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## President Donald Trump and Federal Bench Diversity

Carl Tobias

*University of Richmond School of Law*

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# PRESIDENT DONALD TRUMP AND FEDERAL BENCH DIVERSITY

Carl Tobias\*

## *Abstract*

*President Donald Trump constantly reminds United States citizens about the myriad circuit and district court appointments that his White House is making to the federal judiciary. Last September, Trump proposed the seventh “wave,” which included three people of color among sixteen judicial nominees. This wave permitted the administration to triple the number of ethnic minority picks whom it had selected, which means that the Executive Branch has proffered ten persons of color in 113 appeals court and district court submissions, yet none is a lesbian, gay, bisexual, or transgender (LGBT) individual. Nevertheless, a problematic pattern, which implicates a stunning lack of ethnic-minority, LGBT, and female nominees rather swiftly arose, even though the administration is relatively nascent. Because when Trump captured the White House he pledged to serve as the President of all U.S. citizens, because diversity has great significance, and because the 140 current lower court vacancies provide an exceptionally rare opportunity, the striking paucity of minority representation in Trump’s federal court nominees deserves evaluation.*

*The initial section of this piece surveys why increased diversity is essential, detecting that improved minority representation enhances the quality of court opinions, confines ethnic, sexual-preference, and gender biases which undermine justice and expands public confidence in the judiciary. The segment also*

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\* Williams Chair in Law, University of Richmond School of Law. I wish to thank Margaret Sanner for invaluable suggestions, Jane Baber and Emily Benedict for invaluable research and editing, the *Washington and Lee Law Review* editors for valuable editing, Leslee Stone for exceptional processing as well as Russell Williams and the Hunton Williams Summer Endowment Fund for generous, continuing support. All of the errors that remain in the piece are mine alone.

*reviews how modern Presidents have addressed diversity when nominating and confirming jurists. The second part considers the record which the Trump White House has assembled, finding that it compiled the weakest one since President Ronald Reagan served when substantially fewer people of color, LGBT individuals or women were practicing lawyers. The third section analyzes the record's consequences. Because the Trump presidency only commenced in 2017 and the executive has considerable time for treating this dearth, the final segment provides recommendations which might help place numerous minority, LGBT, and female jurists on the federal courts.*

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*I. Introduction*

President Donald Trump fondly trumpets the many nominations which his administration is making to the federal judiciary. Early in September 2017, Trump proffered the seventh “wave” encompassing three persons of color in sixteen judicial nominees. This wave allowed the Executive Branch to triple the ethnic minority prospects whom it had named, so that the White House has recommended ten people of color among 113 circuit and district court selections but no lesbian, gay, bisexual or transgender (LGBT) individuals. However, a troubling pattern, which involves a striking paucity of ethnic minority, LGBT, and

female nominees soon materialized, even though the administration remains comparatively nascent. Because, with his election victory, Trump promised to serve as President of all the citizens, diversity has substantial importance and the 140 present lower-court vacancies create an extremely unusual opportunity, the stunning lack of minority representation in Trump's federal court nominees warrants assessment.

The first part scrutinizes why enhanced diversity is critical, finding that expanded minority representation improves judicial determinations, restricts ethnic, sexual-orientation and gender prejudices—which subvert justice's delivery—and enlarges public confidence in the bench. The section also recounts how contemporary Presidents have treated diversity when appointing jurists. The second portion canvasses the record which the Trump Administration has compiled, detecting that it assembled the worst one since President Ronald Reagan's tenure when dramatically fewer persons of color, LGBT individuals, or women were practicing attorneys. Segment three evaluates the implications of this record. Because the Trump presidency only started during 2017 and the chief executive possesses much time for remedying that dearth, the last section posits suggestions which could help appoint numerous minority, LGBT, and female nominees to the federal courts.

## *II. A Brief History of Federal Court Diversity*

Modern Presidents and Senates have carefully followed analogous practices when nominating and confirming jurists.<sup>1</sup> They have also seriously considered the issue of enhancing minority representation in the judiciary, even while individual Democratic and Republican Presidents and senators have differently emphasized the idea.<sup>2</sup>

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1. Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2235–36 (2013). See generally *The Confirmation Process for Presidential Appointees*, HERITAGE FOUND., <https://www.heritage.org/political-process/heritage-explains/the-confirmation-process-presidential-appointees> (last visited Jan. 1, 2018) (on file with the Washington and Lee Law Review).

2. See *infra* notes 13–38 and accompanying text (evaluating the nomination and confirmation processes of the Carter, Reagan, George H.W. Bush, Clinton, George W. Bush, and Obama administrations).

### A. *The Appointments Process*

The Office of the White House Counsel assumes chief responsibility for nominations.<sup>3</sup> The Department of Justice (DOJ), provides assistance with crucial selection and major confirmation obligations, principally analyzing choices whom home-state elected officials recommend and preparing nominees for hearings.<sup>4</sup> The Senate Judiciary Committee discharges multiple responsibilities across the confirmation process, especially investigating designees and staging hearings.<sup>5</sup> Particular senators from jurisdictions that experience openings play central nomination and confirmation roles, mainly delineating superb picks and familiarizing colleagues with nominees.<sup>6</sup>

### B. *Diversity's Benefits*

Increased minority representation affords multiple significant benefits. People of color, LGBT individuals, and women can supply effective, nuanced “outsider” perspectives<sup>7</sup> and different,

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3. See *Federal Judicial Appointments*, LUMEN, <https://courses.lumenlearning.com/boundless-politicalscience/chapter/federal-judicial-appointments/> (last visited Jan. 27, 2018) (“The president nominates all federal judges, who must then be approved by the Senate.”) (on file with the Washington and Lee Law Review).

