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## Filling the New York Federal District Court Vacancies

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# Filling the New York Federal District Court Vacancies

Carl Tobias\*

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## *I. Introduction*

President Donald Trump contends that federal appellate court appointments constitute his foremost success. The president and the United States Senate Grand Old Party (GOP) majority have compiled records by approving forty-eight conservative, young, accomplished, overwhelmingly Caucasian, and predominantly male, appeals court jurists. However, their appointments have exacted a toll, particularly on the ninety-four district courts around

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the country that must address eighty-seven open judicial positions in 677 posts.

One riveting example is New York's multiple tribunals, which confront twelve vacancies among fifty-two court slots. The Administrative Office of the United States Courts considers nine of these openings "judicial emergencies," because they have been protracted and involve substantial caseloads. Despite that pressing situation, Trump failed to propose any candidate before May 2018 and did not appoint a single jurist for a New York vacant district court position until October 2019. Indeed, eleven of thirteen openings lacked nominees until recently, mostly because prior to this May, President Trump delayed resending the upper chamber seven of eight nominees whom the White House astutely tapped last year.

District judges comprise the federal justice system's workhorses in New York and resolve voluminous filings, while the myriad vacancies pressure New York jurists and litigants, conditions which epitomize the circumstances in jurisdictions throughout the United States. Thus, the attempts to fill the openings by Trump, the chamber and the home state politicians—Democrats Chuck Schumer, the Minority Leader, and Kirsten Gillibrand—necessitate assessment.

This piece first recounts the background of the court appointments issue, stressing modern concerns. Part two surveys the practices of Trump and the chamber, detecting that both the president and the Republican Senate majority emphasize rapidly appointing conservative, young appellate judges but downplay vacancies in trial court positions. The chief executive also eschews revered customs, including assiduous consultation of senators from jurisdictions that experience openings, which predecessors had used. The section then analyzes the confirmation procedures, ascertaining that the Judiciary Committee deemphasizes salutary traditions, principally the "blue slip" policy—which stops processing unless home state legislators approve candidates—and the careful arrangement of hearings that previous committees had rigorously applied.

Segment three considers the detrimental impacts of numerous practices, determining that until recently more appellate court and district court vacancies as well as judicial emergencies existed than when President Trump assumed office. Stressing fast

confirmation of abundant conservative appeals court jurists and deviating from venerable precedents—notably reliance on meticulous consultation and blue slips that had long performed efficaciously—seemingly undercut presidential discharge of the constitutional responsibilities to nominate and confirm plentiful impressive judges and senatorial fulfillment of the constitutional duties to advise and consent respecting nominees for the voluminous openings. Moreover, the prolonged nature and colossal quantity of empty trial level seats undermine the judiciary’s compelling responsibility to promptly, inexpensively, and fairly treat massive dockets.

The last section proffers constructive suggestions for future judicial selection. Now that the president has renominated the seven excellent, mainstream nominees, who decisively earned committee votes, the White House should meaningfully consult the New York lawmakers while revitalizing mechanisms from which presidents and senators have derived consummate benefit to fill all twelve of New York’s unoccupied posts. The Senate must revive efficacious measures, primarily appeals court slips, robust hearings and committee discussions, and rigorous confirmation debates. These endeavors should offer an instructive path for the entire country.

## *II. Contemporary Selection Difficulties*

The history needs comparatively little review; many observers have examined this background and the current situation enjoys greater pertinence.<sup>1</sup> One salient attribute is the persistent vacancies dilemma, which results from enlarged federal court jurisdiction, filings, and judicial slots.<sup>2</sup> The other feature, the

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1. See, e.g., Gordon Bermant, Jeffrey Hennemuth & Fletcher Mangum, *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319, 319 (1994) (analyzing, and suggesting solutions to remedy, excessive federal judicial vacancies); MILLER CENTER OF PUB. AFFAIRS, IMPROVING THE PROCESS FOR APPOINTING FEDERAL JUDGES (1996).

2. That particular attribute deserves somewhat less assessment. This constituent of delay comprises an inherent difficulty which resists felicitous solution, and other writers have comprehensively assessed the question. See Bermant, Hennemuth & Mangum, *supra* note 1, at 319; *Remedying the Permanent Vacancy Problem in the Federal Judiciary*, 42 RECORD ASS’N BAR CITY

contemporary difficulty, is political and can be ascribed to conflicting White House and Senate control which commenced approximately forty years ago.

