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## Confirm Judge Koh for the Ninth Circuit

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# Confirm Judge Koh for the Ninth Circuit

Carl Tobias\*

## *Abstract*

*On February 25, 2016, President Barack Obama appointed United States District Court Judge Lucy Haeran Koh for a judicial emergency vacancy on the United States Court of Appeals for the Ninth Circuit. The jurist has served professionally for more than six years in the United States District Court for the Northern District of California, ably resolving major litigation. Thus, White House efforts to confirm her were unsurprising. Nevertheless, 2016 is a presidential election year when delay infuses many court appointments. That conundrum was exacerbated because the United States Senate Republican majority refused to even consider United States Court of Appeals for the District of Columbia Circuit Chief Judge Merrick Garland, the experienced, moderate candidate, whom President Obama nominated to replace Justice Antonin Scalia. Because Judge Koh is an exceptional, consensus nominee—and the Ninth Circuit must have its entire judicial complement to resolve promptly, inexpensively, and equitably the nation’s largest appellate docket—her confirmation process merits scrutiny.*

*This piece analyzes Koh’s impressive record, judicial selection under President Obama, and the Ninth Circuit’s present circumstances. The paper concludes that Judge Koh is a highly accomplished, mainstream candidate and the appellate court desperately needs all twenty-nine of its members. Republican senators, however, did not cooperate, particularly after they had*

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\* Williams Chair in Law, University of Richmond. I wish to thank Margaret Sanner for valuable suggestions, Katie Lehen for exceptional research and editing, the editors of the Washington and Lee Law Review for expeditious, careful 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.

*captured an upper chamber majority in the 114th Congress, a situation that this presidential election year significantly aggravates. The last section, therefore, proffers recommendations for Judge Koh's approval.*

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### *I. Judge Koh's Qualifications*

Judge Koh is extremely well qualified to serve as a member of the Ninth Circuit. The jurist was an excellent Assistant United States Attorney in the Central District of California and superb partner of a respected national law firm.<sup>1</sup> In 2008, California Republican Governor Arnold Schwarzenegger appointed Koh to the Santa Clara County Superior Court. In 2010, President Obama nominated Koh and the Senate confirmed her 90–0 for the Northern District of California, where she has enjoyed an impeccable reputation. When elevating Judge Koh, the President deemed her “a first-rate jurist [of] unflagging integrity and evenhandedness.”<sup>2</sup> Koh became the first Asian American to serve

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1. I rely substantially here on Press Release, White House, Office of the Press Sec'y, President Obama Nominates Judge Lucy Koh to the U.S. Court of Appeals (Feb. 25, 2016) (on file with author); Jonathan Jew-Lim, *A Brief Overview of President Obama's Asian American Judicial Nominees in 2010*, 17 AS. AMER. L. J. 227, 233–37 (2010).

2. Bob Egelko, *Lucy Koh Nominated for US Court of Appeals in SF*, SAN FRANCISCO CHRON. (Feb. 25, 2016), <http://www.sfgate.com/bayarea/article/Obama-nominates-local-judge-to-federal-appeals-6855113.php> (last visited Nov. 29, 2016) (on file with the Washington and Lee Law Review).

on the Northern District of California.<sup>3</sup> She has efficaciously treated multiple high-profile suits. Notable was her masterful disposition of Apple's patent infringement litigation against Samsung.<sup>4</sup> Koh also deftly processed claims filed by several thousand employees, who alleged that large high-tech firms had conspired to limit wages by pledging that they would not hire one another's workers.<sup>5</sup> Koh rejected a settlement proposition as insufficient: a number of companies ultimately agreed to pay \$ 415 million.<sup>6</sup> The nominee earned a well qualified rating from a substantial majority of the America Bar Association assessment committee.<sup>7</sup>

Koh is a dynamic nominee who merits prompt Ninth Circuit appointment, as she resembles numerous talented, moderate, diverse Obama confirmees who afford copious benefits. Appeals courts with all of their posts filled can expeditiously,

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3. See *id.* (describing Judge Koh); Howard Mintz, *San Jose Judge Koh Nominated to Federal Appeals Court*, SAN JOSE MERCURY (Feb. 25, 2016), <http://www.mercurynews.com/2016/02/25/san-jose-judge-lucy-koh-nominated-to-federal-appeals-court/> (last visited Nov. 19, 2016) (same) (on file with the Washington and Lee Law Review).

4. *Apple, Inc. v. Samsung Electronics Co.*, 2011 WL 7036077 (N.D. Cal. Dec. 2, 2011), *aff'd in part, vacated in part, remanded*, 678 F.3d 1314 (Fed. Cir. 2012); see Kristen Brown, *In Silicon Valley, Lucy Koh is the Law*, SAN FRANCISCO CHRON. (Aug. 10, 2014), <http://www.sfgate.com/bayarea/article/In-Silicon-Valley-Lucy-Koh-is-the-law-5679303.php> (last visited Nov. 29, 2016) (describing Judge Koh's valuable efforts when overseeing the resolution of "a closely watched case that could change the global smartphone business") (on file with the Washington and Lee Law Review).