4. Tobias, *supra* note 1, at 2235.

5. *Id.* at 2235–36; see also *What Every American Should Know About the Senate Judiciary Committee*, DAILYDOT (Sept., 12, 2017, 2:00 AM), <https://www.dailydot.com/layer8/senate-judiciary-committee/> (last visited Jan. 28, 2018) (observing that the Senate Judiciary Committee assumes principal responsibility for “vetting Supreme Court nominees” as well as for scrutinizing nominees to the circuit and district courts) (on file with the Washington and Lee Law Review).

6. Tobias, *supra* note 1, at 2235.

7. See Theresa Beiner, *The Elusive (but Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 610–17 (2003) (providing examples that “illustrate the ways in which the gender or race of the judge might play into other decisions that may affect the legitimacy of the legal system”); John McCain & Jeff Flake, *Federal Judge Diane Humetewa*, 40 HUMAN RIGHTS 22, 22 (2015) (“A diverse federal judiciary increases the public’s trust in our legal system and ensures equality under the law.”).

LGBT means openly disclosed sexual preference, which some individuals may have not divulged. LGBT judges and individuals are considered “minorities” in this history and throughout the piece. Female judges and women are considered

constructive insights about critical questions respecting abortion, criminal law, employment discrimination, and related complicated issues, which federal judges confront.<sup>8</sup> The jurists also can limit ethnic, gender, and sexual orientation biases that undermine justice.<sup>9</sup> Moreover, judges who resemble the nation instill greater public confidence by saliently demonstrating that abundant persons of color serve productively as federal jurists, while the judges can be especially sensitive to circumstances that could lead minorities to appear in federal courts.<sup>10</sup>

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minorities in this history. President Trump's record for nominating and confirming women is less dismal than his record for nominating and confirming ethnic minorities and LGBT individuals. *Infra note 60. See generally* Nan Aron, *The White House Is Appointing Anti-Woman Judges*, THE NATION (Feb. 28, 2018), <https://www.thenation.com/article/the-white-house-is-appointing-anti-woman-judges/> (last visited Apr. 21, 2018) (on file with the Washington and Lee Law Review); Leah Litman and Helen Marie Berg, *Trump's Male-Dominated Appointments Close the Door for Women*, TAKE CARE (Feb. 5, 2018), <https://takecareblog.com/blog/trump-s-male-dominated-appointments-close-the-door-for-women> (last visited Apr. 21, 2018) (on file with the Washington and Lee Law Review); *Stacking the Courts: The Fight Against Trump's Extremist Nominees*, LAMBDA LEGAL (2017), <https://www.lambdalegal.org/judicial-nominees> (last visited Apr. 21, 2018) (on file with the Washington and Lee Law Review). *But see* 163 CONG. REC. S6,952 (daily ed. Nov. 1, 2017) (statement of Sen. Cornyn).

8. *See generally* Jennifer Peresie, Note, *Female Judges Matter: Gender and Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005) (providing empirical "data to illuminate whether and how the presence of female judges on three-judge federal appellate panels affects collegial decision-making in a subset of gender-coded cases"). *But see* Stephen J. Choi, Mitu Gulati, Mirya Holman & Eric A. Posner, *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504, 505 (2011) (detecting "insignificant gender-related differences in substantive decisionmaking" on state Supreme Courts as well as on federal appellate and district courts).

9. *See generally, e.g.*, NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS AND ETHNIC FAIRNESS: FINAL REPORT (1997); FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990) (evaluating the need for expanding "efforts to educate judges and supporting personnel about the existence and dangers of racial, ethnic, and gender discrimination and bias"); 164 CONG. REC. S1,258 (daily ed. Feb. 28, 2018) (statement of Sen. Schumer) [hereinafter Schumer statement] ("Having a diversity of views and experience on the Federal bench is necessary for the equal administration of justice.").

10. *See* Sylvia Lazos, *Only Skin Deep?: The Cost of Partisan Politics on the Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1442 (2008) (revealing how numerous diverse judges were nominated and appointed throughout President George W. Bush's administration and evaluating how the appointment of a federal judiciary that reflects the United States populace can enhance public confidence in the bench); Jeffrey Toobin, *The Obama Brief*, NEW YORKER, Oct. 27, 2014, at 245. ("The majority of Obama's appointments are women and nonwhite

Assessors who criticize actions that would confirm numerous additional people of color, LGBT individuals, and women, contend that supplementing representation will dilute merit, as the candidate “pool” remains small or America has too few conservative designees.<sup>11</sup> However, those notions are less convincing today when ample persons of color, LGBT individuals, and women are strong, conservative attorneys.<sup>12</sup>

### C. Diversifying the Federal Courts

Modern chief executives’ records illuminate the difficulties entailed in realizing greater diversity related to ethnicity, gender, and sexual orientation. The circuit and district courts included minuscule numbers of ethnic minority, LGBT and female judges before President Jimmy Carter’s selection.<sup>13</sup> He applied efficacious procedures to name superb people of color and women for the circuits,<sup>14</sup> asking that senators institute concerted efforts to

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males.”) (internal quotation marks omitted); Schumer statement, *supra* note 9 (“Having a diversity of views and experience on the federal bench is necessary for the equal administration of justice.”).

11. For assessments of the concepts of merit and the candidate pool, see SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 335 (1997); Carl Tobias, *Justifying Diversity in the Federal Judiciary*, 106 NW. U. L. REV. COLLOQUY 283, 294–96 (2012); Richard Wolf, *Trump’s 87 Picks to be Federal Judges Are 92% White With Just One Black and One Hispanic Nominee*, USA TODAY (Feb. 13, 2018, 3:26 PM), <https://www.usatoday.com/story/news/politics/2018/02/13/trumps-87-picks-federal-judges-92-white-just-one-black-and-one-hispanic-nominee/333088002/> (last updated Feb. 14, 2018, 3:51 PM) (last visited Apr. 21, 2018) (on file with the Washington and Lee Law Review).

12. See *infra* note 47 and accompanying text (listing ten individuals of color whom President Trump has nominated for federal judgeships).