### A. Persistent Vacancies

Legislators expanded federal jurisdiction in the 1960s,<sup>3</sup> enhancing civil causes of action plus criminalizing more activity, phenomena which increased district litigation.<sup>4</sup> Congress attacked rising caseloads with seats.<sup>5</sup> Over the fifteen years before 1995, appointment times mounted.<sup>6</sup> In 1992, for example, court of appeals nominations required twelve months, and confirmations required three months.<sup>7</sup> The processes' significant number of phases and participants makes some delay intrinsic.<sup>8</sup> Presidents

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N.Y. 374 (1987).

3. MILLER CENTER, *supra* note 1, at 3; see Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1268–70 (1996) (assessing the contemporary difficulty which results from contrasting political control).

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

5. 28 U.S.C. §§ 44, 133 (2012) (providing for the appointment of appellate court and district court judges); *Archive of Judicial Vacancies*, ADMIN. OFFICE OF THE U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> (last visited Nov. 4, 2019) [hereinafter *Archive of Judicial Vacancies*] (cataloging federal judicial vacancies since 1981) (on file with the Washington and Lee Law Review).

6. JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS (1995), <https://perma.cc/D5TP-MDEY> (“Research aimed at eliminating obstacles to efficiency in the federal courts shows two disturbing trends: (1) an increasing percentage of vacant judgeships; and (2) a lengthening average time from the occurrence of a vacancy to the confirmation of a successor judge.”).

7. Bermant, Hennemuth & Mangum, *supra* note 1, at 331 (providing data on average time from vacancy to nomination and nomination to confirmation). Appellate nominations consumed twenty months and appointments six months during 1997, the first year of President Bill Clinton’s last administration, and 2001, the first year of President George W. Bush’s initial administration. Each resembled President Barack Obama’s first year and his last half term. Carl Tobias, *Curing the Federal Court Vacancy Crisis*, 53 WAKE FOREST L. REV. 883, 887 (2018).

8. See generally Bermant, Hennemuth & Mangum, *supra* note 1, 320–23 (providing the mechanisms for judicial appointments); Sheldon Goldman, *Obama*

assiduously consult home state politicians, seeking advice on candidates, and the officials recommend prominent submissions. The Federal Bureau of Investigation (FBI) develops probing “background checks.” The American Bar Association (ABA) evaluates and ranks choices.<sup>9</sup> The Department of Justice (DOJ) helps scrutinize individuals while robustly preparing nominees for Senate assessment. The Judiciary Committee analyzes picks, schedules their hearings, discusses candidates and votes; choices reported might attain floor debates, when necessary, preceding chamber ballots.

### *B. The Contemporary Dilemma*

Article II envisions that senators will moderate flawed nominations, while politicization has infused the selection process since the Republic’s founding.<sup>10</sup> However, partisanship continued, significantly expanding when President Richard Nixon promised to deliver “law and order” by forwarding “strict constructionists,”<sup>11</sup> and perceptibly increased with Judge Robert Bork’s mammoth Supreme Court fight.<sup>12</sup> Politicization soared, while divided government and the fervent hope that the party without executive control may recapture it and confirm jurists fueled dilatory behavior.

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*and the Federal Judiciary: Great Expectations But Will He Have a Dickens of a Time Living up to Them?*, 7 FORUM No. 1, 2009, at 9–12 (summarizing the judicial selection process prior to the Obama Administration and proffering suggestions for improvement).

9. MILLER CENTER, *supra* note 1; *see* ABA, STANDING COMM. ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS (1983).

10. THE FEDERALIST No. 76, at 513 (Alexander Hamilton) (Jacob Cooke ed., 1961); *see* MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 28 (2000); SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997).

11. GOLDMAN, *supra* note 10, at 205; DAVID M. O’BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 20 (1988).

12. *See e.g.*, MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER’S ACCOUNT OF AMERICA’S REJECTION OF ROBERT BORK’S NOMINATION TO THE SUPREME COURT 11–12 (1992); JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 18–19 (2007).