5. *In re High-Tech Emp.'t Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012); see Davey Alba, *The Meme-Worthy Judge of Silicon Valley's Titans*, WIRED (Apr. 21, 2015), <https://www.wired.com/2015/04/lucy-koh/> (last visited Nov. 29, 2016) ("In a suit alleging that seven illustrious tech companies . . . colluded to keep 64,000 engineers' wages down by not hiring each other's employees, Koh rejected an initial proposed settlement for those companies of \$325 million, ruling that it was at least \$55 million too low.") (on file with the Washington and Lee Law Review); see sources *supra* notes 3–4 (discussing Koh's cases and her qualifications for nomination to the appeals court).

6. *Order on Attorney's Fees, High-Tech Emp't Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012) (No. 11-CV-02509-LHK); see sources *supra* note 3 (describing Koh's role in major cases).

7. STANDING COMM. ON FEDERAL JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES (2016), <http://www.americanbar.org/content/dam/aba/uncategorized/GAO/WebRatingChart114.authcheckdam.pdf>.

inexpensively, and equitably review significant, complex caseloads.<sup>8</sup> Increased ethnic, gender, and sexual orientation diversity improves comprehension and resolution of numerous essential questions which courts of appeals decide.<sup>9</sup> Ethnic minority judges concomitantly reduce prejudices that undercut justice.<sup>10</sup> Nonetheless, consideration that the GOP has accorded most Obama nominees indicates that Koh may encounter a number of difficulties in realizing 2016 approval.

## II. Obama Administration Appointments

Selection proceeded smoothly in President Obama's first six years when Democrats possessed a chamber majority. He aggressively consulted home state politicians, especially Republicans, seeking, and normally following, proposals of skilled, mainstream, diverse nominees.<sup>11</sup> These initiatives promoted collaboration, as lawmakers from states having vacancies receive deference because they could halt the process through retaining "blue slips."<sup>12</sup> Even with assiduous cultivation

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8. 160 CONG. REC. S5,364 (daily ed. Sept. 8, 2014) (statement of Sen. Leahy) [hereinafter Leahy statement]; Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2239–40, 2254 (2013) (explaining how appellate courts that possess complete judicial complements can rather promptly, economically, and fairly resolve substantial caseloads).

9. They resolve issues involving critical, controversial questions regarding matters such as religious freedom, civil rights, and abortion. *See generally* SALLY KENNEY, GENDER AND JUSTICE (2013); FRANK WU, YELLOW (2003). *But see* Stephen Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504, 505 (2011) ("[F]or many of our tests on data from the state high courts we are unable to reject the null hypothesis of no gender effects and instead find only insignificant gender-related differences.").

10. *See generally* U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT, REPORT OF THE FIRST CIRCUIT GENDER, RACE AND ETHNIC BIAS TASK FORCES (1999). Courts reflecting the diversity of the United States improve the citizenry's confidence in the judiciary. *See* Sylvia Lazos, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L. J. 1423, 1442 (2008) ("A representative judiciary provides important symbolic and political meaning, has more legitimacy, demonstrates to the American public that the system is equitable and free of discrimination, and is better able to achieve its goals of fairness and justice."); Tobias, *supra* note 8, at 2249.

11. Tobias, *supra* note 8, at 2239–40, 2253; Sheldon Goldman et al., *Obama's First Term Judiciary*, 97 JUDICATURE 7, 8–17 (2013).

12. *See generally* Ryan Owens et al., *Ideology, Qualifications, and Court*

of the political actors, many have not cooperated, declining to suggest able people.<sup>13</sup>

The GOP coordinated routine hearings yet “held over” panel discussions and committee votes for all but one nominee among more than sixty exceptional, moderate circuit prospects.<sup>14</sup> Republicans slowly agreed on numerous picks’ chamber debates, when required, and up or down ballots, relegating strong centrists to languish for weeks or months until Democrats petitioned for cloture.<sup>15</sup> The GOP also sought plentiful roll call votes and debate time for competent, mainstream aspirants; they readily won confirmation, thereby devouring scarce floor hours.<sup>16</sup> Those practices roiled judicial appointments, leaving nearly twenty circuit openings for approximately a half-decade following September 2009.<sup>17</sup>

In the 2012 presidential election year, these Republican strategies increased.<sup>18</sup> Delay persisted, while the GOP ended final ballots in June. With Obama’s reelection, Democrats hoped for significantly greater cooperation, which failed to materialize and

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*Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347; *see also* Tobias, *supra* note 8, at 2242 (“Often before nominations, and invariably subsequently, the chief executive and chamber members, namely the leadership, attempted to cooperate.”).

13. Some home state elected officials proposed few or no candidates or delayed recommendations interminably. *See* Goldman et al., *supra* note 11, at 17; *see also* ALLIANCE FOR JUSTICE, TEXAS: STATE OF JUDICIAL EMERGENCY (2016) (demonstrating that Texas Republican senators delayed recommendations for protracted periods); 161 CONG. REC. S6,151 (daily ed. July 30, 2015) (statement of Sen. Schumer).