13. See generally Elliot Slotnick, *Lowering the Bench or Raising it Higher?*, 1 YALE L. & POL’Y REV. 270 (1983); GOLDMAN, *supra* note 11. See also Tracey George, *Court Fixing*, 43 ARIZ. L. REV. 9, 19 (2001) (observing that “Jimmy Carter’s efforts to diversify the federal bench resulted in appointment of two Hispanics, one Asian American, and nine African Americans to the courts of appeals (representing twenty-one percent of his circuit appointments).”).

14. See generally LARRY BERKSON & SUSAN CARBON, THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES (1980) (observing that President Carter issued Executive Order 11972 with the purpose of developing “a mechanism which would allow him to place a larger number of women and members of minority groups on the bench”); see also GOLDMAN, *supra* note 11, at 238–50 (providing a history of President

recommend many talented aspirants when district court vacancies arose.<sup>15</sup> Carter appointed for the circuit and trial courts forty-one women, thirty-four African Americans, fifteen Latino/as, two Asian Americans, and the initial Native American.<sup>16</sup>

Republican Presidents who correspondingly served after President Carter attained comparatively little progress when expanding diversity because the chief executives would not stress minority representation while their administrations directly implemented few comprehensive endeavors that would increase the number of minority jurists.<sup>17</sup> President Ronald Reagan vowed to appoint numerous dynamic conservatives, saying that they would exercise judicial restraint, and his administration opposed Carter's diversity initiative, undertaking limited activity to promote ethnic, sexual preference and gender diversity.<sup>18</sup> Reagan confirmed thirty-one women, seven African Americans, fourteen Latino/as, and two Asian Americans, yet he chose zero Native American or LGBT jurists.<sup>19</sup>

President George H.W. Bush stated that he would deploy practices which matched Reagan's, conducting no discrete actions

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Carter's involvement in judicial selection).

15 Merit selection panels fostered appointments. *See generally* ALAN NEFF, UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS (1981); *The Problems and Achievements of Carter's Merit Plan*, 62 JUDICATURE 463–510 (1979).

16. Eastern District of Oklahoma Judge Frank Howell Seay was the initial Native American federal court judge appointed. Sheldon Goldman, *Reagan's Judicial Legacy*, 72 JUDICATURE 318, 322 (1989). "Native American" means a descendant of the indigenous peoples of the Americas. *See generally* M. Alexander Pearl, *How to Be an Authentic Indian*, 5 CALIF. L. REV. CIRCUIT 392 (2014). Nevertheless, President Carter failed to nominate or confirm a single LGBT judge.

17. *See infra* notes 18–27, 39–54 and accompanying text (evaluating the nomination and confirmation processes of post-Carter Republican administrations).

18. *See* GOLDMAN, *supra* note 11, at 290–91, 298–302, 327–35 (discussing the particular procedures employed by past Presidents, especially Reagan, for selecting jurists). Reagan appointed comparatively substantial numbers of Latino/as; however, Reagan's "record of appointing blacks was the worst since" Dwight Eisenhower was President. *Id.* at 328, 335.

19. *See Diversity on the Bench*, FED. JUD. CTR., <https://www.fjc.gov/node/7491> (last visited Jan. 30, 2018) [hereinafter FJC] (providing links to the number of appointed judges based on demographic factors) (on file with the Washington and Lee Law Review).



to recruit minorities.<sup>20</sup> Bush confirmed thirty-six women, eleven African Americans, and eight Latino/as but failed to choose an Asian-American, Native-American or LGBT judge.<sup>21</sup> President George W. Bush realized improved success vis-à-vis Bush *père*, because he devoted resources to enlarging certain dimensions of representation.<sup>22</sup> For instance, the administration confirmed seventy-one women, twenty-four African Americans, and thirty Latino/as.<sup>23</sup>

Contemporary Democratic Presidents have enjoyed much greater success, primarily because they implemented specific efforts to identify, propose, and confirm numbers of strong minority aspirants. President Bill Clinton requested that numerous home-state elected officials pursue, denominate, and recommend multiple fine, diverse candidates.<sup>24</sup> He set records for appointing women, persons of color, and LGBT jurists, confirming 106 women, sixty-one African Americans, twenty-four Latino/as, five Asian Americans, the second Native American,<sup>25</sup> and the first lesbian.<sup>26</sup> Upon President Barack Obama's 2009 inauguration, women constituted some twenty-two percent of federal judges,

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20. See generally Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282 (1993).

21. See generally FJC, *supra* note 19. President Bush did appoint Northern District of California Judge Vaughn Walker, but he was not openly gay at the time of confirmation. Bob Egelko, *Judge Vaughn Walker and the Prop. 8 Trial*, S.F. CHRON., Apr. 20, 2014.

22. See Jennifer Segal Diascro & Rorie Spill Solberg, *George W. Bush's Legacy on the Federal Bench: Policy in the Face of Diversity*, 92 JUDICATURE 289, 290–91 (2009) (“What we see is a moderate commitment to diversity that can be described as passive and reactive, one that reflects an appreciation for the political significance of appointing nonwhite and female judges to the court . . .”); Goldman, *supra* note 20, at 285–86 (describing the Bush administration selection process).

23. President Bush failed to confirm a single Asian American, Native American or LGBT judge. FJC, *supra* note 19.

24. See Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 265, 266–67 (1999) (evaluating President Clinton's nomination and confirmation processes for making judicial appointments); Sheldon Goldman, Elliot Slotnick, Gerald Gryski & Gary Zuk, *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 229–31 (2001) (same).