Relatively slow nominations and confirmations might explicate the dearth of approvals in the Bill Clinton and George W. Bush presidencies that 1997 and 2001 selection exemplifies.<sup>13</sup> In President Barack Obama’s tenure, Republican cooperation plummeted, which the unprecedented refusal to assess Judge Merrick Garland, Obama’s dynamic Supreme Court nominee, revealed.<sup>14</sup>

After the GOP earned a chamber majority in November 2014, vowing to dutifully effectuate “regular order” again, the party confirmed merely two Obama nominees for the appellate courts and eighteen for the district courts, the fewest since Harry Truman was president, which meant that there were 103 appeals court and district court vacancies at Trump’s inauguration; New York encountered two appellate court and a half dozen additional open trial court slots.<sup>15</sup>

### *III. Trump Administration Judicial Selection*

#### *A. Nomination Process*

Across the 2016 presidential campaign, Donald Trump pledged to nominate and seat individuals who are ideological conservatives. He respected the promises by marshaling and

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13. Tobias, *supra* note 7, at 888–89 (assessing additional judicial selection issues in the Clinton and Bush presidencies).

14. Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama’s Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 55–61 (2016) (“[After Justice Antonin Scalia’s death,] Republican Senators—led by Senate Majority Leader Mitch McConnell—immediately announced that they would not vote on any replacement nominations by President Barack Obama.”); Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089, 1093 (2017) (“Obama’s tapping of a sitting circuit judge, like nearly all present Supreme Court members, facilitated Senate consideration, as the Federal Bureau of Investigation . . . background check and American Bar Association . . . evaluation only needed to be updated.”).

15. *Archive of Judicial Vacancies*, *supra* note 5; see also 163 CONG. REC. S8021–24 (daily ed. Dec. 14, 2017) (statements of Sens. Feinstein & Leahy) (criticizing Republicans’ willingness to disregard judicial selection norms in confirming appellate court judges); Carl Tobias, *The Republican Senate and Regular Order*, 101 IOWA L. REV. ONLINE 12, 15–34 (2016) (defining the concept of regular order and arguing that the Republican Senate has not restored regular order since winning the majority in 2014).

confirming Justices Neil Gorsuch and Brett Kavanaugh with many analogous circuit, and comparatively few similar district, nominees.<sup>16</sup> Trump established appellate court appointments records over his initial year of twelve confirmations plus more the second.<sup>17</sup>

The chief executive adopts certain valuable conventions but his White House omits and downplays numerous efficacious customs. For instance, Trump, as every contemporary president, assigns lead responsibility for judicial selection to the White House Counsel, related duties to the Justice Department, and central responsibility for district court vacancies to in-state politicians, while stressing appeals court openings.<sup>18</sup> When tendering appellate prospects, the White House Counsel accentuates conservatism and youth and he employs the “short list” of possible High Court aspirants that the Federalist Society principally compiled.<sup>19</sup> Those ideas govern today, as the Society’s Executive Vice President, Leonard Leo, advises the chief executive on judicial selection.<sup>20</sup> Trump emphasizes the appeals courts, because they

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16. *Archive of Judicial Vacancies*, *supra* note 5 (recounting Trump’s judicial appointments).

17. *Id.* (documenting eighteen additional appellate court judicial confirmations during 2019).

18. Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2239–40 (2013) (describing President Obama’s approach to federal judicial appointments); Michael S. Schmidt & Maggie Haberman, *McGahn, Soldier for Trump and Witness Against Him, Leaves White House*, N.Y. TIMES (Oct. 17, 2018), <https://perma.cc/R62E-EYCN> (last visited Nov. 4, 2019) (recounting Trump’s tweet which announced the discharge of McGahn, who served as the initial White House Counsel, and the appointment of Patrick Cipollone, who serves as the second White House Counsel) (on file with the Washington and Lee Law Review).

19. Donald F. McGahn II, *A Brief History of Judicial Appointments From the Last 50 Years Through the Trump Administration*, 60 WM. & MARY L. REV. ONLINE 105, 124–34 (2019) (summarizing McGahn’s experience and success as White House Counsel); Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 10, 2017), <https://perma.cc/8C3P-2XPS> (last visited Nov. 4, 2019) (profiling the Federalist Society and its executive vice president, Leonard Leo); Charlie Savage, *Trump is Rapidly Reshaping the Judiciary. Here’s How.*, N.Y. TIMES (Nov. 11, 2017), <https://perma.cc/72YH-ASNB> (last visited Nov. 4, 2019) (recounting McGahn’s plan to fill the appellate courts with young, extremely conservative judges).

