Obama Texas nominees or any other nominees for the eleven Texas emergency district vacancies in his initial group of nominees.<sup>54</sup>

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S.D. Ind., E. & W. D. La., D. Md., D. Mass, D. N.J., E.D.N.Y., D.R.I., D. S.C., W.D. Tenn. and D. Utah.

49. Press Release, White House, Office of the Press Sec'y, President Obama Nominates Six to Serve on the U.S. District Courts (Mar. 15, 2016). Texas has eight more appellate and district court emergencies without nominees. *Archive of Judicial Vacancies*, *supra* note 8 (noting the emergencies).

50. Press Release, *supra* note 9.

51. S. Judiciary Comm., *Hearings on Nominees* (Sept. 7, 2016).

52. *Id.*; see S. Judiciary Comm., *Questions for the Record* (Sept. 2016) (Provided the written questions senators posed).

53. The Senate met three more weeks in September and had lame duck sessions in November and December.

54. See sources cited *supra* note 42. The senators have not publicly recommended renomination of any of the five, but the nominees were afforded the opportunity to reapply to their evaluation commission. Press Release, Sen. Ted



Three other nominees whom President Obama submitted—Paul Abrams, John Younge, and Robert Colville, for California’s Central, and Pennsylvania’s Eastern and Western, Districts—captured hearings, although Grassley scheduled no panel meeting for the selections’ discussions and votes.<sup>55</sup> Because the Chair, additional lawmakers or home state constituents apparently voiced concerns about these nominees’ candidacies, the nominees probably should be renominated only if the politicians from their states actually propose this.<sup>56</sup>

*b. Sixteen Nominees Without Hearings*

Many of the sixteen nominees who did not receive hearings across 2016 deserve serious consideration for renomination. Quintessential is Florida’s Middle District which faces substantial caseloads and three emergencies.<sup>57</sup> President Obama nominated Patricia Barksdale and Philip Lammens, who are very capable Magistrate Judges, and William Jung, an extremely competent litigator, in April 2016, but the committee afforded them no hearings last year.<sup>58</sup> Home state senators Marco Rubio (R) and Bill Nelson (D) diligently urged President Trump to renominate them with a March letter, but the White House failed to include any of the three Obama Florida nominees or any other nominees for the seven Florida district openings in the administration’s first package of nominees.<sup>59</sup>

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Cruz, Cornyn, Cruz Announce Application Process for Texas Judgeships (Jan. 23, 2017).

55. Press Release, White House, Office of the Press Sec’y, President Obama Nominates Four to Serve on the U.S. District Courts (Dec. 16, 2015) (Abrams is a Central District of California Magistrate Judge); Press Release, *supra* note 47 (Younge and Colville are Pennsylvania Court of Common Pleas Judges); S. Judiciary Comm., *Hearing on Nominees* (Dec. 9, 2015).

56. Scarce resources justify this. Renominees who lack home state support will not proceed.

57. *Archive of Judicial Vacancies*, *supra* note 8 (noting the 2017 emergencies).

58. Press Release, White House, Office of the Press Sec’y, President Obama Nominates Eight to Serve on U.S. District Courts (Apr. 28, 2016).

59. Letter from Sens. Marco Rubio & Bill Nelson to President Donald Trump (Mar. 16, 2017); see Andrew Pantazi, *Rubio and Nelson Ask Trump to Keep Judicial Picks They Sent Obama*, FLA. TIMES-UNION, Mar. 23, 2017; see sources

The three highly qualified, consensus Western District of Washington Obama nominees provide similar examples: Beth Andrus is a prominent, experienced state court judge, Michael Diaz is a talented federal prosecutor, and Kathleen O'Sullivan has been an excellent practitioner.<sup>60</sup> A longstanding bipartisan judicial selection commission proffered all three submissions, while the home state politicians recommended the choices to President Obama, who nominated them in April 2016.<sup>61</sup> This April, Democratic Senators Patty Murray and Maria Cantwell repropose the designees, and President Trump must seriously consider the prospects' nomination, although the chief executive did not place any of the three Obama Washington nominees or any other nominees for the Western District vacancies in his initial batch of nominees.<sup>62</sup> A third analogous illustration might be Regina Rodriguez, the exceptional, moderate District of Colorado nominee. Senators Michael Bennet (D) and Cory Gardner (R) agreed on powerfully submitting her to President Obama, who chose Rodriguez during April 2016, but President Trump failed to include Rodriguez or any nominee for the Colorado vacancy in his first group of nominees.<sup>63</sup>

Other individuals whom President Obama nominated who did not attain hearings may deserve consideration for renomination, while home state elected officers should evaluate the nominees' qualifications to ascertain whether the politicians

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cited *supra* note 42.