14. *Exec. Bus. Meeting*, S. COMM. ON THE JUDICIARY (Mar. 22, 2013), [http://www.judiciary.senate.gov/meetings/rescheduled\\_-\\_executive-business-meeting-2013-03-22](http://www.judiciary.senate.gov/meetings/rescheduled_-_executive-business-meeting-2013-03-22) (last visited Dec. 4, 2016) (on file with the Washington and Lee Law Review); *see also* Tobias, *supra* note 8, at 2242–43.

15. I rely in this paragraph on Goldman et al., *supra* note 11, at 26–29; Tobias, *supra* note 8, at 2243–46.

16. Tobias, *supra* note 8, at 2244; *see* Juan Williams, *The GOP’s Judicial Logjam*, HILL (July 27, 2015), <http://thehill.com/opinion/juan-williams/249196-juan-williams-the-gops-judicial-logjam> (last visited Nov. 29, 2016) (on file with the Washington and Lee Law Review).

17. *Archive of Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> (last visited Nov. 29, 2016) [hereinafter *Judicial Vacancies*] (providing empirical data for years 2009–2014) (on file with the Washington and Lee Law Review).

18. Tobias, *supra* note 8, at 2246.

resistance substantially grew the next year when he proffered three excellent, moderate, diverse nominees for the D.C. Circuit, America's second most important tribunal.<sup>19</sup> Republicans would not grant the candidates floor votes, while prolonged recalcitrance motivated Democrats to explode the “nuclear option” that restricted filibusters.<sup>20</sup>

During 2015, once Republicans had secured a chamber majority,<sup>21</sup> already negligible collaboration further diminished. GOP leaders incessantly promised that they would again bring to the chamber “regular order,” the approach that governed before Democrats ostensibly eroded it. Early in January, Mitch McConnell (R-Ky.), the new Majority Leader, exclaimed: “We need to return to regular order.”<sup>22</sup> Chuck Grassley (R-Iowa), the new Judiciary Chair, vowed that his committee would analogously evaluate President Obama's submissions.<sup>23</sup> Despite manifold pledges, Republicans have slowly provided individuals

19. I rely in this paragraph 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.

20. The 113th Senate approved 130 judges. *Judicial Vacancies*, *supra* note 17 (providing empirical data for years 2013–2014). Republicans required that Democrats file cloture on all nominees who received final votes after Democrats released the nuclear option in 2013 until 2015. 161 CONG. REC. S3,223 (daily ed. May 21, 2015) (statement of Sen. Leahy).

21. Jerry Markon et al., *Republicans Win Senate Control as Polls Show Dissatisfaction With Obama*, WASH. POST (Nov. 4, 2014), [https://www.washingtonpost.com/politics/senate-control-at-stake-in-todays-midterm-elections/2014/11/04/e882353e-642c-11e4-bb14-4cfe1e742d5\\_story.html?utm\\_term=.addcbc302917](https://www.washingtonpost.com/politics/senate-control-at-stake-in-todays-midterm-elections/2014/11/04/e882353e-642c-11e4-bb14-4cfe1e742d5_story.html?utm_term=.addcbc302917) (last visited Nov. 29, 2016) (on file with the Washington and Lee Law Review); Jonathan Weisman, *GOP Takes Senate*, N.Y. TIMES, Nov. 5, 2014, at A1.

22. He has reiterated the litany ever since. *See, e.g.*, 161 CONG. REC. S27 (daily ed. Jan. 7, 2015); 161 CONG. REC. S2,767 (daily ed. May 12, 2015). *But see* 161 CONG. REC. S2,949 (daily ed. May 18, 2015) (statement of Sen. Reid); Leahy statement, *supra* note 8.

23. *See Hearing on Nominees*, S. COMM. ON THE JUDICIARY (Jan. 21, 2015), <http://www.judiciary.senate.gov/meetings/nominations-2015-01-21> (last visited Dec. 4, 2016) (on file with the Washington and Lee Law Review); David Catanese, *Chuck Grassley's Gavel Year*, U.S. NEWS & WORLD REP. (Jan. 28, 2015), <http://www.usnews.com/news/articles/2015/01/28/chuck-grassleys-gavel-year> (last visited Nov. 29, 2016) (“The laborious process of setting hearings for a backlog of federal judicial vacancies will continue . . .” and Senator Grassley's pledge that the committee would follow regular order) (on file with the Washington and Lee Law Review).

for Obama to consider, nominee hearings and committee ballots and chamber debates and votes. Upon 2015's conclusion, this meant that eight of nine appellate vacancies lacking nominees—which the U.S. Courts identified as emergencies—troubled states GOP members represented.<sup>24</sup> Only *one* court of appeals jurist captured appointment last year.