20. Robert O’Harrow, Jr. & Shawn Boburg, *A Conservative Activist’s Behind-the-Scenes Campaign to Remake the Nation’s Courts*, WASH. POST (May 21, 2019), <https://perma.cc/F57D-7FP6> (last visited Nov. 4, 2019) (documenting



are courts of last resort for nearly all filings, create greater policy than district courts, and issue rulings that cover a few states.<sup>21</sup> The president's appellate confirmees are very conservative, young and talented.

However, this administration violates or dilutes longstanding traditions. One is meticulously consulting politicians about home state vacancies, a custom which recent presidents have diligently applied. That custom was a chief reason for blue slips, which only permitted hearings when each home state politician duly returned slips across Obama's entire presidency. Democratic senators contended that the first White House Counsel actually consulted nominally about their jurisdictions' appeals court openings, and McGahn retorted that consultation does not appear in the Constitution.<sup>22</sup> Most pertinently, New York's senators accused Trump of choosing Joseph Bianco, Michael Park and Steven Menashin, three New York Second Circuit nominees, without adequate consultation.<sup>23</sup>

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Leonard Leo's involvement in the selection process and the subsequent media campaign as well as his continuing involvement in the appointments process) (on file with the Washington and Lee Law Review); Zoe Tillman, *After Eight Years on the Sidelines, This Conservative Group Is Primed to Reshape the Courts Under Trump*, BUZZFEED NEWS (Nov. 20, 2017), <https://perma.cc/M5LM-LH7B> (last visited Nov. 4, 2019) ("Leo said that the White House does consult him on nominees, but he disputed that he was 'calling the shots.'").

21. GOLDMAN, *supra* note 10; Tobias, *supra* note 18, at 2240–41; 163 CONG. REC. S8022–24 (daily ed. Dec. 14, 2017) (statement of Sen. Feinstein) ("In a way, circuit courts serve as the de facto Supreme Court to the vast majority of individuals who bring cases. They are the last word.").

22. Thomas Kaplan, *Trump Is Putting Indelible Conservative Stamp on Judiciary*, N.Y. TIMES (July 31, 2018), <https://perma.cc/7AFW-5VSR> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review); Zoe Tillman, *Here's How Trump is Trying to Remake His Least Favorite Court*, BUZZFEED NEWS (Mar. 15, 2018), <https://perma.cc/KQ3E-WA4U> (last updated Mar. 16, 2018) (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review).

23. Press Release, Gillibrand Statement On President Trump And Senate Republicans Forcing The Nominations Of Two Far-Right New York Circuit Court Judges Over Strong Objections From Both Home-State Senators (Feb. 13, 2019), <https://perma.cc/5MYK-WZQ4> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review); Press Release, Schumer Statement on Senate Republicans Advancing the Nominations of Michael Park and Joseph Bianco for the Second Circuit (Mar. 7, 2019), <https://perma.cc/BT82-K9PT> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review); *see also* Press Release, Schumer, Gillibrand Denounce Menashi Nomination To New York 2nd Circuit, Cite Long, Disturbing Record (Sept. 11, 2019), <https://www.democrats.senate.gov/newsroom/press-releases/schumer-gillibrand->

A related departure from multiple lengthy precedents was Trump’s resolution to exclude the American Bar Association from the selection process. All presidents in office after Dwight Eisenhower, save Presidents Trump and George W. Bush, carefully invoked American Bar Association examinations and ratings when nominating candidates, and President Obama refrained from tapping selections whom the expert, professional organization deemed not qualified.<sup>24</sup> However, Trump has mustered nine appellate court and district court nominees whom the ABA ranked not qualified—five of whom have secured confirmation—although the ABA directly rated many of the New York designees well qualified, which is the organization’s highest ranking.<sup>25</sup>

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denounce-menashi-nomination-to-new-york-2nd-circuit-cite-long-disturbing-record- (last visited Nov. 8, 2019) (on file with the Washington and Lee Law Review) (New York senators expressing similar opposition to New York Second Circuit nominee Steven Menashi); Corinne Ramey, *White House Lawyer Confirmed to Federal Judgeship Over Democratic Objections*, WALL STREET J. (Nov. 14, 2019), <https://www.wsj.com/articles/white-house-lawyer-confirmed-to-federal-judgeship-over-democratic-objections-11573769287> (Sen. Schumer characterizing Menashi as “one of the most contemptible nominees to come before the Senate in all my time in this body” and contending Menashi “would be a disgrace [to] the seat once held by the great Thurgood Marshall”); Tobias, *supra* note 7, at 898 (concerning similar White House failures to seek adequate consultation with additional senators, the overwhelming majority of whom have been Democrats, for home state vacancies).

