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### Combating the Ninth Circuit Judicial Vacancy Crisis

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# Combating the Ninth Circuit Judicial Vacancy Crisis

Carl Tobias\*

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### *I. Introduction*

When Donald Trump became President, the United States Court of Appeals for the Ninth Circuit had four judicial vacancies that the Administrative Office of the U.S. Courts (AO) identified as “judicial emergencies.”<sup>1</sup> The court also faces a larger caseload than all the other regional circuits, and has frequently decided appeals the least swiftly.<sup>2</sup> The 2016 election returns indicate that more confirmations will be necessary due to additional court members’ probable retirement or assumption of senior status during President Trump’s administration. Striking politicization could frustrate this effort, however. Soon after the inauguration, President Trump signed a novel executive order proscribing U.S. immigration travel from seven predominantly Muslim nations—which the court of appeals subsequently blocked—leading President Trump to criticize the tribunal as chaotic and the motions panel opinion and the judges who decided the case as “so political.”<sup>3</sup> Because the Ninth Circuit resolves the greatest number of filings, and often does so more slowly than other regional circuits even when the tribunal is at full capacity, the compelling need for the President and the Senate to fill these four open positions deserves scrutiny.

This essay initially canvasses the appellate vacancy conundrum’s rise and continued growth. The essay then descriptively and critically evaluates selection throughout President Barack Obama’s administration while reviewing the Ninth Circuit’s present situation. Ascertaining that the dilemma resulted partly from limited cooperation between Democrats and

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1. See *Judicial Emergencies*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies> (last updated Mar. 28, 2017) (last visited Apr. 19, 2017) (showing the current federal judicial vacancies which are classified as judicial emergencies and defining the term judicial emergency) (on file with the Washington and Lee Law Review).

2. See Matt Ford, *Arizona v. Ninth Circuit Court of Appeals*, ATLANTIC (Feb. 4, 2016), <https://www.theatlantic.com/politics/archive/2016/02/a-circuit-split/435567/> (last visited Apr. 19, 2017) (describing how the Ninth Circuit’s magnitude contributes to a “voluminous caseload” and “abysmal turnaround time”) (on file with the Washington and Lee Law Review).

3. *Trump Travel Ban: President Attacks ‘So Political’ Courts*, BBC (Feb. 8, 2017), <http://www.bbc.com/news/world-us-canada-38902574> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

Republicans and the fortuity that multiple Ninth Circuit jurists chose to assume senior status near the end of President Obama's tenure, Part III assesses major implications of the vacancy crisis. This section finds that GOP obstruction distinctly exacerbated the rampant partisanship, strident divisiveness, and incessant paybacks that have clearly eviscerated judicial appointments, phenomena which President Trump could intensify, as exemplified by his corrosive rhetoric directed at judges in the Ninth Circuit and the federal bench more generally. Because those complications restrict the delivery of justice while harming entities and individuals engaged in federal court litigation, the final section proffers suggestions for President Trump and the upper chamber to speedily address the Ninth Circuit openings.

## *II. Contemporary Selection Problems*

The history of the current vacancy crisis merits limited examination here, as it has been chronicled elsewhere<sup>4</sup> and conditions now are most relevant. One notion is the persistent vacancies conundrum, which actually derived from expanded federal court jurisdiction, lawsuits, and judgeships.<sup>5</sup> More salient is the contemporary difficulty, which is political and resulted from conflicting presidential and Senate control that began over three decades ago.

### *A. Persistent Vacancies*

Congress amply enhanced federal court jurisdiction in the 1960s,<sup>6</sup> criminalizing substantially more behavior and

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4. See generally Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319 (1994); MILLER CTR., IMPROVING THE PROCESS FOR APPOINTING FEDERAL JUDGES (1996) [hereinafter MILLER REPORT].

5. The persistent vacancies conundrum needs less review; some delay in the selection process is inherent, resists easy solution, and has received analysis. See Comm. on Fed. Courts, *Remedying the Permanent Vacancy Problem in the Federal Judiciary*, 42 REC. ASS'N B. CITY N.Y. 374, 381–82 (1987). See generally Bermant et al., *supra* note 4.

6. MILLER REPORT, *supra* note 4, at 3; see Carl Tobias, *The New Certiorari and a National Study of the Federal Appeals Courts*, 81 CORNELL L. REV. 1264,

recognizing numerous civil actions, factors which enlarged district court filings and concomitant appeals.<sup>7</sup> Lawmakers countered the rises by increasing judgeships.<sup>8</sup> During the fifteen years after 1980, confirmation periods mounted.<sup>9</sup> For example, appeals court nominations devoured twelve months and confirmations three months, and both grew significantly during that time.<sup>10</sup> The circumstances profoundly worsened later; for instance, appellate nominations consumed twenty months while approvals reached six in 1997, the first year of President Bill Clinton's last term, and 2001, the earliest year of President George W. Bush's opening term.<sup>11</sup>

The process's numerous, convoluted stages and participants make some delay intrinsic.<sup>12</sup> Presidents consult home state politicians, seeking guidance on prospects. Some officials employ panels that screen applicants while recommending capable aspirants. The Federal Bureau of Investigation (FBI) performs intensive "background checks." The American Bar Association (ABA) scrutinizes and ranks choices.<sup>13</sup> The Department of Justice

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1268–70 (1996) (observing how Congress passed numerous statutes expanding federal court jurisdiction).

7. *E.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

8. 28 U.S.C. § 44 (2012); *see* S.1385, 113th Cong. (2013) (providing a judgeships bill which directed the President, with the "advice and consent of the Senate," to appoint additional judges in certain circuits and districts); *Archive of Judicial Vacancies: Year 2016*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2016> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review)

9. U.S. JUDICIAL CONF., LONG RANGE PLAN FOR THE FEDERAL COURTS 103 (1995).

10. *Id.* at 3; *see* Bermant et al., *supra* note 4, at 323 (stating 1970–1992 appellate vacancy rates doubled).

11. *E.g.*, Sheldon Goldman, *Judicial Confirmation Wars*, 39 U. RICH. L. REV. 871, 904–08 (2004); Orrin Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J. L. & PUB. POL'Y 1035, 1038 (2009). Both the Clinton and Bush years resembled Obama's initial and last two years.

12. Bermant et al., *supra* note 4; Sheldon Goldman, *Obama and the Federal Judiciary*, 7 FORUM 9–11 (2009).

13. MILLER REPORT, *supra* note 4; *see* ABA STANDING COMM. ON FEDERAL JUDICIARY, WHAT IT IS AND HOW IT WORKS (1983); *see also infra* note 88 (evaluating the Trump Administration decision to eschew pre-nomination ABA evaluations and rankings).

(DOJ) may help review aspirants while preparing nominees for Senate evaluation. The Judiciary Committee analyzes picks, conducts hearings, discusses submissions, and votes; those reported might have final debates, when needed, prior to floor ballots.

### *B. The Modern Concern*

Most critical now is rampant partisanship which essentially drives selection.<sup>14</sup> This was propelled after U.S. Court of Appeals for the District of Columbia Circuit Judge Robert Bork's attempted Supreme Court appointment, ushering in modern confirmations which are characterized by politicization, divisiveness, and systematic paybacks.<sup>15</sup> However, strident partisanship soared across Obama's presidency when the GOP engaged in unprecedented obstruction.<sup>16</sup>

Tardy nominations might explain the relatively few confirmations. In early 1997 and 2001, President Clinton and President George W. Bush marshaled rather small numbers of circuit picks, some of whom opponents criticized.<sup>17</sup> Politicians who afforded suggestions concomitantly delayed the pace.<sup>18</sup>

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14. Article II suggests that senators may constrict unwise administration choices, while politics has infused appointments. *THE FEDERALIST* NO. 76, at 513 (Alexander Hamilton) (J.E. Cooke ed., 1961). *See generally* MICHAEL GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* (2000) (analyzing the evolution of judicial appointments which culminated in unprecedented processing delays); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997) (reviewing selection under nine Presidents and finding that partisanship was a critical driver of the problems with the federal appointments process).

15. *See generally, e.g.*, MARK GITENSTEIN, *MATTERS OF PRINCIPLE* (1992); JEFFREY TOOBIN, *THE NINE* 18 (2007). For the previous history, see GOLDMAN, *supra* note 14, at 205; DAVID O'BRIEN, *JUDICIAL ROULETTE* 20 (1988).

16. *See infra* notes 33–58 and accompanying text (assessing the systematic Republican obstruction in recent years).

17. Press Release, White House, Office of Press Sec'y, President Clinton Nominates 22 to the Federal Bench (Jan. 7, 1997); *George W. Bush: Remarks Announcing Nominations for the Federal Judiciary*, AM. PRESIDENCY PROJECT (May 9, 2001), <http://www.presidency.ucsb.edu/ws/index.php?pid=45595> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

18. Republicans mandated input, even tendering names. Neil Lewis, *Clinton Has Chance to Shape Courts*, N.Y. TIMES (Feb. 9, 1997), <http://www.nytimes.com/1997/02/09/us/clinton-has-a-chance-to-shape-the->

President Bush's lack of consultation restricted selection,<sup>19</sup> while limited analysis of President Clinton's aspirants explicated paybacks.<sup>20</sup> The committee had considerable responsibility, as it slowly evaluated, conducted hearings, and voted on persons.<sup>21</sup> Over 1997 and 2001, however, few selections nominated captured appointment due to resource constraints and politics, specifically ideological differences.<sup>22</sup> Related pressing Senate business and unanimous consent, which permitted one member to halt ballots, stopped plentiful final votes.<sup>23</sup>

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courts.html (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); see 143 CONG. REC. 4254 (Mar. 19, 1997) (statement of Sen. Biden) [hereinafter Biden statement].

19. David L. Greene, *Bush Sends Judge List to Senate*, BALT. SUN (May 10, 2001), [http://articles.baltimoresun.com/2001-05-10/news/0105100112\\_1\\_senate-democrats-appeals-court-confirmation-process](http://articles.baltimoresun.com/2001-05-10/news/0105100112_1_senate-democrats-appeals-court-confirmation-process) (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); see Elliot Slotnick, *Appellate Judicial Selection During the Bush Administration: Business as Usual or a Nuclear Winter?*, 48 ARIZ. L. REV. 225, 234 (2006) ("From the Democrats' perspective, meaningful consultation was absent . . .").