60. Press Release, White House, Office of the Press Sec'y, President Obama Nominates Three to Serve on the U.S. District Court (Apr. 14, 2016).

61. *Id.*; see Gene Johnson, *5 Named to Short List for Openings on Federal Bench in Seattle*, SEATTLE TIMES (Jan. 15, 2016), <http://www.seattletimes.com/seattle-news/5-named-to-short-list-for-openings-on-federal-bench-in-seattle/> (last updated Jan. 16, 2016) (last visited May 10, 2017) (on file with the Washington and Lee Law Review).

62. Steve Miletich, *Washington Senators Urge White House to Give Panel's Chosen Judges a Chance*, SEATTLE TIMES (April 14, 2017), <http://www.seattletimes.com/seattle-news/politics/washington-senators-urge-white-house-to-give-panels-chosen-judges-a-chance/> (last visited May 10, 2017) see sources cited *supra* note 42.

63. Press Release, *supra* note 58; see John Ingold, *Obama Nominates Denver Lawyer Regina Rodriguez to Federal Bench*, DENVER POST (Apr. 28, 2016), <http://www.denverpost.com/2016/04/28/obama-nominates-denver-lawyer-regina-rodriguez-to-federal-bench/> (last updated Apr. 29, 2016) (last visited May 10, 2017) (on file with the Washington and Lee Law Review).

ought to proffer renomination and the Trump Administration should vigorously consult these officials. Some Obama nominees could apparently have less promising prospects, as the chief executive or home state officers have changed, while the political views of the new President or the in state officials suggest that they are rather unlikely to propose candidates whom President Obama initially nominated. However, President Trump did renominate two Obama district nominees in his first cohort of nominees seemingly at the instigation of senators who represent the home states.<sup>64</sup> Home state politicians are now best positioned to make those determinations and resolve the issue, a judgment to which President Trump should generally defer. Home state officers and the White House might also want to remember that there are 101 district court vacancies and twenty appellate court openings, which means that senators and the Trump Administration may want to depend more substantially on renominations when attempting to fill the substantially larger number of empty district court positions.

### 3. Appeals Court Nominees

#### a. Three Nominees With Committee Approval

Highly qualified, mainstream Eighth Circuit nominee Jennifer Klemetsrud Puhl warrants serious consideration for renominating, as the very experienced Assistant United States Attorney had considerable powerful support of politicians from her state of North Dakota and a panel voice vote.<sup>65</sup> Senators Dan Hoeven (R) and Heidi Heitkamp (D) reportedly decided to concur

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64 See *supra* notes 42-44 and accompanying text (renominate Judge David Nye, President Obama's District of Idaho nominee); *supra* note 45 and accompanying text (renominate Scott Palk, President Obama's Western District of Oklahoma nominee).

65. Press Release, White House, Office of the Press Sec'y, President Obama Nominates Jennifer Klemetsrud Puhl for the Eighth Circuit (Jan. 28, 2016); Patrick Springer, *Puhl Nomination to U.S. Appeals Court Takes Step With Senate Panel OK*, INFORUM (July 14, 2016), <http://www.inforum.com/news/4073896-puhl-nomination-us-appeals-court-takes-step-senate-panel-ok> (last visited May 10, 2017) (on file with the Washington and Lee Law Review); *supra* note 35; see sources cited *supra* note 42.

on Puhl and several possibilities for President Trump's consideration, but the politicians should press her renomination because she is very capable while this idea would preserve scarce energy and time.<sup>66</sup>