In November 2014, Obama proposed Kara Farnandez Stoll, an experienced, mainstream counsel who specialized in patent litigation, and Eastern District of Pennsylvania Judge Felipe Restrepo, a distinguished, consensus jurist, as nominees to the Federal and Third Circuits.<sup>25</sup> Stoll's March 2015 hearing progressed smoothly;<sup>26</sup> the nominee had a late April panel ballot.<sup>27</sup> In June, McConnell suggested that circuit possibilities' approvals would cease.<sup>28</sup> Harry Reid (D-Nev.), the Minority Leader, excoriated McConnell for abdication of his constitutional duty by scheduling no final action.<sup>29</sup> Patrick Leahy (D-Vt.), the Ranking Member, correspondingly decried the failure to appoint any nominee, especially Stoll, which might have provoked her salient July 95–0 vote.<sup>30</sup>

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24. Republican senators minimally cooperated, so Obama sent no 2015 pick and seven in 2016; four lack hearings. Emergencies reflect docket size and vacancy length. *Judicial Vacancies*, *supra* note 17 (discussing emergencies in 2015–2016).

25. Press Release, White House, Office of the Press Sec'y, President Obama Nominates Two for U.S. Courts of Appeals (Nov. 12, 2014) (on file with author).

26. *Hearing on Nominees*, S. COMM. ON THE JUDICIARY (Mar. 11, 2015), <http://www.judiciary.senate.gov/meetings/nominations> (last visited Dec. 4, 2016) (on file with the Washington and Lee Law Review).

27. *Exec. Bus. Meeting*, S. COMM. ON THE JUDICIARY (Apr. 23, 2015), <http://www.judiciary.senate.gov/meetings/executive-business-meeting-2015-04-23> (last visited Dec. 4, 2016) (on file with the Washington and Lee Law Review).

28. McConnell has yet to clarify this suggestion regarding appellate nominees. Nick Gass, *McConnell Vows to Slow Nominees*, POLITICO (June 5, 2015), <http://www.politico.com/story/2015/06/mitch-mcconnell-judicial-nominations-118674> (last visited Nov. 29, 2016) (on file with the Washington and Lee Law Review). *But see* Alexander Bolton, *McConnell Backs Away from Shutdown*, HILL (June 6, 2015), <http://thehill.com/homenews/senate/244196-mcconnell-backs-away-from-judicial-shutdown-talk> (last visited Nov. 29, 2016) (on file with the Washington and Lee Law Review).

29. Reid contended that McConnell would “not even [approve] a consensus nominee [like] Stoll,” recounting McConnell's floor pleas for rapidly approving Bush choices across 2008. 161 CONG. REC. S3,849–50 (daily ed. June 8, 2015).

30. 161 CONG. REC. S4,591 (daily ed. June 24, 2015); 161 CONG. REC. S4,678 (daily ed. July 7, 2015).



Restrepo's canvass, however, was painfully slow. The accomplished centrist waited 200 days on a hearing, principally because Patrick Toomey (R-Pa.) retained the blue slip until May 2015, as compared with Robert Casey (D-Pa.), who delivered his in November 2014 immediately upon the nomination.<sup>31</sup> A June hearing proceeded successfully; Toomey proffered strong support and Restrepo expertly fielded numerous questions propounded.<sup>32</sup> He was only confirmed this January.<sup>33</sup> Should merely two nominees have ballots, that would be virtually unprecedented: over 2007–2008, the Democratic majority promoted approval of ten George W. Bush choices and, throughout 1988, six candidates whom Ronald Reagan designated *and* Supreme Court Justice Anthony Kennedy.<sup>34</sup>

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31. Jonathan Tamari, *A Nominee Waits; Toomey Blamed*, PHILA. INQUIRER (May 8, 2015), [http://www.philly.com/philly/news/local/20150508\\_A\\_judicial\\_nominee\\_waits\\_Toomey\\_gets\\_blamed.html](http://www.philly.com/philly/news/local/20150508_A_judicial_nominee_waits_Toomey_gets_blamed.html) (last visited Nov. 29, 2016) (on file with the Washington and Lee Law Review). *But see* Pat Toomey, *I Am Not Delaying Judge L. Felipe Restrepo's 3rd Circuit Nomination*, PITTSBURGH POST-GAZETTE (May 13, 2015), <http://www.post-gazette.com/opinion/letters/2015/05/13/I-am-not-delaying-Judge-L-Felipe-Restrepo-s-3rd-Circuit-nomination/stories/201505130068> (last visited Nov. 29, 2016) (providing Senator Toomey's response in which he denied the allegations that the senator had primary responsibility for delaying Restrepo's Senate consideration) (on file with the Washington and Lee Law Review).