20. Paul Gigot, *How Feinstein is Repaying Bush on Judges*, WALL ST. J. (May 9, 2001), <https://www.wsj.com/articles/SB989369905566856183> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); Neil Lewis, *Party Leaders Clash Over Pace of Filling Judgeships*, N.Y. TIMES (May 10, 2002), <http://www.nytimes.com/2002/05/10/us/party-leaders-clash-in-capitol-over-pace-of-filling-judgeships.html> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

21. See Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L. Q. 741, 742 (1997) (explaining how there was one hearing for appellate court nominees each month when the Senate was in session); Biden statement, *supra* note 18 (contending that there were two hearings every month in 1987–1994).

22. See generally Tobias, *supra* note 21; Neil Lewis, *Bush and Democrats Trade Blame on Judges*, N.Y. TIMES (May 4, 2002), <http://www.nytimes.com/2002/05/04/us/bush-and-democrats-in-senate-trade-blame-for-judge-shortage.html> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

23. Jennifer Bendery, *Republicans Still Find Ways to Stall Judicial Nominees Despite Filibuster Reform*, HUFFINGTON POST (Feb. 10, 2014), [http://www.huffingtonpost.com/2014/02/08/republicans-judicial-nominees\\_n\\_4748528.html](http://www.huffingtonpost.com/2014/02/08/republicans-judicial-nominees_n_4748528.html) (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

*C. The Ninth Circuit*

The Ninth Circuit manifested both attributes of the national conundrum. For example, huge population rises instigated by economic growth and mounting immigration expanded district court matters and corresponding appeals; thus, court seats increased, reaching twenty-eight by 1984.<sup>24</sup> Accelerating politicization concomitantly subverted the process by delaying many approvals.<sup>25</sup> However, certain elements ameliorated Ninth Circuit selection problems. For instance, across most of the tribunal's 126-year existence, it experienced no vacancy crisis. Appellate membership was comparatively small and court openings arose infrequently, while the chamber rather easily filled most. Indeed, until 1968, the appeals court operated with merely nine jurists.

Even though a judgeships bill which Congress mustered over 1978 authorized ten seats, President Jimmy Carter realized considerable success when appointing jurists, partly because Democrats controlled the Senate, which meant there was no unfilled judgeship when President Ronald Reagan became chief executive.<sup>26</sup> President Reagan's administration smoothly confirmed jurists—although legislation did create five positions—as the GOP enjoyed a chamber majority in President Reagan's first six years, but once Democrats recaptured the body they astutely collaborated.<sup>27</sup> Senator Joe Biden (D-Del.), who ably chaired the Judiciary panel, attempted to confirm all strong,

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24. Judgeship acts expanding posts manifest these ideas. *E.g.*, Pub. L. No. 95-486, 92 Stat. 1629 (1978); Pub. L. No. 98-353, 98 Stat. 345 (1984). The privacy needs of candidates, senators, and Presidents can frustrate efforts to paint a comprehensive picture.

25. *See supra* notes 17–23 (observing that the politicization was gradual, worsening after the Supreme Court confirmation process for Judge Bork). However, even later, some cooperation happened. *Infra* notes 27–29; *see also generally* CHARLES GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM (2007).

26. *Archive of Judicial Vacancies: Year 1981*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/1981> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); *see* GOLDMAN, *supra* note 14, at 236–84 (comprehensively describing selection during the Carter years).

27. Biden statement, *supra* note 18; *see* GOLDMAN, *supra* note 14, at 285–345 (comprehensively describing selection during the Reagan years).).



consensus picks, and the chamber approved High Court Justice Anthony Kennedy with six appellate jurists in 1988, but there were multiple Ninth Circuit vacancies at that year's end.<sup>28</sup> Felicitous processing continued throughout much of President George H.W. Bush's tenure, albeit slowing in 1992, which left one court of appeals post empty.<sup>29</sup>

President Clinton filled this open seat in part because Democrats enjoyed a Senate majority across his first few years. Nevertheless, the GOP earned control starting in 1995, which frustrated appointments efforts, while the chamber did not approve more jurists until early 1996. Over various times in the ensuing years, vacancies reached ten of twenty-eight judgeships, including three upon the presidency's close, which exacerbated delayed appeals' resolution.<sup>30</sup> That situation improved during President George W. Bush's tenure, especially when Republicans possessed a Senate majority. The President confirmed numerous appointees mainly by consulting Democrats, although controversy arose, leaving one Ninth Circuit vacancy upon his administration's conclusion.<sup>31</sup>

In short, appointments were recently mixed, but a few periods did yield relatively successful confirmation endeavors. Illustrative were the George H.W. and George W. Bush

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28. Judge Bork's confirmation process was an exception to relatively collegial selection. *Archive of Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> (last visited Apr. 19, 2017) (providing vacancy information for years 1988–1989 and showing three vacancies) (on file with the Washington and Lee Law Review).

29. Senator Biden cooperated with President Bush. *Archive of Judicial Vacancies: Year 1993*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/1993> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

30. President Clinton's predisposition to name able centrists and compromise together with some GOP senators' coordination allowed processes in certain states to operate rather well. *Archive of Judicial Vacancies*, *supra* note 28 (providing vacancy information for years 1995–2001).

31. *Archive of Judicial Vacancies: Year 2009*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2009> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review). When Judge Stephen Trott, whose chambers were located in Idaho, assumed senior status, California senators argued that his seat belonged to their state—a dispute that continued for a decade. Todd Ruger, *Senate Vote Ends Feud Over Ninth Circuit Seat*, LEGAL TIMES, Mar. 31, 2014.

presidencies, even though the situation gradually worsened after Judge Bork's notorious confirmation fight until 2009, when it deteriorated.<sup>32</sup>

### III. Obama Administration Selection

The process worked rather effectively in President Obama's first term and a half when Democrats enjoyed a chamber majority. He avidly consulted in-state officers, especially Republicans, pursuing, and normally following, suggestions of talented, mainstream, diverse nominees.<sup>33</sup> These initiatives promoted collaboration, as lawmakers from jurisdictions having vacancies receive deference because they could halt the process through retaining "blue slips."<sup>34</sup> Even with aggressive presidential cultivation, many did not cooperate, failing to suggest able people.<sup>35</sup>

The GOP coordinated with regular hearings yet "held over" discussions and committee votes seven days for all but one in sixty-plus exceptional, moderate circuit aspirants.<sup>36</sup> Republicans

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32. See *supra* notes 16, 25, 29 (providing examples of relatively successful confirmation endeavors in the George H.W. and George W. Bush presidencies and deterioration in Obama's presidency); see also GEYH, *supra* note 25.

33. Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2239–40, 2253 (2013); see Sheldon Goldman et al., *Obama's First Term Judiciary*, 97 JUDICATURE 7, 8–17 (2013) (describing President Obama's commitment to expanding diversity on the federal courts, so that the judiciary would better reflect the U.S. and describing the process in the Obama Administration).

34. Ryan Owens et al., *Ideology, Qualifications, and Court Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347, 347; Tobias, *supra* note 33, at 2242.

35. Some politicians sent relatively few or none. See Goldman et al., *supra* note 33, 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 Apr. 19, 2017) ("The list of Texas vacancies continues to grow, in part, because Cornyn and Cruz have refused to screen candidates for district court judgeships . . . until a seat becomes vacant and the court is already working without its full allotment of judges.") (on file with the Washington and Lee Law Review); 161 CONG. REC. S6151 (daily ed. July 30, 2015) (statement of Sen. Schumer).

36. S. Judiciary Comm., *Exec. Business Mtg.* (Mar. 22, 2013); Tobias, *supra* note 33, at 2242–43.

slowly concurred on numerous picks' final debates, when required, and up or down ballots, relegating strong centrists to languish for weeks until Democrats asked for cloture.<sup>37</sup> The GOP also pursued substantial roll call votes and plentiful debate time for competent, mainstream aspirants, who readily captured approval, thereby devouring scarce chamber floor hours.<sup>38</sup> Those procedures roiled appointments, leaving twenty court of appeals openings, some that plagued the Ninth Circuit, for almost a half-decade following September 2009.<sup>39</sup>

In the 2012 presidential election year, these Republican strategies grew.<sup>40</sup> Delay persisted, while court of appeals chamber ballots actually ended in June. With President Obama's reelection, Democrats hoped for greater cooperation, which failed to materialize, and resistance skyrocketed the next year when he forwarded three excellent, moderate, diverse prospects for the D.C. Circuit, the nation's second most important tribunal.<sup>41</sup> The GOP would not accord the choices floor votes, while prolonged recalcitrance motivated Democrats' explosion of the "nuclear option" that restricted filibusters.<sup>42</sup> This allowed the Ninth Circuit to lack vacancies at 2014's close.

During 2015, when Republicans had secured a majority,<sup>43</sup> already negligible collaboration further declined. GOP leaders

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37. I rely in this paragraph on Goldman et al., *supra* note 33, at 26–29; Tobias, *supra* note 33, at 2243–46.

38. Tobias, *supra* note 33, 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 Apr. 19, 2017) (on file with the Washington and Lee Law Review).

39. *Archive of Judicial Vacancies*, *supra* note 28 (providing vacancy information for years 2009–2014).

40. Tobias, *supra* note 33, at 2246.

41. I rely, in this paragraph's remainder, 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.

42. The 113th Senate approved 130 judges. *Archive of Judicial Vacancies*, *supra* note 28 (providing vacancy information for years 2013–2014). Republicans forced Democrats to file cloture on all pre-2015 nominees, especially after Democrats unleashed the nuclear option. 161 CONG. REC. S3223 (daily ed. May 21, 2015) (statement of Sen. Leahy) [hereinafter Leahy statement].

43. Jerry Markon et al., *Republicans Win Senate Control*, WASH. POST, Nov. 4, 2014; Jonathan Weisman & Ashley Parker, *GOP Takes Senate*, N.Y. TIMES, Nov. 5, 2014, at A1.

incessantly promised that they would again bring to the chamber “regular order,” the approach which governed before Democrats ostensibly eroded it. Early in January, Senator Mitch McConnell (R-Ky.), the new Majority Leader, exclaimed: “We need to return to regular order.”<sup>44</sup> Senator Chuck Grassley (R-Iowa), who became the Judiciary Committee Chair, vowed that he would analogously evaluate submissions.<sup>45</sup> Despite manifold pledges, Republicans slowly provided individuals for President Obama to consider, nominee hearings, committee ballots, chamber debates, and final 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 that GOP members represented.<sup>46</sup> Politicians confirmed *one* appeals court jurist last year and a second in 2016.

On November 12, 2014, President Obama proposed Kara Farnandez Stoll, an experienced, mainstream counsel, and District Judge Felipe Restrepo, a distinguished, consensus jurist, as Federal Circuit and Third Circuit nominees.<sup>47</sup> Stoll’s March 2015 hearing proceeded smoothly;<sup>48</sup> the nominee had a late April panel ballot.<sup>49</sup> In June, Senator McConnell suggested that circuit possibilities’ approvals would cease.<sup>50</sup> Senator Harry Reid (D-

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44. He repeatedly recites the regular order 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 42.