Preeminent, moderate Seventh and Ninth Circuit prospects Donald Schott and District Judge Lucy Koh whom President Obama nominated merit ample consideration for renomination because the picks captured identical 13-7 panel approval, encompassing Senator Grassley's vote.<sup>67</sup> Wisconsin Senators Ron Johnson (R) and Tammy Baldwin (D) deftly reconvened a commission for advice, while this panel needs to closely analyze Schott.<sup>68</sup> California Senators Dianne Feinstein (D) and Kamala Harris (D) must seriously assess proffering Koh's renomination, a

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66. Patrick Springer, *Puhl's Federal Judicial Nomination Appears Stalled in Congress*, INFORUM (Nov. 30, 2016), <http://www.inforum.com/news/4169980-puhls-federal-judicial-nomination-appears-stalled-congress> (last visited May 10, 2017) (on file with the Washington and Lee Law Review). President Trump did not include Jennifer Klemetsrud Puhl or any other nominee for the North Dakota Eighth Circuit vacancy in his first batch of nominees, although the White House did include a nominee, Minnesota Supreme Court Justice David Stras, in that group for the Eighth Circuit Minnesota vacancy. See sources cited *supra* note 42.

67. Schott has practiced for more than three decades with the well-respected Quarles & Brady law firm, while Koh has professionally served as a District Judge on the Northern District of California resolving numerous high profile cases regarding intellectual property. Press Release, White House, Office of the Press Sec'y, President Obama Nominates Two to Serve on the U.S. Court of Appeals (Jan. 12, 2016); *id.*, President Obama Nominates Judge Lucy Koh to the U.S. Court of Appeals (Feb. 25, 2016). Judge Koh may present a closer question, as Senator Cornyn strongly opposed an opinion that she wrote. See Tobias, *supra* note 16, at 461-62. Why Schott had opposition is unclear, because he received no panel discussion. *Exec. Business Mtgs.*, *supra* note 35; see Carl Tobias, *Filling the Seventh Circuit Vacancies*, 2017 WIS. L. REV. 225, 246 n.118.

68. Press Release, Sen. Tammy Baldwin, Wisconsin Senators Renew Agreement on Wisconsin Judicial Commission (Feb. 13, 2017); FEDERAL NOMINATING COMMISSION, FEDERAL NOMINATING COMMISSION SEEKS APPLICANTS FOR 7TH CIRCUIT COURT OF APPEALS (Mar. 2017), <http://www.wisbar.org/aboutus/governmentrelations/documents/2017%20Call%20for%20Applicants%207th%20Circuit.pdf>. Nevertheless, the commission has not made a public recommendation to the senators, while President Trump did not include Donald Schott or any other nominee for the Wisconsin Seventh Circuit vacancy in his initial group of nominees. However, the White House did place a nominee, Professor Amy Coney Barrett, a Notre Dame Law School faculty member, other than Myra Selby, President Obama's nominee, in that batch for the Indiana Seventh Circuit vacancy. See sources cited *supra* note 42.

view to which President Trump may wish to defer partly because Feinstein is the Judiciary Committee Ranking Member.<sup>69</sup>

Schott, Puhl and Koh did not receive any floor consideration last year, as the Majority Leader denied the nominees final ballots.<sup>70</sup> Senator McConnell seemingly based his determination on the calculus that the Republican presidential nominee might win election, a surmise that was actually prescient. The Majority Leader's judgment had de minimis relationship to the nominees' distinguished records. Despite all three nominees' exceptional qualifications, President Trump neglected to include them in his initial package of nominees or any nominee for the three vacancies to which President Obama had named them.

#### *b. Four Nominees Without Hearings*

President Obama's four additional 2016 circuit designees—Assistant United States Attorney Rebecca Ross Haywood (Third), Kentucky Supreme Court Justice Lisabeth Tabor Hughes (Sixth), former Indiana Supreme Court Justice Myra Selby (Seventh) and District Judge Abdul Kallon (Eleventh)—who lacked any panel hearing, probably deserve less consideration, because GOP home state politicians refused to deliver blue slips on the nominees, while virtually all of these senators—notably Toomey, McConnell, Rand Paul (Ky.) and Richard Shelby (Ala.)—retained their positions in the 115th Senate.<sup>71</sup> The White House even provided

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69. She wields considerable influence in the critical position and enjoys good relations with GOP panel colleagues because of her support for controversial Bush appellate court nominees. Bob Egelko, *Feinstein Draws Fire Over Vote for Judge*, SAN FRANCISCO CHRON. (Aug. 4, 2007), <http://www.sfgate.com/politics/article/Feinstein-draws-fire-over-vote-for-judge-2549435.php> (last visited May 10, 2017) (on file with the Washington and Lee Law Review); Jennifer Steinhauer, *Grassley and Feinstein Face Party Pressure on Gorsuch Hearing*, N.Y. TIMES, Mar. 20, 2017, at A17. President Trump did not include Judge Koh or any other nominee for the California Ninth Circuit vacancy in his first group of nominees. See sources cited *supra* note 42.