32. *Hearing on Nominees*, S. COMM. ON THE JUDICIARY (June 10, 2015), <http://www.judiciary.senate.gov/meetings/nominations-06-10-15> (last visited Dec. 4, 2016) (on file with the Washington and Lee Law Review). Restrepo was held over, but the committee approved the nominee on a unanimous voice vote. *Exec. Bus. Meeting*, S. COMM. ON THE JUDICIARY (June 25, 2015), <http://www.judiciary.senate.gov/meetings/executive-business-meeting-06-25-15> (last visited Dec. 4, 2016) (on file with the Washington and Lee Law Review); *Exec. Bus. Meeting*, S. COMM. ON THE JUDICIARY (July 9, 2015), <http://www.judiciary.senate.gov/meetings/executive-business-meeting-07-09-15> (last visited Dec. 4, 2016) (on file with the Washington and Lee Law Review).

33. No plausible reason justified Restrepo's protracted confirmation process for an emergency Third Circuit opening. 162 CONG. REC. S21 (daily ed. Jan. 11, 2016); *supra* text accompanying notes 25–27, 30 (contrasting Stoll's fast approval).

34. *Judicial Vacancies*, *supra* note 17 (showing years 1988, 2007–2008); Christopher Kang, *GOP Court Obstruction Could Be Worst Since 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 Dec. 3, 2016) (discussing how the number of judges confirmed by Senate Republicans may be the fewest since 1897–1898, when only one judge—out of twenty-five, rather than today's 179, circuit judgeships—was confirmed) (on file with the

2016 is a presidential election year when lower federal court appointments customarily stall and halt, phenomena intensified by GOP refusal to process Judge Garland, President Obama's Supreme Court nominee,<sup>35</sup> so those attributes might confound approval for Judge Koh and fifty remaining Obama circuit and district court nominees. Nevertheless, conventions do allow prominent, moderate circuit nominees to realize votes following May.<sup>36</sup> The Senate helped appoint eleven of President George H. W. Bush's 1992 choices (six after June); two whom President Bill Clinton marshaled in January 1996, with eight for 2000 (one past June); and five whom President George W. Bush drafted over 2004 with four more coming in 2008 (none subsequent to June either year).<sup>37</sup> All but the last were the very precedents McConnell and Arlen Specter (Pa.) invoked when urging rapid consideration of Bush's 2008 nominees.<sup>38</sup> Across his final (a presidential election) year, the Democratic majority helped confirm four nominees.<sup>39</sup> Indeed, Fourth Circuit Judge Steven Agee's March candidacy with approval nine weeks later was particularly relevant.<sup>40</sup> Moreover, five choices Obama forwarded in 2012 enjoyed appointment before June 13.<sup>41</sup>

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Washington and Lee Law Review).

35. Russell Wheeler, *The Thurmond Rule and Other Advice and Consent Myths*, BROOKINGS INST. (May 25, 2016), <https://www.brookings.edu/blog/fixgov/2016/05/25/the-thurmond-rule-and-other-advice-and-consent-myths/> (last visited Nov. 29, 2016) (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.

36. See Wheeler, *supra* note 35 (analyzing these conventions). Delaying Garland slows Koh's nomination. 162 CONG. REC. S1,523 (daily ed. Mar. 16, 2016); S. Judiciary Comm., *Exec. Business Mtgs.* (Mar. 17, May 19, 2016) (statements of Sens. Leahy & Grassley).

37. *Judicial Vacancies*, *supra* note 17 (showing years 1992, 1996, 2000, 2004, 2008).

38. 154 CONG. REC. S15,411, S15,424 (daily ed. July 17, 2008) (statements of Sens. Specter & McConnell); see Reid statement, *supra* note 28.

39. Six more appellate nominees won 2007 approval. *Supra* note 34.

40. Press Release, White House, Office of the Press Sec'y, Presidential Nominations Sent to the Senate (Mar. 13, 2008) (on file with author); 154 CONG. REC. S9,714 (daily ed. May 20, 2008); *id.* at S13,588 (daily ed. June 24, 2008) (stating that the Senate required merely nine weeks from nomination to confirmation for Sixth Circuit nominee Helene White).

41. No more votes ensued; five able centrists waited until 2013. *Judicial Vacancies*, *supra* note 17 (showing vacancies in 2012–2013).

In short, confirming merely one appeals court prospect last year and a second this January 11 powerfully contrasts with Democrats' approving ten in the comparable juncture of Bush's time. The statistics portend badly for 2016, while Republicans must sharply accelerate the pace now to have any hope of matching the confirmations secured during Bush's final year, much less 2007–08.

### *III. Reasons For and Implications Of Problematic Selection*

The explanations for federal judicial selection's problematic condition are complex.<sup>42</sup> However, some observers ascribe the modern "confirmation wars" to D.C. Circuit Judge Robert Bork's 1987 attempted Supreme Court appointment.<sup>43</sup> They detect that the regime has crumbled, as manifested through corrosive partisanship, systemic paybacks, and strident divisiveness in which both parties constantly ratchet up the stakes, plainly and starkly demonstrated by persistent rejection of the Supreme Court nominee's analysis.<sup>44</sup>

The consequences are grim. The drastically limited confirmation action since 2015 leaves the bench with thirteen circuit, and thirty-eight emergency, vacancies currently and sixteen appellate court, and forty emergency, openings at 2016's end.<sup>45</sup> The judiciary could only have the relatively "few" vacancies

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42. Legal scholars and Senate members vigorously debate whether selection has always been complex. See generally Michael Gerhardt & Michael Stein, *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).