25. Michael Burrage was the second Native American. FJC, *supra* note 19.

26. Deborah Batts was the first lesbian district judge. FJC, *supra* note 19.

African Americans comprised ten, Latino/as were seven, and Asian Americans constituted one.<sup>27</sup>

#### *D. The Obama Administration*

President Obama, who effectuated comprehensive, special initiatives<sup>28</sup> to propel ethnic, sexual-preference, and gender diversity,<sup>29</sup> warrants closer inspection, because these endeavors were most recent and extremely successful. His diversity initiatives encompassed contacting plenty of less traditional sources for nominations—minority, LGBT, and women’s interest and political groups and bar entities—while rigorously canvassing and nominating myriad superb people of color and women and significant numbers of gay and lesbian choices.<sup>30</sup> The White House solicited assistance from many knowledgeable, well-established politicians, including minority, female, and LGBT elected officers,<sup>31</sup> while conscientiously urging that home-state politicians institute concerted actions to submit numerous highly qualified, consensus, and diverse possibilities.<sup>32</sup>

Lawmakers searched for, examined, and forwarded innumerable excellent individuals of color, LGBT candidates, and

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27. Of approximately 1400 active and senior jurists, Seay was the lone Native American and Batts was the sole lesbian. FJC, *supra* note 19.

28. See Tobias, *supra* note 1, at 2239 (“Obama instituted concerted efforts to vastly improve ethnic, gender, and sexual-preference diversity. He comprehensively approached less conventional organizations, such as minority, community, and women’s groups, which have copious information about numerous worthy candidates . . .”). I rely substantially below on Sheldon Goldman, Elliot Slotnick & Sarah Schiavoni, *Obama’s Judiciary at Midterm: The Confirmation Drama Continues*, 94 JUDICATURE 262 (2011), and Jeffrey Toobin, *Bench Press*, NEW YORKER, Sept. 21, 2009, at 42.

29. See Letter from Gregory Craig, White House Counsel, to President Barack Obama (Nov. 13, 2009) (on file with the Washington and Lee Law Review) (describing the nascent Obama Administration’s concerted efforts to substantially increase diversity on the lower federal courts); see Tobias, *supra* note 11, at 286–98 (examining “Obama’s effective efforts to improve diversity and legitimacy by nominating many well-qualified, minority and female candidates”).

30. See *supra* note 28 and accompanying text (evaluating the Obama administration’s diversity-focused nomination and confirmation initiatives).

31. *Id.*

32. Tobias, *supra* note 1, at 2239.

women.<sup>33</sup> Relevant to efforts mainly involving LGBT attorneys were endeavors of New York Democrats Chuck Schumer and Kirsten Gillibrand. They rapidly marshaled Paul Oetken and chose Alison Nathan for the Southern District while recruiting Pamela Ki Mai Chen in the Eastern District; Oetken was the first gay active trial court jurist with Nathan and Chen becoming the only lesbian active judges then.<sup>34</sup> Texas Republicans Kay Bailey Hutchison, John Cornyn, and Ted Cruz suggested and championed a plethora of Latino/as,<sup>35</sup> while their Arizona counterparts, John McCain and Jeff Flake, tendered several Latino/as combined with the third Native American.<sup>36</sup> Moreover, California's Dianne Feinstein and Barbara Boxer pursued, identified, and recommended numbers of Asian-American candidates, which helped double those appointed throughout American history.<sup>37</sup>

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33. See Carl Tobias, *Filling the Federal Appellate Court Vacancies*, 17 U. PENN. J. CONST. L. 1–2 (2015) (“The administration correspondingly sought help from particular traditional sources, namely the ABA, and less conventional outlets, including minority, women’s and LGBT bar groups, and politicians knowledgeable about talented choices.”).

34. See 157 CONG. REC. S4,634 (daily ed. July 18, 2011) (confirming Paul Oetken to be a U.S. District Judge for the Southern District of New York); *id.* at S6,493 (daily ed. Oct. 13, 2011) (confirming Alison Nathan to be a U.S. District Judge for the Southern District of New York); 159 CONG. REC. S1,082 (daily ed. Mar. 4, 2013) (confirming Pamela Ki Mai Chen to be a U.S. District Judge for the Eastern District of New York); Devlin Barrett, *Over 12 Years, Schumer Tips Court Balance*, WALL ST. J., Oct. 7, 2011, at A17 (demonstrating how Senator Schumer’s concerted efforts diversified the Eastern and Southern Districts of New York). For more discussion of LGBT nominees, see Carl Tobias, *Considering Lesbian, Gay, Transgender and Bisexual Nominees for the Federal Courts*, 90 WASH. U. L. REV. 579, 581 & n.13 (2012), and Mark Stern, *Obama’s Most Enduring Gay Rights Achievement*, SLATE, June 17, 2014.

35. See Carl Tobias, *Filling the Texas Federal Court Vacancies*, 95 TEX. L. REV. SEE ALSO 170, 177 (2017) (recommending and powerfully supporting the nominations and confirmations of Gregg Costa, Marina Garcia Marmolejo, and Diana Saldaña). Senators Cornyn and Cruz also recommended and powerfully supported the nomination and confirmation of Robert Pitman, who became the first gay Texas federal district judge. 160 CONG. REC. S6,907 (daily ed. Dec. 16, 2014).

36. See generally Carl Tobias, *Filling Arizona District Vacancies*, 56 ARIZ. L. REV. SYLLABUS 4 (2014).

37. See Carl Tobias, *Combating the Ninth Circuit Judicial Vacancy Crisis*, 73 WASH. & LEE L. REV. ONLINE 688, 715–17 (2017) (observing that Northern District of California Judge Lucy Koh, an Asian-American, received her February 2016 Ninth Circuit nomination partly based on the recommendation of California Democratic Senators Dianne Feinstein and Barbara Boxer). *But cf.* Tracy Jan, *Law Schools Are Filled With Asian Americans. So Why Aren’t There More Asian*

Obama shattered records for confirming accomplished minority choices. For example, he broke practically all of Clinton's diversity records by appointing one-hundred and thirty-six women, sixty-one African Americans, thirty-six Latino/as, twenty-one Asian Americans, the third Native American and ten LGBT jurists.<sup>38</sup>