45. S. Judiciary Comm., *Hearing on Nominees* (Jan. 21, 2015); David Catanese, *Chuck 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> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

46. Republicans minimally cooperated with the administration, which prompted Obama to select no 2015 appellate court pick and nominate seven in 2016; none won approval. Emergencies reflect docket size and vacancy length. *Archive of Judicial Vacancies*, *supra* note 28 (providing vacancy information for years 2015–16).

47. Press Release, White House, Office of Press Sec’y, President Obama Nominates 2 to U.S. Court of Appeals (Nov. 12, 2014).

48. S. Judiciary Comm., *Hearing on Nominees* (Mar. 11, 2015).

49. S. Judiciary Comm., *Exec. Business Mtg.* (Apr. 23, 2015).

50. McConnell never did clarify precisely what his suggestion meant. 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 Apr. 19, 2017) (on file with the Washington and Lee Law

Nev.), the Minority Leader, next excoriated McConnell for abdication of his constitutional duty by scheduling no final action.<sup>51</sup> Senator Patrick Leahy (D-Vt.), the Ranking Member, correspondingly decried the failure to appoint in weeks a nominee, especially Stoll, which might have provoked her significant July 95–0 vote.<sup>52</sup>

Judge Restrepo's canvass was painfully slow. The accomplished centrist waited 200 days on a hearing, because Senator Pat Toomey (R-Pa.) retained the blue slip until May 2015, as compared with Senator Bob Casey (D-Pa.), who delivered his in November 2014.<sup>53</sup> A June hearing progressed successfully; Senator Toomey proffered support and Judge Restrepo expertly fielded questions propounded.<sup>54</sup> The Senate only confirmed him in January 2016.<sup>55</sup>

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Review). *But see* Alex 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 Apr. 19, 2017) (denying that there would be a Republican shutdown on President Obama's federal court nominees despite McConnell's previous comments) (on file with the Washington and Lee Law Review).

51. Senator Reid contended that McConnell would “not even [approve] a consensus nominee [like] Stoll,” recounting the Kentucky senator's floor pleas for rapidly approving Bush 2008 appellate choices. 161 CONG. REC. S3849-50 (daily ed. June 8, 2015).

52. *Id.* at S4591 (daily ed. June 24, 2015); *id.* at S4678 (daily ed. July 7, 2015).

53. Jonathan Tamari, *A Judicial Nominee Waits; Toomey Is 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 Apr. 19, 2017) (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?pgpageversion=pgevoke> (last visited Apr. 19, 2017) (“I fully support the president's proposal to elevate Judge Restrepo to the 3rd Circuit, just as I supported his confirmation to the federal district court.”) (on file with the Washington and Lee Law Review).

54. S. Judiciary Comm., *Hearing on Judicial Nominees* (June 10, 2015). He was held over but unanimously voice voted. S. Judiciary Comm., *Exec. Business Mtgs.* (June 25, July 9, 2015).

55. No plausible reason justified Judge Restrepo's protracted confirmation for an emergency opening. 162 CONG. REC. S21 (daily ed. Jan. 11, 2016); *supra* text accompanying notes 48–49, 52 (contrasting Judge Restrepo's delayed process to Judge Stoll's fast approval).

This was a presidential election year, when appointments conventionally slow and halt, factors distinctly intensified by GOP refusal to process U.S. Court of Appeals for the D.C. Circuit Chief Judge Merrick Garland, President Obama's experienced, mainstream High Court nominee.<sup>56</sup> Even though customs do allow fine, moderate circuit nominees to receive votes after May, that failed to happen this past year.<sup>57</sup> Confirming a sole appellate pick for 2015 with a second in January 2016 was nearly unprecedented: in 2007–2008, the Democratic majority helped confirm ten of President George W. Bush's prospects and, in 1988, six choices whom President Reagan denominated *and* High Court Justice Anthony Kennedy.<sup>58</sup> The figures portended ominously for 2016's remainder, while GOP senators did not accelerate the pace to match confirmations secured during President Bush's final pair of years.

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

The explanations for selection's problematic state are complex,<sup>59</sup> yet observers ascribe the "confirmation wars" to Judge

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56. 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 Mar. 29, 2017) (last visited Apr. 19, 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.

57. Carl Tobias, *Confirming Circuit Judges in a Presidential Election Year*, 84 GEO. WASH. L. REV. ARGUENDO 160, 169 (2016); *see also* sources cited *supra* note 56. 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).

58. *Archive of Judicial Vacancies*, *supra* note 28 (providing vacancy information for years 1988, 2007–2008); Christopher Kang, *Republican Obstruction of Courts Could Be the 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 Apr. 19, 2017) (observing that 2015–2016 circuit appointments could have been the fewest since 1897–1898 when the federal courts comprised only twenty-five circuit judgeships) (on file with the Washington and Lee Law Review).

59. Professors and lawmakers have long debated whether judicial selection has always been as controversial as today. *See generally* Michael Gerhardt & Michael Ashley 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.

Bork's appointment process.<sup>60</sup> They detect that the regime has collapsed, as manifested through corrosive partisanship, systemic paybacks, and stunning divisiveness wherein both parties constantly ratchet up the stakes, plainly shown by persistent denial of Supreme Court nominee Merrick Garland's analysis.<sup>61</sup>

The consequences are bleak. The radical inaction since 2015 means that the judiciary has twenty circuit, and forty-nine emergency, openings.<sup>62</sup> The courts of appeals could only have the "few" vacant posts *after* Democrats marshaled the nuclear option that constricted filibusters.<sup>63</sup> Recent inactivity, however, multiplied open seats and emergencies by 2017, four involving the Ninth Circuit, partly because two judges assumed senior status upon last year's end.<sup>64</sup>

Delayed court approvals have critical adverse impacts.<sup>65</sup> They make nominees leave careers on hold and prevent many

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& PUB. POL'Y 1035 (2009).

60. See *supra* notes 15–16 and accompanying text (describing GOP obstruction).

61. The latest began with claims that Democrats stalled during President Bush's last two years and Republicans retaliated with unprecedented delay in President Obama's time. Democrats then detonated the nuclear option to swiftly confirm many judges in 2014. The GOP next drastically slowed all nominees and detonated the nuclear option for Supreme Court nominees. See *supra* text accompanying notes 31, 33–58 (describing obstruction throughout Obama's presidency which resulted in unprecedented numbers of vacancies over a protracted time); Matt Flegenheimer, *Republicans Gut Filibuster Rule to Lift Gorsuch*, Apr. 7, 2017, at A1.

62. The latter skyrocketed from twelve to forty-nine. *Archive of Judicial Vacancies: Year 2017*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); see Wheeler, *supra* note 56 (describing the Thurmond Rule); Joe Palazzolo, *Obama's Successor Will Likely Fill Dozens of Judicial Vacancies*, WALL STREET J. (Mar. 18, 2016), <https://www.wsj.com/articles/obamas-successor-will-likely-fill-dozens-of-judicial-vacancies-1458340351> (last visited Apr. 19, 2017) ("The winner of the 2016 presidential election will likely come into an early opportunity to make an immediate impact on the federal bench . . .") (on file with the Washington and Lee Law Review).

63. See *supra* notes 41–42 and accompanying text (explaining the Democrats' detonation of the nuclear option to expeditiously move nominees through the confirmation process).

64. They were Judge Diarmuid O'Scannlain and Judge William Clifton. *Archive of Judicial Vacancies: Year 2017*, *supra* note 62.

65. Tobias, *supra* note 33, at 2253; Leahy statement, *supra* note 42.

talented candidates from envisioning the bench.<sup>66</sup> Interminable reviews deprive tribunals of necessary judicial resources and myriad litigants of justice.<sup>67</sup> These detrimental effects also undermine citizen regard for the selection procedures and the government branches.<sup>68</sup> Few circuits address challenges so daunting as the Ninth, which confronts the greatest appeals that consume the most protracted time.<sup>69</sup>

In sum, this analysis reveals the degraded nature of the circuit appointments process, which President Trump's signals might compound, and the need for prompt action. First, the Senate has a constitutional duty. Major precedent, which supports appellate confirmations generally and even near a presidency's end, must apply.<sup>70</sup> Replacing Justice Scalia seemingly delayed work on the Ninth Circuit vacancies. Limited cooperation between Republicans and Democrats when addressing the Court opening should have meant that the senators had plentiful time for approving Ninth Circuit judges, and had both parties collaborated to appoint a Justice, especially in 2016, they might easily confirm four Ninth Circuit aspirants this year.<sup>71</sup> If the parties are able to coordinate in scrutinizing

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66. Andrew Cohen, *In Pennsylvania, the Human Costs of 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 Apr. 19, 2017) (on file with the Washington and Lee Law Review); Palazzolo, *supra* note 62.

67. JOHN ROBERTS, YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2010); Tobias, *supra* note 33, 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 visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

68. Tobias, *supra* note 33, at 2253.

69. TABLE B-4D—U.S. COURTS OF APPEALS JUDICIAL BUSINESS (Sept. 30, 2016), [http://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_b4d\\_0930.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/jb_b4d_0930.2016.pdf). Senior judges have been invaluable to Ninth Circuit efforts to resolve substantial caseloads, but a number of these jurists died or retired in the last decade. Carol J. 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 Apr. 19, 2017) (on file with the Washington and Lee Law Review).

70. See *supra* text accompanying notes 57–58 (observing that confirmations are easier to attain at a presidency's beginning than end).

71. Mike DeBonis, *100 Days Later, White House Isn't Giving Up on Replacing Antonin Scalia*, WASH. POST, (May 25, 2016)



able, mainstream court of appeals nominees who resemble a multitude felicitously canvassed and elevated in prior years, they can efficaciously approve jurists.<sup>72</sup> Finally, the tribunal needs a full judicial complement to speedily, inexpensively, and equitably conclude the largest appeals.<sup>73</sup>

## V. Suggestions for Filling the Vacancies

### A. General Ideas

#### 1. The Nomination Process

President Trump's first priority has been creating a government. Insofar as time has existed for work on court appointments, considerable initiative was devoted to the Supreme Court endeavor.<sup>74</sup> The President afforded comments about the type of judges he might nominate when campaigning, but the ideas may have been election-year rhetoric or directed at the High Court instead of the appellate courts.<sup>75</sup> President Trump lacks experience with selection as compared to President George W. Bush, who had approved plentiful state court jurists when Texas' Governor, and President Obama, who labored on

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[https://www.washingtonpost.com/news/powerpost/wp/2016/05/25/a-hundred-days-later-white-house-isnt-giving-up-on-replacing-antonin-scalia/?utm\\_term=.3d1325a6e50f](https://www.washingtonpost.com/news/powerpost/wp/2016/05/25/a-hundred-days-later-white-house-isnt-giving-up-on-replacing-antonin-scalia/?utm_term=.3d1325a6e50f) (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review). For example, in the 1988 presidential election year, the Senate approved Justice Kennedy and six circuit picks. *Supra* notes 28, 58, 70.