43. For more on Judge Bork's attempted appointment, see generally ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989); MARK GITENSTEIN, *MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT* (1992).

44. The latest controversy apparently began with claims that Democrats stalled confirmations during Bush's last several years and that Republicans retaliated with unprecedented delay in Obama's time. Democrats then detonated the nuclear option, which allowed swift confirmation of many judges in 2014's lame duck session. The GOP next drastically slowed all Obama nominees. *Supra* text accompanying notes 13–35.

45. Judicial emergency vacancies soared from twelve in 2015 when Republicans became the Senate majority to thirty-eight currently. *Judicial*

after Democrats mustered the nuclear option that constricted filibusters.<sup>46</sup> However, recent inactivity will dramatically multiply unfilled positions and emergencies by next year, with three more regarding the Ninth Circuit.<sup>47</sup>

Stymied approvals have manifold critical adverse impacts.<sup>48</sup> They force nominees to leave careers on hold and prevent many talented candidates from envisioning federal judicial service.<sup>49</sup> Interminable assessments deprive the courts of necessary judicial resources and myriad litigants of justice.<sup>50</sup> These deleterious effects also undermine citizen respect for the judicial selection process and the coequal branches of the federal government.<sup>51</sup> Few circuits address challenges so daunting as the Ninth, which confronts the greatest appeals that consume the most protracted time.<sup>52</sup>

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*Vacancies*, *supra* note 17; Wheeler, *supra* note 35; Joe Palazzolo, *Obama's Successor Will Likely Fill Dozens of Vacancies*, WALL ST. J. (Mar. 18, 2016), <http://www.wsj.com/articles/obamas-successor-will-likely-fill-dozens-of-judicial-vacancies-1458340351> (last visited Dec. 1, 2016) (on file with the Washington and Lee Law Review).

46. See *supra* note 20 and accompanying text (describing the Democratic restriction on filibustering).

47. See *Judicial Vacancies*, *supra* note 17 (showing emergency vacancies throughout 2016, including an additional three in late 2016, so that President-Elect Donald Trump will confront four emergency Ninth Circuit vacancies on Inauguration Day, if the Senate fails to confirm Judge Koh).

48. Tobias, *supra* note 8, at 2253 (analyzing manifold critical adverse impacts that stymied appointments impose); Leahy statement, *supra* note 8 (same).

49. Andrew Cohen, *In Pennsylvania, the Human Costs of Judicial Confirmation Delays*, ATLANTIC (Sept. 10, 2012), <http://www.theatlantic.com/politics/archive/2012/09/in-pennsylvania-the-human-costs-of-judicial-confirmation-delays/261862/> (last visited Nov. 29, 2016) (on file with the Washington and Lee Law Review); Palazzolo, *supra* note 45.

50. JOHN ROBERTS, YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2010); Tobias, *supra* note 8, at 2253; Jennifer Bendery, *Federal Judges Are Burned Out, Overworked and Wonder 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 visited Nov. 29, 2016) (on file with the Washington and Lee Law Review).

51. Tobias, *supra* note 8, at 2253.

52. JUDICIAL BUS. OF U.S. COURTS, U.S. COURTS OF APPEALS—MEDIAN TIME INTERVALS IN MONTHS FOR CASES TERMINATED ON THE MERITS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2015 Table B-4 (2016), <http://www.uscourts.gov/file/19492/download>. Senior judges have been an invaluable resource for helping resolve burgeoning Ninth Circuit appeals.

In sum, this analysis clearly reveals the profound necessity for expeditious Senate action on Judge Koh. First, the Senate has a constitutional responsibility to furnish an up or down vote. Major precedent, namely regarding Bush's 2007–2008 appointments, concomitantly applies.<sup>53</sup> Specific earlier precedent is more compelling.<sup>54</sup> Scalia's empty post will not actually slow Koh. If the GOP continues declining to move Obama's accomplished High Court nominee, there would be adequate time for confirming her and, even if the party relents on Judge Garland, the chamber might easily approve Koh this year, as it did Justice Kennedy and six 1988 circuit picks.<sup>55</sup> She also offers multiple contributions and resembles prospects smoothly canvassed and elevated in presidential election years.<sup>56</sup> Finally, the Ninth Circuit desperately needs a full contingent of jurists.<sup>57</sup>

#### IV. Suggestions For The Confirmation Process

Court selection and election year politics must not subvert Judge Koh's thorough consideration, as partisan fighting over Scalia's vacancy cogently attest. Koh is presently a district judge, which may often speed the confirmation process, and the jurist's Federal Bureau of Investigation (FBI) evaluation only needed to be updated, as she was previously confirmed and has compiled a

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However, a number have recently died or retired. Carol Williams, *Judges' Deaths Add to 9th Circuit Backlog*, L.A. TIMES (Oct. 15, 2011), <http://articles.latimes.com/2011/oct/15/local/la-me-9th-circuit-vacancies-20111012> (last visited Nov. 30, 2016) (on file with the Washington and Lee Law Review).