### III. The Trump Administration

President Trump has selected the fewest ethnic minority and LGBT prospects since the Reagan presidency, when there were dramatically smaller numbers of lawyers of color as well as LGBT and female practitioners.<sup>39</sup> Across Trump's campaign, he made repeated pledges to nominate and seat ideological conservatives and kept the promises by mustering and confirming Justice Neil Gorsuch and a multitude of similarly conservative appellate court and district court nominees.<sup>40</sup>

Appeals court vacancies are the President's emphasis, spearheaded by his White House Counsel Office, and they depend on the list of twenty-one putative Supreme Court possibilities whom the Federalist Society and Heritage Foundation compiled.<sup>41</sup>

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*Judges?*, WASH. POST (July 18, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/07/18/there-are-94-united-states-attorneys-only-three-of-them-are-asian-american/?noredirect=on&utm\\_term=.6fb34d8cfad7](https://www.washingtonpost.com/news/wonk/wp/2017/07/18/there-are-94-united-states-attorneys-only-three-of-them-are-asian-american/?noredirect=on&utm_term=.6fb34d8cfad7) (last visited Apr. 21, 2018) (finding that "only 3 percent of the federal judiciary" comprise Asian Americans) (on file with the Washington and Lee Law Review). Senators Feinstein and Boxer also recommended and powerfully supported Michael Fitzgerald, who became the first openly gay California federal district judge. 158 CONG. REC. S1,714 (daily ed. Mar. 15, 2012).

38. District of Arizona Judge Diane Humetewa was the third, and the first female, Native American federal court judge. McCain & Flake, *supra* note 7. Obama confirmed 20 ethnic-minority, 24 female, and one LGBT circuit judge. FJC, *supra* note 19; *supra* notes 33–34 and accompanying text.

39. I rely here on Tobias, *supra* note 37, at 702–11, and Charlie Savage, *Trump is Rapidly Reshaping the Judiciary: Here's How*, N.Y. TIMES (Nov. 11, 2017), <https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html> (last visited Apr. 22, 2018) (on file with the Washington and Lee Law Review).

40. See generally Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089, 1103 (2017); Savage, *supra* note 39.

41. See Jeffrey Toobin, *Full Court Press*, NEW YORKER, Apr. 17, 2017, at 24

Most of the nominees are very conservative and quite prominent. The chief executive has stressed the appeals courts, because they are courts of last resort for virtually all cases, articulate considerably greater policy, and issue opinions that govern multiple states.<sup>42</sup> When filling district court openings, Trump, like numerous recent Presidents, has appeared to duly rely on selections by politicians from home states and to premise nominations mainly on competence vis-à-vis expeditious, inexpensive, and fair case disposition.<sup>43</sup> Trump has seemingly activated no endeavors that could identify and confirm exceptional minorities.

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(evaluating the Federalist Society's role in helping Republican Presidents nominate federal judges, especially to the Supreme Court and appellate courts); Savage, *supra* note 39 (same and describing the role of the Federalist Society and the Heritage Foundation in helping President Trump compile his Supreme Court list of twenty-one potential candidates); AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS (2015) (evaluating the rise and growth of the Federalist Society and the significant role that the entity has played in American legal and political life); *President Donald J. Trump Announces Five Additions to Supreme Court List*, WHITE HOUSE, OFFICE OF THE PRESS SEC'Y (Nov. 17, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-announces-five-additions-supreme-court-list/> (last visited Mar. 21, 2018) (providing a list of five more names that the White House added to the earlier Supreme Court lists compiled by President Trump) (on file with the Washington and Lee Law Review).

42. See Goldman, *supra* note 20, at 293 (evaluating the reasons why Presidents and senators emphasize appointments to the appellate courts); Tobias, *supra* note 1, at 2240–41 (“Courts of appeals include several contiguous jurisdictions and have perceptibly less frequent vacancies, . . . because circuits are essentially courts of last resort for ninety-nine percent of filings and decide complex questions regarding issues including terrorism and constitutional interpretation.”); Savage, *supra* note 39 (evaluating the reasons why President Trump and senators emphasize appellate court appointments).

43. See Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9, 19 (2017) (“President Obama correspondingly selected the twenty fine, mainstream trial level nominees principally for their intelligence, diligence, ethics, independence, and balanced judicial temperament, especially their capability to manage and resolve substantial caseloads, rather than ideology.”). *But see* Seung Min Kim, *Trump Could Remake Judiciary For 40 Years*, POLITICO (Oct. 17, 2017), <http://readersupportednews.org/news-section2/318-66/46348-trump-could-remake-judiciary-for-40-years-with-controversial-picks> (last visited Jan. 28, 2018) (observing that Democrats “have mounted a campaign to derail a slew of” nominees “who they say have shown a hostility to the rights of minorities, were chosen for their ideological perspectives or lack the requisite competence”) (on file with the Washington and Lee Law Review).

The White House has implemented limited effort to prioritize nominations by initially submitting picks who reduce the seventy-one “judicial emergency” vacancies.<sup>44</sup> For instance, during the period after the GOP captured a Senate majority, emergencies more than quintupled.<sup>45</sup> Trump has also named relatively few prospects from states that Democrats represent, especially California and New York.<sup>46</sup>

President Trump has confirmed thirty-two lower federal court jurists; three—Judges Amul Thapar, James Ho and Karen Gren Scholer—are persons of color.<sup>47</sup> Trump did send 113 nominees; ten

44. ADMIN. OFFICE OF U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY, Emergencies (2018) [hereinafter JUDICIAL VACANCIES]. The Administrative Office of the U.S. Courts premises emergencies on their protracted length or courts’ substantial caseloads. *Id.*, Judicial Emergency Definition.

45. They skyrocketed from 12 to 71. *Id.* (2015–18). *But see President Donald J. Trump Announces Nomination of Indiana Attorney James Sweeney to Fill Judicial Emergency*, WHITE HOUSE, OFFICE OF THE PRESS SEC’Y (Nov. 1, 2017) <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-nomination-indiana-attorney-james-sweeney-fill-judicial-emergency/> (last visited Mar. 21, 2018) (observing that as of the date of the press release there were a total of 64 judicial emergency vacancies and citing Sweeney nomination as an example of White House efforts to fill the judicial emergency vacancies) (on file with the Washington and Lee Law Review).