72. For elevation of judges from district to appellate courts, see Tobias, *supra* note 33, at 2258; *infra* notes 89–92.

73. See *supra* text accompanying notes 24–25, 69 (describing the enormous Ninth Circuit docket and the substantial backlog of cases).

74. Press Release, White House, Office of Press Sec'y, President Trump Nominates Judge Neil Gorsuch to Supreme Court (Jan. 31, 2017); see Adam Liptak, *Gorsuch Clinched Spot After a Lengthy Process*, N.Y. TIMES, Feb. 7, 2017, at A15 (discussing Judge Gorsuch's nomination process).

75. Shane Goldmacher et al., *How Trump Got to Yes on Gorsuch*, POLITICO (Jan. 31, 2017), <http://www.politico.com/story/2017/01/trump-supreme-court-gorsuch-234474> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); Liptak, *supra* note 74; see Press Release, White House, Office of Press Sec'y, Doing What He Said He Would Do: President Trump's Transparent, Principled and Consistent Process for Choosing a Supreme Court Nominee (Jan. 31, 2017).

confirmations when he served as a member of the U.S. Senate.<sup>76</sup> The new President's limited familiarity with judges and courts generally and selection particularly might explain his comments and specific White House perspectives. In fairness, however, the current administration remains nascent with many complex assignments to complete, although a number of conclusions may be derived from early actions.<sup>77</sup>

The recent Supreme Court nomination process affords certain insights about circuit appointments.<sup>78</sup> The measures for designating a nominee appeared comparatively effective and the result secured was concomitantly defensible, given time restraints and other crucial White House demands. Assessors might criticize as inappropriate outsourcing the chief executive's putative reliance on the Federalist Society and the Heritage Foundation in compiling the list of twenty-one aspirants from whom the chief executive tapped, yet President George W. Bush applied comparable practices.<sup>79</sup>

Very little information exists on appellate selection in part because the Supreme Court vacancy preoccupied numerous salient participants;; the White House and Justice Department, which have chief responsibility, fulfilled other monumental

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76. E.g., Carl Tobias, *Filling the Texas Federal Court Vacancies*, 95 TEX. L. REV. \_\_ (manuscript at 5) (forthcoming 2017) ("Each Bush named many state court judges.") (on file with author); Gregory Korte, *With The Tables Turned, Obama Now 'Regrets' His 2006 Alito Filibuster*, USA TODAY (Feb. 17, 2016), <http://www.usatoday.com/story/news/politics/2016/02/17/obama-now-regrets-his-2006-alito-filibuster-white-house-says/80514152/> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

77. The presidency is too new and not enough hard data exist to posit definitive conclusions. Trump has proposed merely one circuit nomination and has yet to proffer more appellate nominations, even though the Senate has completed its consideration of Justice Gorsuch. Comparatively few home state officials have apparently recommended picks, and the White House, the Justice Department, and senators have said little publicly about the circuit processes which they are deploying.

78. I rely here and in this paragraph's remainder on sources cited *supra* notes 74–75, *infra* note 87.

79. Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER, Apr. 17, 2017, at 24; Jason DeParle, *Debating the Subtle Sway of the Federalist Society*, N.Y. TIMES (Aug. 1, 2005), [http://www.nytimes.com/2005/08/01/politics/politicsspecial1/debating-the-subtle-sway-of-the-federalist.html?\\_r=0](http://www.nytimes.com/2005/08/01/politics/politicsspecial1/debating-the-subtle-sway-of-the-federalist.html?_r=0) (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); see *infra* note 87.

duties;; and home state politicians were helping create a new government and may have been waiting on the executive. Some ideas can be extracted from recent Texas appellate vacancy initiatives.<sup>80</sup> Exceptionally conservative ideological views are the principal characteristic which unites the six people President Trump supposedly asked the Texas Judicial Evaluation Commission to investigate.

A few early White House actions inspire nominal confidence. President Trump's derogatory, misguided public statements regarding jurists, tribunals, and court opinions, as well as certain legal arguments enunciated by the Justice Department, have been problematic. For example, when Judge James Robart decided to impose a temporary restraining order upon the U.S. travel ban, which President Trump considered wrong, he denigrated the respected jurist as a "so-called judge."<sup>81</sup> Prior and subsequent to the Ninth Circuit panel's affirmation of the district court order, President Trump explicitly remarked that the jurists and their determinations were "so political."<sup>82</sup> He later

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80. I rely here and below on John Council, *6 Candidates Trump Wants to Place on the Fifth Circuit Set for Vetting*, TEX. LAWYER (Feb. 14, 2017), <http://www.texaslawyer.com/id=1202779124278/6-Candidates-Trump-Wants-to-Place-on-the-Fifth-Circuit-Set-for-Vetting?slreturn=20170229154845> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); Ken Klukowski, *Texas Republicans Hail Judicial Hopefuls to Fulfill Trump Promise*, BREITBART (Feb. 23, 2017), <http://www.breitbart.com/big-government/2017/02/23/exclusive-texas-republicans-hail-judicial-hopefuls-fulfill-trump-promise/> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review). See generally Tobias, *supra* note 76 (discussing the federal court vacancies in Texas).

81. David Cole, *'So-Called Judges' Trump Trump*, WASH. POST (Feb. 10, 2017), [https://www.washingtonpost.com/opinions/so-called-judges-trump-trump/2017/02/10/573fd1c8-ef42-11e6-b4ff-ac2cf509efe5\\_story.html?utm\\_term=.1386627acf03](https://www.washingtonpost.com/opinions/so-called-judges-trump-trump/2017/02/10/573fd1c8-ef42-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.1386627acf03) (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); Julie Hirschfeld Davis, *Court Pick Says Trump's Critique of Judiciary is 'Demoralizing'*, N.Y. TIMES, Feb. 9, 2017, at A1. But see Jonathan Turley, *Trump's Abuse of Judges is Perfectly Presidential*, USA TODAY (Feb. 23, 2017), <http://www.usatoday.com/story/opinion/2017/02/23/so-called-judge-robart-trump-twitter-judges-jonathan-turley-column/97824926/> (last visited Apr. 19, 2017) ("[President Trump's statement] was not only relatively mild for Trump but positively tame in comparison with past conflicts between Presidents and judges.") (on file with the Washington and Lee Law Review).

82. Robert Barnes, *Trump Suggests Only Politics Could Lead Court to Rule Against His Immigration Order*, WASH. POST (Feb. 8, 2017),

mistakenly castigated the appeals court by alleging “that circuit [is] frankly in turmoil,” and the federal government had to react expeditiously “because of the bad decision we received from a circuit that has been overturned at a record number,” dismissive retorts which might dramatically reignite counterproductive activities to split the Ninth Circuit.<sup>83</sup> The Justice Department made the remarkable assertion that federal judges could not directly review the President’s authority to issue the executive order governing immigration, a contention which the appellate court distinctly rejected.<sup>84</sup>

These actions suggest President Trump may confront somewhat greater difficulty approving jurists than other new

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[https://www.washingtonpost.com/world/national-security/in-their-courtrooms-theyre-protected-by-people-like-me-dhs-secretary-weighs-in-on-legal-dispute-over-trump-ban/2017/02/07/5e37fc4e-ed4e-11e6-9662-6eedf1627882\\_story.html?utm\\_term=.a5180967d8f3](https://www.washingtonpost.com/world/national-security/in-their-courtrooms-theyre-protected-by-people-like-me-dhs-secretary-weighs-in-on-legal-dispute-over-trump-ban/2017/02/07/5e37fc4e-ed4e-11e6-9662-6eedf1627882_story.html?utm_term=.a5180967d8f3) (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); see Sai Prakash & John Yoo, *Trump’s ‘So-Called’ Judgment*, WALL STREET J., Feb. 13, 2017, at A15; *infra* note 130 (detailing President Trump’s criticism of Judge Gonzalo Curiel that presaged the recent attacks).

83. *Full Transcript and Video: Trump News Conference*, N.Y. TIMES (Feb. 16, 2017), <https://www.nytimes.com/2017/02/16/us/politics/donald-trump-press-conference-transcript.html> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); see Bob Egelko, *Trump May Reopen Debate on Splitting Ninth Circuit in SF*, SAN FRANCISCO CHRON. (Feb. 18, 2017), <http://www.sfgate.com/nation/article/Trump-attack-may-reopen-debate-on-splitting-Ninth-10943304.php> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review). For the most recent attack, see Press Release, White House, Office of the Press Sec’y, Statement on Sanctuary Cities Ruling (Apr. 25, 2017). Even were his data accurate, they mean little, as the Supreme Court hears so few cases. Adam Feldman, *Evaluating Speculation That the Ninth Circuit is the Lower Court SCOTUS Overturns the Most*, EMPIRICAL SCOTUS (Feb. 27, 2017), <https://empiricalsctus.com/2017/02/27/evaluating-speculation-ninth-circuit/> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review). The circuit is also very efficient and transparent. Egelko, *supra*; see also Ariane de Vogue, *Trump Considering Proposals to Break up the 9th Circuit*, CNN, <http://www.cnn.com/2017/04/26/politics/9th-circuit-what-to-know/index.html> (last updated Apr. 26, 2017) (last visited Apr. 30, 2017) (on file with the Washington and Lee Law Review); Peter Baker, *Defiant Trump Vows to Take Immigration Case to Supreme Court*, N.Y. TIMES (Apr. 26, 2017), [https://www.nytimes.com/2017/04/26/us/politics/trump-immigration-courts-california.html?\\_r=0](https://www.nytimes.com/2017/04/26/us/politics/trump-immigration-courts-california.html?_r=0) (last visited Apr. 30, 2017) (on file with the Washington and Lee Law Review).

84. Order at 13–18, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 9, 2017); see Cole, *supra* note 81; Adam Liptak, *Justice Dept. Drops Travel Ban Case, But Says a New Order is Coming*, N.Y. TIMES, Feb. 17, 2017, at A16.