53. See *supra* notes 34, 37–40 (analyzing relevant precedent, especially regarding Bush's circuit appointments).

54. Senators approved considerably more judges and confirmed the jurists later in time. *Supra* text accompanying notes 36–37.

55. Mike DeBonis, *100 Days Later, Obama Still Trying*, WASH. POST, May 25, 2016; see *supra* notes 34, 36 (analyzing relevant precedent, especially from 1988).

56. For elevation, see Tobias, *supra* note 8, at 2258; *infra* note 68; see also *supra* notes 4–10, 36–40 (noting other ideas).

57. See *supra* text accompanying notes 47, 52 (detailing future vacancies due to factors like assumption of senior status and why it is important to have a fully functioning court with no vacancies).

lengthy, accessible record.<sup>58</sup> The committee amply investigated Koh by actively cooperating with the FBI and the Justice Department.<sup>59</sup>

The Chair ought to have efficiently scheduled a committee hearing for the following reasons: Koh is very astute, the Ninth Circuit must have every position filled, and Grassley should have reciprocated for Democrats' collegially approving ten circuit jurists across 2007–2008.<sup>60</sup> The Chair finally managed to arrange the panel hearing on July 13, nearly five months after Koh actually received nomination. California Senators Barbara Boxer (D) and Dianne Feinstein (D) introduced Koh and comprehensively praised her as the consummate “American success story,” while they emphasized the jurist’s powerful bipartisan support from prominent Republicans, including former Governor Schwarzenegger and Stanford Law School Professor Michael McConnell whom President Bush had earlier appointed to the Tenth Circuit.<sup>61</sup>

Members then robustly questioned Judge Koh, who provided clear, direct answers. Senator John Cornyn (R-Tex.) asked Koh about the opinion that she issued in the Google Gmail litigation, which the senator contended had “effectively invalidated the Electronic Privacy Act.”<sup>62</sup> The jurist carefully answered that when she resolved the case, and today, the Ninth Circuit lacked any precedential decisions, so the judge consulted additional federal and state court precedent that revealed a split of

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58. Tobias, *supra* note 8, at 2258; *see supra* notes 4–6 (analyzing the lengthy, accessible record compiled by Judge Koh); *infra* text accompanying notes 68, 72–74 (describing the arrangement of Koh’s panel discussion, but noting the failure of the Senate to hold a confirmation debate and vote).

59. Koh received vetting when she was nominated to the Northern District, so analysis could be brief. *Supra* notes 3, 56.

60. Obama sent four nominees before, and two after, Koh. *Judicial Vacancies*, *supra* note 17 (noting vacancies in 2016).

61. *See Hearing on Nominees*, S. COMM. ON THE JUDICIARY (July 13, 2016), <http://www.judiciary.senate.gov/meetings/07/13/2016/nominations> (last visited Dec. 4, 2016) (providing statements of Sens. Feinstein & Boxer) (on file with the Washington and Lee Law Review). Both senators emphasized the sterling record that Judge Koh had compiled, her substantial Republican support, and the Ninth Circuit’s dire need for judges.

62. *Id.*; *see In re Google Gmail Litig.*, No. 13–MD–02430–LHK, 2014 WL 1002660 (N.D. Cal. Mar. 18, 2014) (citing Judge Koh’s opinion about which Senator Cornyn asked); 18 U.S.C. § 2510 (2006) (Electronic Privacy Act).

authority.<sup>63</sup> Koh thoroughly documented the analytical process that she employed in reaching a determination.<sup>64</sup> Senator Thom Tillis (R-N.C.) queried Koh about her law review piece, which ostensibly urged that minority judges needed to be more clever than sixty-year-old white jurists when addressing cases that affect people of color.<sup>65</sup> She now “disagree[d] with that 100 percent,” observing that she wrote this paper twenty-eight years earlier when a law student.<sup>66</sup> The members who participated appeared satisfied. A few next posited written questions to which the designee swiftly responded.<sup>67</sup>

Grassley arranged a panel debate in September when politicians had completed the lengthy summer recess, although the GOP held Koh over for seven days like most nominees.<sup>68</sup> The following week, the panel rigorously discussed her, while Cornyn announced his opposition based on Koh’s opinion in the *Google* litigation.<sup>69</sup> Nevertheless, Grassley and three other Republican members did support Koh and she won approval.<sup>70</sup> Obama-elevated jurists—personified by Ninth Circuit Judge Jacqueline Nguyen—feliculously secured committee ballots, as the individuals had previously captured unanimous reports and similar confirmations.<sup>71</sup>

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63. *Hearing, supra* note 61. She discussed several federal and state court opinions, which had addressed similar issues.

64. *Id.*

65. *Id.*; see *Yearning: Race, Gender and Cultural Politics*, 14 HARV. WOMEN’S L. J. 255, 259–60 (1991) (book review) (writing by Koh along with several student colleagues).