46. JUDICIAL VACANCIES, *supra* note 44. For example, the state of New York experiences two circuit openings, both of which are emergencies, and ten district court vacancies, four of which are emergencies, and one of which has a nominee. The state of California correspondingly experiences three circuit openings, all of which are emergencies, and nine district court vacancies, four of which are emergencies, and none of which has a nominee. When Republicans ignore the minority party, that GOP inactivity resembles Republican neglect of minority candidates.

47. *President Donald J. Trump Announces Intent to Nominate Judge Amul Thapar for the Sixth Circuit*, WHITE HOUSE, OFFICE OF THE PRESS SEC’Y (Mar. 21, 2017) <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judge-amul-r-thapar-u-s-court-appeals-sixth-circuit/> (last visited Mar. 21, 2018) (on file with the Washington and Lee Law Review); *see also* 163 CONG. REC. S3,179 (daily ed. May 25, 2017) (confirming Judge Amul Thapar); *President Donald J. Trump Nominates His Eighth Wave of Judicial Candidates*, WHITE HOUSE, OFFICE OF THE PRESS SEC’Y, (Sept. 28, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-eighth-wave-judicial-candidates/> (last visited Mar. 21, 2018) (nominating nine individual candidates, including James Ho) (on file with the Washington and Lee Law Review); 163 CONG. REC. S8,033 (daily ed. Dec. 14, 2017) (appointing Judge James Ho); *President Donald J. Trump Nominates His Seventh Wave of Judicial Candidates*, WHITE HOUSE, OFFICE OF THE PRESS SEC’Y (Sept. 7, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-seventh-wave-judicial-candidates/> (last visited Mar. 21, 2018)

are people of color—Judges Thapar, Ho and Scholer, as well as Asian-American nominees John Nalbandian and Jill Otake, African-American nominees Terry Moorer and Rodney Smith, and Latino nominees Raúl Arias-Marxuach, Fernando Rodriguez and Rodolfo Ruiz.<sup>48</sup> The 113 nominees eclipse the choices whom predecessors tapped by a similar juncture.<sup>49</sup>

Identifying exactly why President Trump has amassed such a mediocre diversity record can be difficult to ascertain, because the White House provides so little information regarding the

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(nominating sixteen individual candidates, including Karen Gren Scholer) (on file with the Washington and Lee Law Review); 164 CONG. REC. S1,333 (daily ed. Mar. 5, 2018) (confirming Judge Karen Gren Scholer); Schumer Statement, *supra* note 10 (“President Trump’s confirmed nominees represented the lowest share of non-White candidates in three decades.”).

48. See *Seventh Wave of Judicial Candidates*, *supra* note 47 (nominating sixteen individual candidates, including Terry Moorer and Fernando Rodriguez); *President Donald J. Trump Nominates His Ninth Wave of Judicial Nominees and Tenth Wave of United States Attorney Nominees*, WHITE HOUSE, OFFICE OF THE PRESS SEC’Y (Dec. 20, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-ninth-wave-judicial-nominees-tenth-wave-united-states-attorney-nominees/> (last visited Mar. 21, 2018) (nominating ten individual candidates, including Jill Otake) (on file with the Washington and Lee Law Review); *President Donald J. Trump Nominates His Tenth Wave of Judicial Nominees*, WHITE HOUSE, OFFICE OF THE PRESS SEC’Y (Jan. 23, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-tenth-wave-judicial-nominees/> (last visited Mar. 21, 2018) (nominating nine individual candidates, including John Nalbandian) (on file with the Washington and Lee Law Review); *President Donald Trump Announces Twelfth Wave of Judicial Nominees, Twelfth Wave of United States Attorneys, and Sixth Wave of United States Marshals*, WHITE HOUSE, OFFICE OF THE PRESS SEC’Y (Apr. 10, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-twelfth-wave-judicial-nominees-twelfth-wave-united-states-attorneys-sixth-wave-united-states-marshals/> (last visited Apr. 17, 2018) (nominating nineteen individual candidates, including Raúl Arias-Marxuach) (on file with Washington and Lee Law Review); *President Donald Trump Announces Thirteenth Wave of Judicial Nominees and Seventh Wave of United States Marshals*, WHITE HOUSE, OFFICE OF THE PRESS SEC’Y (Apr. 26, 2017); <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-thirteenth-wave-judicial-nominees-seventh-wave-united-states-marshals/> (last visited Apr. 26, 2018) (on file with Washington and Lee Law Review); *supra* note 47 and accompanying text (appointing Fifth Circuit Judge James Ho and confirming Sixth Circuit Judge Amul Thapar). See generally Wolf, *supra* note 11.

49. Presidents Obama, Bush, and Clinton sent fewer nominees by the same juncture. See *supra* notes 19, 22–24, 28–39 and accompanying text (discussing Obama’s, Bush’s, and Clinton’s judicial nominations).

confirmation and nomination processes.<sup>50</sup> However, there clearly are more significant numbers of capable ethnic-minority, LGBT, and female aspirants today who could be fine possibilities and supply preeminent court service than were available at earlier periods throughout American history, phenomena illustrated by the ten persons of color whom Trump has submitted.<sup>51</sup>

Perhaps the best explanation for this problematic diversity record is that the Executive Branch has devoted negligible attention to recruiting strong minority picks. In sharp contrast to Democratic Presidents, Trump has failed to effectuate initiatives, which search for and confirm able people of color, LGBT individuals, and women. For example, the administration has not actively committed minority individuals to the appointments efforts.<sup>52</sup> The President has concomitantly not insisted that home-state politicians recruit, find, and send many estimable persons of color, LGBT individuals, or women or sought recommendations of purported designees from sources—notably ethnic-minority, LGBT, and female legislators and numerous minority, LGBT, or women’s interest, political, and bar groups—familiar with numbers of well-qualified minority candidates.<sup>53</sup> A