Presidents, but he can easily ameliorate the situation. Because creating the government and filling the Court vacancy have demanded much time, the White House needs to identify essential appointments priorities. For instance, the Administrative Office of the U.S. Courts categorizes open slots as emergencies based on conservative work and case load projections, which show vacancies warranting priority.<sup>85</sup> President Trump also ought to keep in mind that re-nominating and confirming several able, consensus Obama nominees who almost captured approval, especially District Judge Lucy Koh, will actually preserve scarce resources, which must be dedicated to restarting the process, cultivate Democrats, and quickly fill the Ninth Circuit openings.<sup>86</sup>

The Federalist Society and the Heritage Foundation correspondingly appeared to help Mr. Trump compile the list of twenty-one aspirants from whom the candidate pledged to nominate a Supreme Court pick, and they will continue supplying advice on circuit vacancies.<sup>87</sup> Most Presidents seek ideas and candidates from public servants who had previous selection responsibilities and conventional outlets, notably myriad particular lawyers, the ABA, and concomitant state and local bars.<sup>88</sup> Administrations correspondingly pursue efficacious input

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85. *Judicial Emergency Definition*, *supra* note 1.

86. *E.g.*, Carl Tobias, *Confirm Judge Koh for the Ninth Circuit*, 73 WASH. & LEE L. REV. ONLINE 449 (2016); *see* sources cited *supra* note 57 (describing the difficulty in confirming judges during presidential election years); *infra* notes 126-127 (discussing Koh's nomination and confirmation processes).

87. *See* sources cited *supra* notes 74-75, 79 (addressing President Trump's process for nominee selection); *see also* Jeffrey Toobin, *The Supreme Court After Scalia*, NEW YORKER (Oct. 3, 2016), <http://www.newyorker.com/magazine/2016/10/03/in-the-balance> (last visited Apr. 19, 2017) (detailing Justice Scalia's impact on the Supreme Court and the potential ramifications) (on file with the Washington and Lee Law Review); Kyle Peterson, *Trump's Supreme Court Whisperer*, WALL STREET J. (Feb. 3, 2017), <https://www.wsj.com/articles/trumps-supreme-court-whisperer-1486165573> (last visited Apr. 19, 2017) (explaining the decisions made behind the scenes that led to Judge Gorsuch's selection) (on file with the Washington and Lee Law Review); Eric Lipton & Jeremy Peters, *Conservatives Press Overhaul in the Judiciary*, N.Y. TIMES, Mar. 13, 2017, at A1 (describing the Federalist Society's influence generally on Republican Presidents' judicial selections and on Justice Neil Gorsuch's nomination).

88. Goldman et al., *supra* note 33, at 19-20; Tobias, *supra* note 33, at 2239-40. Unfortunately, President Trump eschewed ABA input through

from less traditional sources, namely ethnic minority, female, lesbian, gay, bisexual, and transgender individuals and entities. The White House can and ought to carefully approach those persons and committees.

President Trump should also contemplate notions which proved salutary for prior administrations. One is elevating current federal and state court judges, particularly federal district jurists and state High Court Justices.<sup>89</sup> That avenue is constructive, as the chamber has already canvassed and confirmed federal judges, who have much pertinent expertise and comprehensive, fine, accessible records.<sup>90</sup> This scrutiny decidedly facilitates primary constituents of Senate assessments, notably ABA consideration, candidate ratings, and FBI background checks. Plentiful state justices' work directly resembles that of federal appeals court jurists.<sup>91</sup> Other possible sources would be attorneys involved with federal circuit and district cases.<sup>92</sup>

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evaluations and ratings prior to nominations. This decision is a mistake, because the ABA assessments and ratings are very professional, afford valuable insights, and can save the candidates and the administration from embarrassment, should problematic revelations arise subsequently in the process. Mike Zubrensky, *Trump, Lower Court Nominees Need American Bar Association Review*, THE HILL (Apr. 25, 2017), <http://thehill.com/blogs/pundits-blog/the-judiciary/330414-trump-lower-court-nominees-need-non-partisan-american-bar> (last visited Apr. 30, 2017) (on file with the Washington and Lee Law Review). The administration may also want to remember that the ABA accorded Chief Justice John Roberts and Associate Justices Samuel Alito and Gorsuch its highest rating. Adam Liptak, *White House Cuts ABA Out of Judge Evaluations*, N.Y. TIMES, Apr. 1, 2017, at A16.

89. See generally Elisha C. Savchak et al., *Taking it to the Next Level: The Elevation of District Court Judges to the U.S. Courts of Appeals*, 50 AM. J. OF POL. SCI. 478 (2006); Tobias, *supra* note 33, at 2243–46.

90. See, e.g., Press Release, White House, Office of Press Sec'y, President Obama Nominates Judge Mary Murguia to the U.S. Court of Appeals (Mar. 25, 2010); *id.*, President Obama Nominates Judge Jacqueline Nguyen to the U.S. Court of Appeals (Sept. 22, 2011); 156 CONG. REC. S10,986 (daily ed. Dec. 22, 2010) (regarding the Murguia confirmation); 158 CONG. REC. S1677 (daily ed. May, 14, 2012) (regarding the Nguyen confirmation).

91. See, e.g., Press Release, White House, Office of Press Sec'y, President Obama Nominates Justice Morgan Christen to the U.S. Court of Appeals (May 18, 2011); Press Release, White House, Office of Press Sec'y, President Obama Nominates Justice Andrew Hurwitz to the U.S. Court of Appeals (Nov. 2, 2011); 157 CONG. REC. S8625 (daily ed. Dec. 15, 2011) (regarding Judge Christen's confirmation); 158 CONG. REC. S4108 (daily ed. June 12, 2012) (regarding Judge Hurwitz's confirmation).

92. See, e.g., Press Release, White House, Office of Press Sec'y, President

Modern chief executives have located responsibility for appellate confirmations and nominations in the White House Counsel Office with help, mainly when preparing specific nominees for the appointments process, supplemented by the Department of Justice Office of Legal Policy (OLP).<sup>93</sup> President Trump must grant tribunal selection considerable priority and allocate sufficient resources to clearly expedite nominations and confirmations by, for instance, promoting ABA and FBI canvasses and concerted White House selection efforts.

Presidents actively consult home state politicians, seeking proposals of a few well-qualified, mainstream choices for all openings.<sup>94</sup> Vigorous consultation helps in states with empty posts, which have two senators from the party lacking White House control—as is true for California, Hawaii, and Oregon—because they could stop any processing through not delivering blue slips. Each party's leaders from home states must be responsive to White House overtures, cooperate in good faith, and promptly denominate several exceptional, consensus aspirants for President Trump's consideration by indicating preferences and cogent reasons for them.

The administration ought to cautiously and speedily evaluate the lawmakers' input, present them lingering questions, diligently reconcile substantial differences which remain, and choose a nominee who proves satisfactory for President Trump and the members. The White House needs to maximize transparency consistent with privacy of all concerned and secure the finest disposition. The politicians should pursue clear and equitable resolution.

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Obama Nominates Paul Watford to the U.S. Court of Appeals (Oct. 17, 2011); Press Release, White House, Office of Press Sec'y, President Obama Nominates Michelle Friedland to the U.S. Court of Appeals (Aug. 1, 2013); 158 CONG. REC. S3388 (daily ed. May 21, 2012) (regarding Judge Watford confirmation); 160 CONG. REC. S2426 (daily ed. Apr. 28, 2014) (regarding Judge Friedland's confirmation); *see infra* note 133. Other prospects may be state intermediate appellate and trial judges and counsel, but federal court experience would be more applicable to Ninth Circuit service.

93. *See* Goldman et al., *supra* note 33, at 14–16; Tobias, *supra* note 33, at 2239.

94. Presidents assume the lead. They and senators deem circuit selection critical. Circuits encompass multiple states, are courts of last resort for ninety-nine percent of cases in specific regions, and treat complex, essential issues. Tobias, *supra* note 33, at 2240–41.

President Trump concomitantly ought to inform the senators about the possible nominee, so the politicians can express why they deem the nominee objectionable. Recommending a few candidates and swift, open communications will give the President and legislators considerable flexibility and decrease surprise. If the politicians keep opposing someone President Trump proffers, they must attempt to effectively resolve crucial disagreements, so all could identify a preferred approach. Continued objection and blue slip retention often fosters embarrassment, delay, cost, and the necessity to restart the process, which can materialize and devour scarce resources.<sup>95</sup>

## 2. The Confirmation Process

Once the President nominates, Judiciary Committee Democrats and Republicans should collaborate to insure quick, thorough, and fair confirmation processes. The specific parties' staffs must astutely conduct prompt, systematic, and equitable investigation partly by helping expedite ABA and FBI consideration, and the nominee should cooperate with these individuals and entities by, for instance, comprehensively and directly completing the panel questionnaire.<sup>96</sup>

Home state politicians must retain blue slips when they actually conclude that a nominee proves unacceptable *after* exhausting initiatives meant to have the chief executive alter the nomination's course. The touchstone should be merit, defined vis-à-vis remarkable independence, ethics, intelligence, diligence, and balanced judicial temperament. The choice recommended ought to possess, although senators need to ensure that the

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95. These ideas suggest why proffering multiple candidates is usually preferable to suggesting one.

96. President Trump's executive nominees experienced considerable difficulty finishing questionnaires or ethics reports, while some nominees even withdrew. Ylan Mui & Ed O' Keefe, *Treasury Nominee Initially Omitted More Than \$100 Million from Disclosures, Democratic Memo Says*, WASH. POST (Jan. 19, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/01/19/treasury-nominee-initially-omitted-more-than-100-million-from-disclosures-democratic-memo-shows/?utm\\_term=.ca33e8d5b388](https://www.washingtonpost.com/news/wonk/wp/2017/01/19/treasury-nominee-initially-omitted-more-than-100-million-from-disclosures-democratic-memo-shows/?utm_term=.ca33e8d5b388) (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); Alan Rappeport, *Issues of Riches, Trip up Picks, But Few, If Any, May Be Denied*, N.Y. TIMES, Jan. 20, 2017, at A1.



candidate in fact has: (1) views within the mainstream of U.S. jurisprudence, defined as not too ideologically conservative or liberal; (2) abundant respect for High Court precedent and many state and federal legislative and executive branch concerns; and (3) no prejudgments about the critical matters to be decided.

After the lawmakers return blue slips for a nominee who clearly possesses these attributes, the committee must speedily arrange a hearing. When the nominee is very capable, moderate, and not controversial, and the corresponding ABA, FBI and committee evaluations have been thorough and fair while yielding unproblematic conclusions, relatively few politicians attend the hearing which often smoothly proceeds.<sup>97</sup> If controversy does arise, the session ought to promote robust, complete, and equitable questioning. The hearing chair ordinarily instructs members that they have seven days in which to tender written queries which are normally direct, comprehensive, rigorous, and fair, while the prospect swiftly, completely, and cautiously answers those questions.