70. I rely here on 162 CONG. REC. S7013 (daily ed. Dec. 9, 2016) (statement of Sen. Leahy); Kang, *supra* note 8; Philip Rucker & Robert Barnes, *As Obama Picks Languish, Trump to Inherit 100 Court Vacancies*, WASH. POST, Dec. 25, 2016.

71. Tobias, *supra* note 18, at 174. Senator Jeff Sessions (R-Ala.) became the United States Attorney General. Indiana Sen. Todd Young (R), who replaced Dan Coats, sought candidates for the Seventh Circuit vacancy but minimally

notice of intent to nominate someone other than Justice Tabor Hughes, President Obama's nominee, for the Kentucky vacancy that she would have filled,<sup>72</sup> and this nominee, Eastern District of Kentucky Judge Amul Thapar is expected to be the first Trump Administration nominee who secures confirmation.<sup>73</sup> President Trump correspondingly included Professor Amy Coney Barrett, a nominee for the Indiana Seventh Circuit vacancy, other than Justice Selby, President Obama's nominee, in his first batch of nominees and Kevin Newsom, a nominee for the Alabama Eleventh Circuit vacancy other than Judge Kallon, President Obama's nominee in that group.<sup>74</sup> Thus, the Trump Administration ought to consult Senators Toomey and Casey who represent Pennsylvania and defer to the senators on possible renomination.<sup>75</sup>

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coordinated with Senator Joe Donnelly (D) to fill the vacancy. Ryan Martin, *As Trump Boots U.S. Attorneys, Indiana Senator Looks for Applicants*, INDY STAR (Mar. 13, 2017), <http://www.indystar.com/story/news/crime/2017/03/13/trump-boots-us-attorneys-indiana-senator-looks-applicants/99121958/> (last visited May 10, 2017) (on file with the Washington and Lee Law Review).

72. Press Release, White House, Office of the Press Sec'y, President Donald Trump Announces Intent to Nominate Judge Amul Thapar for the Sixth Circuit (Mar. 21, 2017); Lucas Aulbach, *Trump to Nominate Thapar to Serve on U.S. Court of Appeals*, COURIER-J. (Mar. 20, 2017), <http://www.courier-journal.com/story/news/2017/03/20/trump-nominate-thapar-serve-us-court-appeals/99432286/> (last visited May 10, 2017) (on file with the Washington and Lee Law Review).

73. *Schedule*, U.S. SENATE DEMOCRATS (May 24, 2017), <https://democrats.senate.gov/2017/05/22/schedule-for-wednesday-may-24-2017/#> (last visited May 25, 2017) (on file with the Washington and Lee Law Review). Judge Thapar was concomitantly the first Trump Administration nominee to secure a Judiciary Committee hearing and panel approval. Hearing on Nominees, S. COMM. ON THE JUDICIARY (Apr. 26, 2017); *Exec. Business Mtg.*, S. COMM. ON THE JUDICIARY (May 18, 2017).

74. See *supra* note 68; see also sources cited *supra* note 42.

75. See *supra* note 71 and accompanying text. Kentucky experiences a second appellate vacancy for which President Trump included a nominee, Jonathan K. Bush, in his first batch. See sources cited *supra* note 42; see also *supra* notes 72-73 and accompanying text. Because there are five times as many district as circuit vacancies, the White House and home state politicians might want to rely more substantially on renominations when attempting to fill district vacancies.

*V. Conclusion*

Donald Trump confronts multiple onerous assignments, especially creating a government and filling 121 circuit and district court vacancies. Nevertheless, he can seat many jurists by renominating numerous impressive, mainstream Obama nominees, whose efficient appointments will permit the courts to better deliver justice.