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50. Judicial selection participants’ privacy needs may justify limiting publicly-available information. *See* Tobias, *supra* note 40, at 1103 (“The lack of transparency, which may have been instigated somewhat by the perceived need to move swiftly, privacy concerns, and the compelling necessity to simultaneously and efficaciously create a new government and fill a prolonged Supreme Court vacancy acutely frustrate much cogent assessment.”). *But see Doing What He Said He Would: President Donald Trump’s Transparent, Principled and Consistent Process for Choosing a Supreme Court Nominee*, WHITE HOUSE, OFFICE OF THE PRESS SEC’Y (Jan. 31, 2017), <https://www.whitehouse.gov/briefings-statements/said-president-trumps-transparent-principled-consistent-process-choosing-supreme-court-nominee/> (last visited Apr. 22, 2018) (contending that President Trump was conducting a transparent process for selecting a Supreme Court nominee) (on file with the Washington and Lee Law Review).

51. *See supra* note 48, *infra* note 60 and accompanying text (evaluating the Trump administration’s nomination and confirmation of ethnic-minority and female judicial nominees).

52. *Compare* Savage, *supra* note 39 (discussing systematic approach to filling vacancies resulting in a majority of white appointees), *with* Tobias, *supra* note 1, at 2239–40 (discussing Obama’s approach of actively consulting with home-state politicians to nominate minorities).

53. Indeed, the White House has not seriously consulted with numerous senators on vacancies that materialize in their states. *See, e.g.*, S. Judiciary Comm., *Hearing on Nominees*, Nov. 29, 2018 (Republican Senator John Kennedy suggesting in hearing for a Louisiana Fifth Circuit nominee that the White House



related explanation is elevation of appointing many ideological conservatives above the need to enlarge diversity.<sup>54</sup>

#### IV. Implications

Trump's neglect of ethnic minorities, LGBT individuals, and women when considering and confirming jurists has numerous adverse implications. The federal courts are a salient locus for justice where people of color, mainly African Americans, Latino/as and Native Americans, experience overrepresentation in the criminal justice system<sup>55</sup> and minorities correspondingly encounter too insubstantial judicial representation.<sup>56</sup> This nominal attention to diversity's expansion comprises a lost opportunity for improving the quality of justice, which parties require and federal courts supply.

Increased diversity affords the crucial benefits specifically recounted above: enhancing decisionmaking with constructive views; limiting ethnic, sexual-orientation, and gender biases which undercut justice; and improving public confidence that jurists will supply litigants fair treatment.<sup>57</sup> Appointing plentiful superb persons of color, LGBT individuals, and women could help end or decrease the 140 openings<sup>58</sup> and curtail the rampant divisiveness

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Counsel had instructed the home-state senators that Kyle Duncan would be the nominee); S. Judiciary Comm., *Hearing on Nominees*, Jan. 24, 2018 (Democratic Senator Tammy Baldwin alleged that the White House, after minimal consultation with Baldwin, nominated a Wisconsin Seventh Circuit nominee who lacked sufficient votes from a bipartisan commission, which had successfully evaluated, interviewed and recommended federal judicial candidates for three decades); see also Bruce Vielmetti, *Trump Court Pick Michael Brennan Faces Senate Judiciary Committee*, JOURNAL SENTINEL, Jan. 24, 2018. See generally Tobias, *supra* note 1, at 2256 (assessing the successful record that the Wisconsin commission assembled).

54. See *supra* notes 39–42 and accompanying text (suggesting that the Trump Administration's emphasis on appointing conservative judges may have limited Executive Branch initiatives to recruit, nominate and confirm accomplished minority candidates).

55. See *supra* notes 39–42, 47–48 and accompanying text (evaluating the underrepresentation of minorities in the federal judiciary).

56. See *supra* notes 13, 17–23, 39, 47–48 and accompanying text (same).

57. See *supra* notes 7–99 and accompanying text (discussing the ways in which a diverse federal judiciary can improve the federal court system).

58. JUDICIAL VACANCIES, *supra* note 44.

and strident partisanship, which synergistically plague the contemporary federal government branches and confirmations, while showing that Republicans and Democrats can achieve meaningful progress by cooperating to fill the abundant vacancies for the good of the courts, the President, the Senate, and the country. The United States in fact has numerous accomplished, conservative minorities, LGBT individuals, and women from whom to select; thus, the prospects would be felicitously confirmed.<sup>59</sup>

Several reasons for not addressing diversity, which may have possessed some plausibility earlier, concomitantly are unpersuasive today. For instance, the strong, conservative people of color and women—encompassing confirmees Judges Thapar, Ho and Scholer as well as nominees Arias-Marxuach, Moorer, Nalbandian, Otake, Rodriguez, Ruiz and Smith—distinctly refute the condescending notions that appointing capable minority, LGBT, and female nominees will undermine merit because the pool is narrow or America essentially lacks sufficient conservative aspirants.<sup>60</sup> The persons of color and women chosen and confirmed to date suggest that Trump has readily available many possible nominees, who could simultaneously provide merit and conservative views. His administration need only capitalize on this potential.

In sum, despite the benefits of minority representation, the nascent Trump presidency has dedicated few resources to enlarging diversity. However, there is significant time for effectuating activities to increase the people of color, LGBT

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59. *Supra* note 48, *infra* note 60. *But see supra* note 47 (confirming Sixth Circuit Judge Amul Thapar but only on a party-line vote); John Gramlich, *Federal Judicial Picks Have Become More Contentious, and Trump's Are No Exception*, PEW RES. CTR. (Mar. 7, 2018) <http://www.pewresearch.org/fact-tank/2018/03/07/federal-judicial-picks-have-become-more-contentious-and-trumps-are-no-exception/> (last visited Apr. 22, 2018) (on file with the Washington and Lee Law Review).