A few weeks later, the panel convenes an executive business meeting in which senators comprehensively and equitably discuss questions regarding the nominee and vote. If the committee approves the choice, but the minority party filibusters, the nominee's advocates should pursue cloture, which accomplished, mainstream nominees ordinarily capture.<sup>98</sup> After the selection comes to the floor, the Majority Leader needs to promptly arrange a chamber debate and ballot. McConnell should encourage complete, robust discussion that respects the nominee, the process, and colleagues. Following this Senate debate, legislators rapidly vote.

At the outset, Democrats will confront, and must carefully address, a conundrum: whether to retaliate for the unprecedented GOP denial of any consideration to Judge Garland, party rejection of Judge Koh's Senate ballot, and the limited canvass

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97. Third Circuit Judge Felipe Restrepo's hearing was illustrative. Relatively few members attended, the queries were rather perfunctory, and the nominee easily fielded them. S. Judiciary Comm., *Hearing on Judicial Nominees* (June 10, 2015); see Carl Tobias, *Confirming Judge Restrepo to the Third Circuit*, 88 TEMPLE L. REV. ONLINE 37, 43, 45–46 (2017) (emphasizing Restrepo's smooth hearing).

98. See, e.g., Tobias, *supra* note 33, at 2244–46; see *supra* note 39.

provided six other able, consensus appeals court nominees whom President Obama tapped last year.<sup>99</sup> Democrats ought to resist that temptation at least initially, especially if President Trump's picks comprise excellent, moderate nominees, because matching GOP obstruction will accelerate the process' unproductive downward spiral. Full collaboration with President Trump and Republican politicians could also facilitate confirmations, and the Ninth Circuit must have all its judges to supply justice.

Democrats ought to completely and equitably query nominees in hearings, pose rigorous questions, and comprehensively explore many qualifications across committee and floor discussions. If they have serious concerns regarding ability, ethics, or temperament, or detect that nominees retain perspectives beyond the jurisprudential mainstream, Democrats should ventilate criticisms, be receptive to persuasive GOP arguments while treating the contentions and vote no on candidates when unsatisfied.

### *B. Specific Vacancies*

The four Ninth Circuit judges who assumed senior status were confirmed from, and maintain chambers in, Arizona, California, Hawaii, and Oregon. Contemporary administrations honor the custom of nominating prospects from the states where the openings arise.<sup>100</sup> Presidents do so because lawmakers jealously guard their prerogatives to sustain this remnant of unalloyed patronage.<sup>101</sup>

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99. None of the seven appellate court nominees received a floor vote and four had no hearing. Tobias, *supra* note 57; sources *supra* note 86; *infra* notes 119–128.

100. For two exceptions, see Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2174 (2011) (filling a South Carolina seat with a North Carolina nominee); *supra* note 31 (describing dispute over Judge Stephen Trott's seat).

101. All of the states which comprise each circuit must have at least one active jurist. This means that a Hawaiian will replace Judge Clifton. 28 U.S.C. § 44 (c) (2012).

*1. Arizona*

The White House should persistently consult Senators John McCain (R) and Jeff Flake (R) and preferably the state's Democratic political leader, who need to cooperate with one another by submitting people for President Trump's consideration. The administration ought to evince solicitude for the Republican officials, because they have voiced more criticism of White House initiatives, and exercised greater independence, than numerous GOP members.<sup>102</sup>

The politicians should employ a few pertinent sources for prospects, while considerable in state precedent favors nominee elevation, as President Obama confirmed Arizona District Court Judge Mary Murguia and Arizona Supreme Court Justice Andrew Hurwitz to the Ninth Circuit.<sup>103</sup> Peculiarly relevant would be the six fine, mainstream, diverse trial level possibilities whom both Republican lawmakers designated and were confirmed in 2014.<sup>104</sup> The jurists have served adequate periods to compile easily-located records, which, in fact, supplement their already consummate expertise. For instance, practically all had judicial experience when confirmed. Thus, useful information about competence, ethics, temperament, and decisionmaking could now be readily available.

More specifically, Judge Diane Humetewa carefully worked—over thirteen years with the U.S. Attorney Office—on questions central to Indian Law and federal practice, which culminated with her acclaimed confirmation to be U.S. Attorney, capably serving Bush primarily at McCain's behest.<sup>105</sup> She

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102. *E.g.*, Carl Hulse, *Trump's Next Battle: Keeping These Republicans Happy*, N.Y. TIMES, Nov. 27, 2016, at A20; Alan Rappeport et al., *Some Senators in GOP Feel Trump's Wrath*, N.Y. TIMES, July 8, 2016, at A1.

103. *See supra* notes 86, 89-91 and accompanying text (providing an example of possible elevation and elevation's benefits).

104. *See generally* Press Release, White House, Office of Press Sec'y, President Obama Nominates 8 for the District Courts (Sept. 19, 2013); Carl Tobias, *Filling the District of Arizona Vacancies*, 56 ARIZ. L. REV. SYLLABUS 4 (2014).

105. *See sources cited supra* note 104; Press Release, DOJ, Diane J. Humetewa Sworn in as United States Attorney (Dec. 8, 2007), [https://web.archive.org/web/20080520010135/http://www.justice.gov/usao/az/press\\_releases/2007/2007-255%20%28Humetewa%29.pdf](https://web.archive.org/web/20080520010135/http://www.justice.gov/usao/az/press_releases/2007/2007-255%20%28Humetewa%29.pdf); John McCain & Jeff Flake, *Federal Judge Diane Humetewa*, 40 HUM. RIGHTS 22 (2015).

correspondingly was the first Native American woman to hold a federal court post; thus, Humetewa's elevation will increase diversity and both legislators would strongly promote her candidacy.<sup>106</sup> Among the 2014 confirmees, Judge Steven Logan had been a well-regarded U.S. Magistrate Judge prior to nomination, while Judge Alan Soto was a prominent state trial court jurist.<sup>107</sup>

The four Arizona District judges whom President George W. Bush confirmed upon the proposal of McCain and John Kyl (R-Az.) have assembled comprehensive, accessible records with substantial experience for a decade serving on the tribunal. Judge Cindy Jorgenson was a respected federal prosecutor for ten years and a state trial judge for six.<sup>108</sup> Judge David Campbell ably clerked at the Ninth Circuit and the Supreme Court, practiced many years with a strong Arizona firm, and chaired the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure.<sup>109</sup> Judge Neil Wake had skillfully practiced over three decades and capably administered the court as chief judge.<sup>110</sup>

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106. See sources cited *supra* notes 104–105 (showing McCain and Flake's avid support for Humetewa for the district bench).

107. Dan Nowicki, *Obama Nominates Santa Cruz Judge for Ariz. U.S. District Court*, ARIZ. REPUB. (Dec. 18, 2013), <http://archive.azcentral.com/news/politics/articles/20131219obama-nominates-santa-cruz-judge-district-court-arizona.html> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); Alia Rau, *Second Ruling in 2 Days Against Abortion Laws*, ARIZ. REPUB. (Oct. 16, 2015), <http://www.azcentral.com/story/news/arizona/politics/2015/10/16/judge-freezes-arizona-abortion-reversal-law/74079464/> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); see sources cited *supra* note 104 (describing the 2014 district appointees).

108. *Biographical Directory of Federal Judges, 1798–Present*, FED. JUD. CTR. (2017), <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Apr. 19, 2017) [hereinafter *Directory*] (on file with the Washington and Lee Law Review); see generally Dillon Fishman, *Judicial Profile: Hon. Cindy K. Jorgenson, U.S. District Judge, District of Arizona*, 63 FED. LAWYER 21 (2014).

109. *Directory*, *supra* note 108; Zoe Tillman, 'Informed By What I Am': Judges Talk Obligation to Faith, Duty and the Law, LAW.COM, (Sept. 30, 2016), <http://www.law.com/sites/almstaff/2016/09/28/informed-by-what-i-am-judges-talk-faith-duty-and-the-law/> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

110. *Directory*, *supra* note 108; Chris Geidner, *Arizona Enlists Major Law Firm to Import Execution Drugs from India*, BUZZFEED NEWS (Jan. 28, 2016), [https://www.buzzfeed.com/chrisdaniel/arizona-enlists-major-law-firm-to-import-execution-drugs-fro?utm\\_term=.gp8LQn9ga6#.prMye1RQZP](https://www.buzzfeed.com/chrisdaniel/arizona-enlists-major-law-firm-to-import-execution-drugs-fro?utm_term=.gp8LQn9ga6#.prMye1RQZP) (last visited

Judge Murray Snow, who joined the federal bench in 2008, was a preeminent Arizona Court of Appeals Judge for six years, while he professionally oversaw novel litigation encompassing controversial activities of Maricopa County Sheriff Joe Arpaio.<sup>111</sup>

Related promising outlets would be federal circuit and trial court lawyers and the Arizona Supreme Court. For instance, prominent Arizona Ninth Circuit Judges Mary Schroeder and Michael Daly Hawkins constituted well-regarded practitioners at nomination,<sup>112</sup> while Chief Justice Scott Bales and Vice Chief Justice John Pelander have been valuable Arizona High Court members for numerous years.<sup>113</sup>

Once the senators do agree, they might present several prioritized suggestions with full explanations of the potential nominee rankings. The White House, in turn, must carefully and expeditiously canvass those notions while selecting a person who satisfies President Trump and the legislators. The President should inform the officers about the prospect being considered, which enables the senators to identify a pick they may oppose and cogently explain why. If one does resist after frank discussions, both should keep negotiating and reach a preferred solution.<sup>114</sup> When all concur, they must cooperate with each other

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Apr. 19, 2017) (on file with the Washington and Lee Law Review).

111. *Directory*, *supra* note 108; Michael Kiefer, *A Look at Arpaio's Judge*, ARIZ. REPUB., June 6, 2015, at A6.