66. *Hearing, supra* note 61. Koh urged that her judicial record shows she has worked to be “extremely impartial.”

67. *See id.* (noting that the record was open a week for written queries). Most questions were uncontroversial and her answers were careful.

68. *Exec. Bus. Meeting*, S. COMM. ON THE JUDICIARY (Sept. 8, 2016), <http://www.judiciary.senate.gov/meetings/09/05/2016/executive-business-meeting-09-08-16> (last visited Dec. 4, 2016) (on file with the Washington and Lee Law Review); *see supra* note 14 (showing that the Republicans “held over” nominees).

69. *Exec. Business Mtg.*, S. COMM. ON THE JUDICIARY (Sept. 15, 2016), <http://www.judiciary.senate.gov/meetings/09/08/2016/executive-business-meeting-09-15-16>; *see supra* notes 62–63 (providing a description of the exchange between Senator Cornyn and Judge Koh related to the *Google* opinion in her hearing).

70. The vote was 13–7. *Exec. Bus. Meeting, supra* note 69.

71. Press Release, White House, Office of the Press Sec’y, President Obama

A plethora of arguments demonstrates why Judge Koh requires a speedy confirmation debate and ballot. McConnell necessarily must effectuate the regular order that he consistently trumpets, and he also must honor distinctly relevant 2008 precedent.<sup>72</sup> If the leader, nonetheless, eschews scheduling Koh's debate and vote, her champions may wish to assertively pursue cloture.<sup>73</sup> Accomplished centrists traditionally receive up or down ballots; therefore numerous legislators who appreciate custom should promptly agree on cloture.<sup>74</sup> After Koh reaches the floor, McConnell ought to stage a dignified and respectful debate, which

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Nominates Judge Jacqueline Nguyen to the U.S. Court of Appeals (Sept. 22, 2011) (on file with author); 158 CONG. REC. S2,913 (daily ed. May 7, 2012).

72. See *supra* text accompanying notes 22, 37–40 (showing McConnell's statements urging regular order and swift approval of Bush 2008 circuit nominees, four of whom Democrats helped confirm). The 7th Circuit's Donald Schott and the 8th Circuit's Jennifer Puhl captured summer panel approval. *Hearing on Nominees*, S. COMM. ON THE JUDICIARY (May 18, 2016), <http://www.judiciary.senate.gov/meetings/05/18/2016/nominations> (last visited Dec. 4, 2016) (on file with the Washington and Lee Law Review); *Hearing on Nominees*, S. COMM. ON THE JUDICIARY (June 21, 2016), <http://www.judiciary.senate.gov/meetings/06/21/2016/nominations> (last visited Dec. 4, 2016) (on file with the Washington and Lee Law Review); *Exec. Bus. Meeting*, S. COMM. ON THE JUDICIARY (June 16, 2016), <http://www.judiciary.senate.gov/meetings/06/16/2016/executive-business-meeting-1> (last visited Dec. 4, 2016) (on file with the Washington and Lee Law Review); *Exec. Bus. Meeting*, S. COMM. ON THE JUDICIARY (July 14, 2016), <http://www.judiciary.senate.gov/meetings/07/04/2016/executive-business-meeting> (last visited Dec. 4, 2016) (on file with the Washington and Lee Law Review). Regular order would apparently suggest that they receive final ballots first, but much time remains to vote on Koh because debate on her could be comparatively brief.

73. See *supra* note 20 (noting that there is ample precedent in filing for cloture); 162 CONG. REC. S5,312 (daily ed. Sept. 7, 2016) (showing unanimous consent denial). Most GOP senators oppose a 2016 Supreme Court pick; few oppose Koh. Ted Cruz, *The Scalia Seat: Let the People Speak*, WALL ST. J. (Mar. 6, 2016), <http://www.wsj.com/articles/the-scalia-seat-let-the-people-speak-1457307358> (last visited Nov. 30, 2016) (on file with the Washington and Lee Law Review).

74. See *supra* text accompanying notes 36–41 (analyzing relevant customs and precedent involving presidential election year confirmations). Senator Feinstein, who will become the Ranking Member in the 115th Congress, recently expressed hope that the Senate would confirm Judge Koh in Congress' lame duck session. Michael Doyle, *What's Ahead for West's Liberal Appeals Court, Once Trump Takes Over?*, SACRAMENTO BEE (Nov. 22, 2016), <http://www.sacbee.com/news/article116777848.html> (last visited Dec. 2, 2016) (on file with the Washington and Lee Law Review).



robustly considers numbers of pertinent questions, and the Senate must quickly vote.

#### *V. Conclusion*

During February, President Obama tendered Judge Koh for the Ninth Circuit. In September, the Judiciary panel approved Koh on a bipartisan vote. Because she is an experienced, mainstream candidate, and because the court needs all of its circuit jurists, the Senate chamber must not allow the presidential election year or GOP recalcitrance to frustrate Judge Koh's confirmation.