60. Trump confirmed numerous other strong, conservative women, including Seventh Circuit Judge Amy Coney Barrett and Sixth Circuit Judge Joan Larsen. White House, Office of the Press Sec'y, President Donald Trump Announces Judicial Candidate Nominations (May 8, 2017) (on file with the Washington and Lee Law Review); 163 CONG. REC. S6,908 daily ed. Oct. 31, 2017) (confirming Judge Barrett); 163 CONG. REC. S6,944 (daily ed. Nov. 1, 2017) (confirming Judge Larsen).

individuals, and women serving. Thus, the last part surveys recommendations to expand minority jurists.

### V. Suggestions For The Future

President Trump now must institute a number of special concepts which enhance federal judicial diversity. One trenchant, reliable practice is elevating to appeals courts some able, conservative minority district court jurists whom Presidents Bush and Obama appointed. That procedure is venerable, because the nominees have compiled accessible, comprehensive records and supply much pertinent experience, while the Senate has previously investigated and confirmed them.<sup>61</sup> Examples are Judge Thapar, Judge Diane Humetewa, who can be the initial Native-American circuit jurist and Judge Manesh Shah, who could be the first Asian-American person named to the Seventh Circuit.<sup>62</sup>

A related approach would be deftly renominating certain of the twenty accomplished, conservative, and moderate, Obama district court nominees who received Judiciary Committee approval without dissent but lacked confirmation votes.<sup>63</sup> This construct would markedly expedite appointments, because renamed nominees must only capture approval of the Judiciary Committee and Senate floor ballots.<sup>64</sup> Trump has deployed renomination with nine of President Obama's designees, including Karen Gren Scholer, five of whom have already secured confirmation.<sup>65</sup>

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61. Elisha Savchak, Thomas Hansford, Donald Songer, Kenneth Manning & Robert Carp, *Taking It to the Next Level: The Elevation of District Court Judges to the U.S. Court of Appeals*, 50 AM. J. OF POL. SCI. 478 (2006); Tobias, *supra* note 28, at 2248 (discussing the positive aspects of the Obama Administration judicial selection process).

62. FJC, *supra* note 19. There are numerous other prospects, such as Judges Philip Gutierrez and Lucy Koh, see Tobias, *supra* note 37, at 715–18. Bush confirmed Judge Amul Thapar and Judge Gutierrez; Obama appointed the others. *Id.*

63. The Republican leadership refused to conduct final votes. Tobias, *supra* note 43, at 11, 18; Savage, *supra* note 39.

64. The 20 nominees comparatively easily secured committee hearings and panel approval with no dissent. Tobias, *supra* note 43, at 18–19.

65. They are District Judges David Nye, Scott Palk, Donald Coggins, Walter Counts and Scholer. *Id.* at 21–22. President Trump can tap many others, such as Inga Bernstein and Florence Pan. See Carl Tobias, *Confirm Inga Bernstein for the District of Massachusetts*, THE HILL (Jan. 13, 2017),

The executive needs to assign improving minority representation high priority while communicating to each individual and entity closely involved with selection and the public that Trump believes enlarging diversity has great importance. The White House Counsel, who assumed lead responsibility for nominations, should orchestrate the project by systematically conveying the message that diversity's robust augmentation has compelling priority akin to conservative attributes. This importuning's focus will be Counsel staff; the Department of Justice, that analyzes candidates delineated and readies nominees for hearings; the Judiciary Committee, which assesses choices denominated and correspondingly mounts hearings, discussions, and votes; and politicians from states that encounter openings, who proffer competent submissions and introduce nominees to lawmakers.

The Counsel must expansively prescribe recommendations to amplify diversity. For instance, Counsel's staff and the other people and entities which collaborate respecting appointments need to include minorities while dutifully committing enough resources to smoothly discharge the task of increasing representation. Every nomination participant must duly seek out, pinpoint, review, and send numerous talented persons of color, LGBT candidates, and women, specifically by contacting individuals, legislators as well as ethnic-minority, LGBT, and women's political, interest and bar committees, especially the Federalist Society, with knowledge of able designees. The President's Counsel should persuade all senators whose jurisdictions confront vacancies to pursue and suggest fine people of color, LGBT selections, and women. This office then must scrutinize, interview and recommend these picks, urging that Trump seriously consider naming them. He might practically and

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<http://thehill.com/blogs/congress-blog/judicial/314071-confirm-inga-bernstein-for-the-district-of-massachusetts> (last visited Mar. 21, 2018) (recommending that President Trump promptly renominate and the Senate swiftly confirm Inga Bernstein) (on file with the Washington and Lee Law Review); Carl Tobias, *Confirm Florence Pan for D.C. District Court*, WASH. POST (Nov. 21, 2016), [https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2016/11/21/confirm-florence-pan-for-d-c-district-court/?utm\\_term=.a2a4d919bef1](https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2016/11/21/confirm-florence-pan-for-d-c-district-court/?utm_term=.a2a4d919bef1) (last visited Mar. 21, 2018) (recommending that President Trump promptly renominate and the Senate swiftly confirm Florence Pan) (on file with the Washington and Lee Law Review)

symbolically lead by example with the prospects' concomitant nomination.

After Trump forwards superb minority choices, the White House, DOJ and Democratic and GOP lawmakers need to coordinate and promote swift, fair confirmation processes. For instance, Trump may request that senators powerfully support nominees, DOJ ought to amply prepare submissions for confirmation and the Judiciary panel must expeditiously schedule comprehensive, equitable hearings, discussions and votes. Once nominees win committee approval, the candidates should have thorough, rigorous floor debates and expeditious upper chamber ballots.

#### *VI. Conclusion*

President Donald Trump has assembled a lackluster record of seating capable minorities. Because their appointments would improve the justice which federal courts dispense and that parties warrant, the chief executive needs to initiate reforms, which find, select, and confirm accomplished, diverse choices, by meticulously applying numbers of measures that have proved successful.