112. Judge Schroeder practiced with the Lewis & Roca law firm; Judge Hawkins practiced with a few firms before and after 1977–1980 service as U.S. Attorney. *Directory*, *supra* note 108; Jason Hoppin, *Schroeder Will Lead 9th Circuit*, THE RECORDER, Aug. 15, 2000; Betsy Russell, *9th Circuit Skeptical in Idaho Case Challenging NSA Cell Phone Surveillance*, SPOKESMAN REV. (Dec. 8, 2014), <http://www.spokesman.com/stories/2014/dec/08/9th-circuit-judges-skeptical-idaho-case-challengin/> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

113. Howard Fischer, *Newest AZ Supreme Court Justice Likens Role to Umpire's Task*, TUCSON.COM (Aug. 16, 2009), [http://tucson.com/news/national/newest-az-supreme-court-justice-likens-role-to-umpire-s/article\\_912f0ac6-ef77-5827-8070-82f794de2d36.html](http://tucson.com/news/national/newest-az-supreme-court-justice-likens-role-to-umpire-s/article_912f0ac6-ef77-5827-8070-82f794de2d36.html) (last visited Apr. 21, 2017) (on file with the Washington and Lee Law Review); Jon Kamman & Billy House, *Justice O'Connor Retires*, ARIZ. REPUB. (July 2, 2005), <http://archive.azcentral.com/specials/special47/articles/0702oconnor-legacy.html> (last visited Apr. 21, 2017) (on file with the Washington and Lee Law Review).

114. These measures provide flexibility while restricting embarrassment, expense, and delay by obviating the need to restart, if President Trump differs with a single choice tendered. *Supra* note 95.

and the politicians' colleagues to insure a swift, thorough and fair confirmation process. Little else specific to Arizona can be provided until the White House nominates, but the general ideas explored would apply.<sup>115</sup>

## 2. California

President Trump must vigorously consult Senators Dianne Feinstein (D) and Kamala Harris (D) and probably the state's leading Republican, who ought to collaborate by agreeing on a few impressive, consensus designees for presidential analysis. Feinstein has tendered valuable, lengthy Judiciary Committee service, working efficaciously with GOP lawmakers, and is now the Ranking Member.<sup>116</sup> For example, Senator Feinstein helped disputed Bush nominees, including Circuit Judges Brett Kavanaugh, William Pryor, and Leslie Southwick, when they captured panel and chamber approval, which should endear her to opposition colleagues.<sup>117</sup>

Feinstein and Harris initially must carefully ask that the President re-nominate District Judge Lucy Koh, who earned February 2016 nomination on the recommendation of Feinstein and Barbara Boxer (D). She was a dynamic, mainstream nominee, who marshaled a bipartisan committee vote. This possibility would also save precious, scarce time by not having to recommence the designation process. Swiftly filling the open post

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115. See *supra* Part IV.A.2. Critical will be swift, full, respectful, dignified, and robust committee review and prompt, fair, and complete panel and chamber discussions regarding nominee qualifications.

116. Michael Doyle, *What's Ahead for West's Liberal Appeals Court, Once Trump Takes Over?*, SACRAMENTO BEE (Nov. 23, 2016), <http://www.sacbee.com/news/article116777848.html> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); see Bob Egelko, *Feinstein, Harris Will Have Some Pull on Federal Judge Picks*, SAN FRANCISCO CHRON. (Dec. 31, 2016), <http://www.sfchronicle.com/news/article/Feinstein-Harris-will-have-some-pull-on-federal-10828126.php> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

117. 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 Apr. 19, 2017) (on file with the Washington and Lee Law Review); Sheryl Gay Stolberg, *Avoiding Clash, Senate Sends Judicial Nomination to Floor*, N.Y. TIMES, May 26, 2006, at A18.

is essential for many litigants, Ninth Circuit jurists, and California active circuit judge representation.<sup>118</sup>

President Trump must diligently assess re-nominating Judge Koh.<sup>119</sup> Across six years in California's Northern District, the jurist has enjoyed a fine reputation for astutely deciding complex issues, especially of intellectual property, expertise the tribunal requires. She is a district judge, which often expedites the process as Koh's FBI analysis merely needed updating, and because the jurist was confirmed once she has compiled a lengthy, accessible record.<sup>120</sup> The committee amply investigated Koh by actively coordinating with the FBI and the Justice Department.<sup>121</sup>

The Chair only arranged a July hearing, but Senator Grassley ought to have reciprocated for Democrats' collegially approving ten circuit jurists across 2007–2008.<sup>122</sup> Koh testified at the session, which proceeded effectively<sup>123</sup> while capturing September panel approval 13–7 with four GOP members, including the Chair, favoring the pick.<sup>124</sup> After July 6, the GOP leadership failed to permit chamber votes for any of twenty-three highly-qualified, appellate and district court consensus aspirants

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118. This may appear to conflict with the proposition that senators should offer multiple picks, as this would increase flexibility. When senators agree on a designee, however, President Trump should defer, as they have worked on the vacancy, are more familiar with excellent prospects who will best represent California, and can halt processing by retaining blue slips.

119. I rely here on Tobias, *supra* note 86. President George W. Bush provided critical precedent for renominating Judge Koh. The chief executive included Roger Gregory whom President Bill Clinton had recess appointed to the Fourth Circuit and Barrington Parker whom Clinton had nominated to the Second Circuit in Bush's first package of appellate nominees. Neil Lewis, *Bush Appeals for Peace on His Picks for the Bench*, N.Y. TIMES, May 10, 2001.

120. Tobias, *supra* note 33, at 2258; *see* Tobias, *supra* note 86, at 450–52.

121. Judge Koh had received vetting when she was nominated to the Northern District of California, so analysis was brief. Tobias, *supra* note 86, at 460–61.

122. President Obama sent four appeals court nominees before, and two after, Judge Koh. *Archive of Judicial Vacancies: Year 2016*, *supra* note 8; *see Archive of Judicial Vacancies*, *supra* note 28 (providing information for years 2007–2008).

123. S. Judiciary Comm., *Hearing on Nominees*, July 13, 2016 (statements of Sens. Feinstein & Boxer). Both stressed her sterling record, GOP support, and Ninth Circuit dire need.

124. S. Judiciary Comm., *Exec. Business Mtg.*, Sept. 15, 2016; *see* Tobias, *supra* note 86, at 462.

with committee reports, so all of these plus twenty-eight other designees' nominations expired in January.<sup>125</sup>

Judge Koh warranted a rapid chamber debate and ballot. Senator McConnell should have effectuated the regular order that the Majority Leader has insistently championed and honored directly relevant 2008 precedent.<sup>126</sup> Because the senator, nevertheless, eschewed staging Judge Koh's debate and vote, her champions ought to have aggressively pursued cloture.<sup>127</sup> Accomplished centrists traditionally receive up or down ballots; therefore, legislators who appreciate custom should have quickly agreed on cloture.<sup>128</sup> Had the aspirant reached the floor, Senator McConnell ought to have conducted a dignified and respectful debate, which robustly considered numerous pertinent questions, and the chamber must have voted. In sum, the experienced, prominent judge attained no final ballot due to GOP obstruction unrelated to her candidacy's actual merits.

If President Trump wishes to consider several prospects, the California lawmakers must attempt to realize consensus on a few names. Additional sources would be the twenty-three California district jurists whom President Obama recommended and confirmed; many of the possibilities have served five years. An example is Northern District Judge Edward Chen, who in fact affords considerable ethnic, and impressive, rare experiential, diversity, because he previously was a very capable ACLU lawyer.<sup>129</sup> Another is Southern District Judge Gonzalo Curiel, who offers ethnic diversity and thirteen years of highly-competent initiatives as a federal prosecutor, while his

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125. 161 CONG. REC. S7183-84 (daily ed. Jan 3, 2017).

126. Tobias, *supra* note 86, at 454, 455 n.29 (noting McConnell's urging regular order and Bush nominees' 2008 approval). Much time remained in the 114th Congress's second session Judge Koh's final vote, yet it did not occur.

127. Tobias, *supra* note 86, at 454 n.20, 463 n.73; *see supra* note 98; 162 CONG. REC. S5312 (daily ed. Sept. 7, 2016) (discussing unanimous consent denial).

128. *See* Tobias, *supra* note 86, at 457 nn.36–41.

129. *Directory*, *supra* note 108; *see generally* Edward Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 1109 (2003); Kenneth Lee, *One Year and Waiting—The Nomination of Edward M. Chen*, HUFFINGTON POST (Sept. 2, 2010), [http://www.huffingtonpost.com/kenneth-k-lee/one-year-and-waiting-the-b\\_703971.html](http://www.huffingtonpost.com/kenneth-k-lee/one-year-and-waiting-the-b_703971.html) (last updated May 25, 2011) (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).



confirmation might help ameliorate President Trump's unjustified excoriation of the jurist.<sup>130</sup>

President Bush confirmed twenty-one nominees, who have rendered fine district court service across the past ten years. For instance, Judge James Selna had been a respected O'Melveny & Myers partner for two decades before nomination, while he masterfully resolved the Toyota "sticky pedals" litigation.<sup>131</sup> Judge Philip Gutierrez could bring ethnic diversity and immense expertise following considerable rigorous work in the Los Angeles County Superior Court across ten years.<sup>132</sup>

A number of federal circuit and district court attorneys can also be promising sources. For example, Obama confirmees Judge Paul Watford and Judge Michelle Friedland were stellar civil practitioners for numerous years in the superb Munger, Tolles & Olson law firm, while Judge John Owens had correspondingly been a partner and capably served with the U.S. Attorney's Office a number of years.<sup>133</sup>

A related valuable possibility would be the California Supreme Court. For instance, Justice Goodwin Liu and Justice Mariano- Florentino Cuéllar had been groundbreaking law professors at California Berkeley and Stanford prior to California High Court appointment.<sup>134</sup> Nonetheless, the U.S. Senate GOP

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130. *Directory, supra* note 108; Alan Rappeport, *Judge Faulted By Trump Has Faced a Lot Worse*, N.Y. TIMES, June 4, 2016, at A12; Editorial, *Donald Trump and the Judge*, N.Y. TIMES, June 1, 2016, at A20; *see supra* note 82.

131. *Directory, supra* note 108; Stuart Pfeifer, *Judge Taps Lawyers in Toyota Cases*, L.A. TIMES, May 15, 2010.

132. *Directory, supra* note 108; Kenneth Ofgang, *Judge Philip Gutierrez Confirmed to U.S. District Court*, METROPOLITAN NEWS-ENTERPRISE (Feb. 1, 2007), <http://www.metnews.com/articles/2007/guti020107.htm> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

133. *Directory, supra* note 108; Scott Graham, *9 Circuit Nominees Face Uncertain Prospects*, RECORDER, Aug. 30, 2013; 160 CONG. REC. S1881 (daily ed. Mar. 31, 2014) (regarding the Owens approval); *supra* note 92.

134. Bob Egelko, *Goodwin Liu Confirmed to Calif. Supreme Court*, SAN FRANCISCO CHRON. (Aug. 31, 2011), <http://www.sfgate.com/bayarea/article/Goodwin-Liu-confirmed-to-Calif-Supreme-Court-2311696.php> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); David Siders, *Jerry Brown Names Law School Professor to California Supreme Court*, SACRAMENTO BEE (July 22, 2014), <http://www.sacbee.com/news/politics-government/capitol-alert/article2604510.html> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

minority earlier halted Liu's Ninth Circuit approval, because it contended he was outside the mainstream.<sup>135</sup>

After the lawmakers concur, all need to propose multiple selections with full explication of their prioritization for President Trump, who, in turn, should pick a mutually satisfactory purported nominee.<sup>136</sup> Once the chief executive and the Californians agree, they must deploy speedy, comprehensive, and fair confirmation procedures. Nothing more about California needs analysis before President Trump chooses, although concepts proffered above should govern.<sup>137</sup>

### 3. Hawaii

The President ought to insistently consult Senators Mazie Hirono (D) and Brian Schatz (D) and perhaps a high-level state Republican politician, who necessarily must coordinate with President Trump and each other to swiftly name competent, moderate designees for White House review. The political leaders should use plentiful sources for picks' suggestion.

One illustration would be the pair of accomplished, consensus, diverse trial level nominees Obama appointed. Judge Leslie Kobayashi won 2010 approval, having carefully labored over ten years as a well-respected Magistrate Judge.<sup>138</sup> Judge Derrick Kahala Watson has remained a district jurist since 2013 following robust work as a federal prosecutor for nearly twenty years.<sup>139</sup> A similar prospect could be George W. Bush Hawaii

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135. Tobias, *supra* note 33, at 2242; Egelko, *supra* note 134.

136. The ideas should allow all to craft the best result and limit embarrassment, cost, and delay by preventing the necessity to start over if President Trump disagrees with a sole pick offered. *Supra* note 95.

137. See *supra* Part IV.A.2, B.1. Crucial is prompt, thorough, dignified, and rigorous panel scrutiny with expedient, fair, and full committee and Senate debates on a choice's qualifications.

138. *Directory, supra* note 108; Ken Kobayashi, *Dignity Key for Kobayashi*, STAR ADVERTISER (Feb. 18, 2017), <http://www.staradvertiser.com/2010/12/27/hawaii-news/dignity-key-for-kobayashi/> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

139. *Directory, supra* note 108. The jurist initially addressed Hawaii's lawsuit which challenged President Trump's first immigration order. Order,

District appointee Michael Seabright, who has professionally served for twelve years, has been the chief judge and was the very capable U.S. Attorney before that.<sup>140</sup>

A related potential source of nominees might be numerous federal court practitioners.<sup>141</sup> Another may be the Hawaii State High Court. The five Justices were appointed every year from 2010 until 2014, while they comprise prominent, highly-regarded jurists.<sup>142</sup>

The legislators should provide several impressive prioritized submissions with thorough explanations for the administration, which ought to choose a person who satisfies all. If one lawmaker keeps opposing this judgment after frank discussions, everyone ought to continue negotiation and craft a preferred result.<sup>143</sup> President Trump and the Hawaiian lawmakers should then insure the designee a quick, fair confirmation process. Little else about Hawaii merits stating before the President taps a candidate, yet the ideas above should pertain.<sup>144</sup>

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Hawaii v. Trump, C.V. No. 17-00050 DKW-KJM (Feb. 9, 2017). Judge Watson subsequently enjoined the revised travel ban. *Highlights From Court Ruling Halting Trump's Revised Travel Ban*, N.Y. TIMES, (Mar. 15, 2017), [https://www.nytimes.com/2017/03/15/us/politics/highlights-immigration-ruling.html?\\_r=0](https://www.nytimes.com/2017/03/15/us/politics/highlights-immigration-ruling.html?_r=0) (last visited Apr. 11, 2017) (on file with the Washington and Lee Law Review); see Alexander Burns, *From a Placid Judge in Honolulu, A Cutting Rejection of Trump's New Travel Ban*, N.Y. TIMES, Mar. 17, 2017, at A12.

140. *Directory*, *supra* note 108; Jonathan Handel, *Judge Scolds Hollywood Sex Accuser for Lying in Court*, HOLLYWOOD REP. (Oct. 21, 2014), <http://www.hollywoodreporter.com/news/judge-scolds-hollywood-sex-accuser-742505> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

141. President George W. Bush drew from practice Judge Richard Clifton, whose recent assumption of senior status created the Ninth Circuit vacancy. *Directory*, *supra* note 108; Jason Hoppin, *Judicial Profile: Richard Clifton*, RECORDER (Sept. 24, 2002), <http://www.therecorder.com/id=900005372930/Judicial-Profile-Richard-Clifton?slreturn=20170229183753> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

142. *Hawaii Supreme Court Justices*, HAW. ST. JUDICIARY, <http://www.courts.state.hi.us/courts/supreme/justices/justices> (last visited Feb. 28, 2017) (on file with the Washington and Lee Law Review).

143. These practices offer flexibility and limit embarrassment, expense, and delay by eliminating the need to restart if President Trump does not agree with a lone prospect suggested. *Supra* note 95.

144. See *supra* Parts IV.A.2, B.1–2. Central is fast, respectful, and robust

#### 4. Oregon

President Trump needs to consult Oregon Senators Ron Wyden (D) and Jeff Merkley (D) and possibly upper-echelon in state GOP politicians, who necessarily should cooperate with the President and each other to speedily proffer competent, mainstream aspirants for Trump's consideration. The legislators ought to invoke a number of sources.

One would be the accomplished, consensus Obama trial level picks, two of whom have served longer than five years. Judge Marco Hernandez—who provides ethnic, and intensive experiential, diversity from Oregon Legal Services practice—was a Bush nominee the chamber failed to approve.<sup>145</sup> Judge Michael Simon labored for the international law firm Perkins Coie for numerous years after being Justice Department trial counsel for over five.<sup>146</sup> Judge Michael McShane, who increases sexual orientation diversity and experiential diversity from rigorous Public Defender work, carefully and fairly treated the nascent Oregon marriage equality litigation.<sup>147</sup>

A related source is the only nominee whom President Bush confirmed, Judge Michael Mosman, who has prominently served thirteen years—a number as chief judge—enjoyed appointment to the powerful Foreign Intelligence Surveillance Court, and was the extremely capable U.S. Attorney prior to

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committee analysis with quick, equitable, and comprehensive panel and chamber debates regarding nominee qualifications.

145. *Directory*, *supra* note 108; see Charles Pope, *Senate Unanimously Approves Marco Hernandez to be Federal Judge*, OREGONIAN (Feb. 7, 2011), [http://www.oregonlive.com/politics/index.ssf/2011/02/senate\\_unanimously\\_approves\\_ma.html](http://www.oregonlive.com/politics/index.ssf/2011/02/senate_unanimously_approves_ma.html) (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

146. *Directory*, *supra* note 108; see Charles Pope, *U.S. Senate Confirms Portland Attorney Michael Simon as Oregon Federal Judge*, OREGONIAN (June 21, 2011), [http://www.oregonlive.com/politics/index.ssf/2011/06/senate\\_confirms\\_michael\\_simon.html](http://www.oregonlive.com/politics/index.ssf/2011/06/senate_confirms_michael_simon.html) (last visited Apr. 11, 2017) (on file with the Washington and Lee Law Review).

147. *Directory*, *supra* note 105; see generally *Geiger v. Kitshaber*, 994 F. Supp. 2d 1128 (D. Or. 2014); Jeff Mapes, *Judge McShane Writes Unusually Personal Decision in Oregon Gay Marriage Case*, OREGONIAN (May 19, 2014), [http://www.oregonlive.com/mapes/index.ssf/2014/05/judge\\_michael\\_mcshane\\_writes\\_u.html](http://www.oregonlive.com/mapes/index.ssf/2014/05/judge_michael_mcshane_writes_u.html) (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

joining the district.<sup>148</sup> Another would be the federal court bar from which President Obama appointed Simon.<sup>149</sup> A fourth possibility is the Oregon Supreme Court. Justice Rives Kistler and Justice Martha Walters have compiled dynamic records across prolonged service; he earned a clerkship with Justice Lewis Powell and she was the initial female President of the National Commissioners on Uniform State Laws.<sup>150</sup>

The politicians should provide a few suggestions with explications of prioritization and collaborate to make a nomination satisfactory for President Trump and the legislators.<sup>151</sup> When they concur, all must work together with the lawmakers' colleagues to institute fast, thorough, and equitable confirmation practices. Nothing specific to Oregon might be added until President Trump designates the nominee, but the propositions surveyed previously may obtain.<sup>152</sup>

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148. *Directory*, *supra* note 108; see Bryan Denson, *Portland Federal Judge Appointed to Secretive Surveillance Court*, OREGONIAN (June 7, 2013) [http://www.oregonlive.com/portland/index.ssf/2013/06/portland\\_federal\\_judge\\_appoint.html](http://www.oregonlive.com/portland/index.ssf/2013/06/portland_federal_judge_appoint.html) (last visited Apr. 19, 2017) (chronicling the experience of Judge Mosman) (on file with the Washington and Lee Law Review); Charlie Savage, *Roberts' Picks Reshaping Surveillance Court*, N.Y. TIMES, July 26, 2013, at A1 ("Ten of the court's 11 judges — all assigned by Chief Justice Roberts — were appointed to the bench by Republican Presidents; six once worked for the federal government.").

149. See *supra* note 146 and accompanying text (discussing Judge Michael Simon).

150. Karen Breslau, *A Rising Tide, Rocking Boats*, NEWSWEEK (May 16, 2004), <http://www.newsweek.com/rising-tide-rocking-boats-128335> (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); Amanda Bronstad, *Oregon Justice Elected ULC President*, NAT'L. L. J., Dec. 13, 2007. For full disclosure, Justice Walters is a personal friend.

151. If one legislator keeps rejecting President Trump's pick after candid discussions, all ought to cooperate and pursue optimal resolution. These procedures yield flexibility and decrease embarrassment, expense, and delay by avoiding the necessity to start again if President Trump differs with a single pick submitted. *Supra* note 95.

152. See *supra* Parts IV.A.2, IV.B.1–3. Critical would be quick, dignified, and rigorous panel evaluation with fast, complete, and fair committee and Senate debates related to prospect qualifications.

*VI. Conclusion*

The Ninth Circuit resolves the most cases the least swiftly in part because the tribunal now suffers four emergency vacancies. If President Trump and the Senate follow the concepts posited, they might simultaneously fill those openings with excellent jurists who best promote justice while addressing the counterproductive downward spiraling process, which restricts the judiciary's ability to deliver justice and citizen respect for the government.