24. Adam Liptak, *White House Ends Bar Association’s Role in Vetting Judges*, N.Y. TIMES (Mar. 31, 2017), <https://perma.cc/39NZ-RM5T> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review); 163 CONG. REC. S8022–24 (daily ed. Dec. 14, 2017) (statements of Sens. Feinstein & Leahy) (strongly touting the substantial value of American Bar Association evaluations and ratings and stating that Obama refrained from suggesting nominees who received not qualified ABA ratings). *But see infra* note 53 and accompanying text (Sen. Grassley strenuously arguing that the ABA is an external “political group” that should not dictate Judiciary Committee scheduling); *Nominations*, S. COMM. JUDICIARY (Oct. 30, 2019), <https://www.judiciary.senate.gov/meetings/10/30/2019/nominations> (last visited Nov. 8, 2019) (on file with the Washington and Lee Law Review) (Sen. Mike Lee (R-UT) strenuously criticizing the ABA as a liberal political organization and recommending that the White House and the Justice Department terminate cooperation with the ABA in the selection process).

25. ABA STANDING COMM. ON FEDERAL JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES 116TH CONGRESS (2019), <https://perma.cc/Y7LZ-T6N3>; ABA STANDING COMM. ON FEDERAL JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES 115TH CONGRESS (2018), <https://perma.cc/BY3Z-DX5D>; Tobias, *supra* note 7, at 893.

Trump employs comparatively traditional procedures when sending district court choices. For instance, his White House like recent predecessors, depends on home state politician suggestions while premising most nominations on the nominees' strong ability to promptly resolve massive caseloads.<sup>26</sup> Numerous submissions are preeminent candidates who enjoy quite high ABA rankings.<sup>27</sup> Yet some nominees withdrew, the ABA rated three more not qualified, and Trump cautioned Republican Senate members to vote against nominees whom they determine lack the requisite qualifications.<sup>28</sup>

The president ignores or deemphasizes numerous effective judicial selection mechanisms. One problem with trial court selection is failing to prioritize the eighty-seven vacancies—fifty of which are judicial emergencies—in the haste to rapidly confirm ample exceptionally conservative, young and competent appeals court jurists.<sup>29</sup> Trump proposes fewer judges in states which

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26. See Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9, 12–19 (2017) (recounting Obama's district court selection process and the president's nominees, especially his administration's reliance on nominees' ability to manage substantial dockets); *but see* Seung Min Kim, *Trump's Judge Picks: 'Not Qualified,' Prolific Bloggers*, POLITICO (Oct. 17, 2017), <https://perma.cc/4UFE-8JUU> (last updated Oct. 18, 2017) (last visited Nov. 4, 2019) (reporting on controversial Trump nominees and weak qualifications of a number to resolve large caseloads) (on file with the Washington and Lee Law Review).

27. Texas Federal District Court Judges Walter Counts and Karen Gren Scholer are preeminent examples. See ABA STANDING COMM. ON FEDERAL JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES 116TH CONGRESS; ABA STANDING COMM. ON FEDERAL JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES 115TH CONGRESS.

28. Tobias, *supra* note 7, at 894; Tom McCarthy, *Judge Not: Five Judicial Nominees Trump Withdrew—and Four Pending*, GUARDIAN (Mar. 10, 2019), <https://perma.cc/ZFG7-GLUF> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review).

29. Judicial emergencies soared from twelve to as many as eighty-six. *Archive of Judicial Vacancies*, *supra* note 5. The one remaining appellate court opening is a judicial emergency. *Judicial Emergencies*, ADMIN. OFFICE OF THE U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies> (last visited Nov. 4, 2019) [hereinafter *Judicial Emergencies*] (on file with the Washington and Lee Law Review). Sixty percent of district court openings and fewer than one percent of appellate court vacancies are judicial emergencies. *Id.*; *Current Judicial Vacancies*, ADMIN. OFFICE OF THE U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> (last visited Nov. 4, 2019) [hereinafter *Current Judicial Vacancies*] (on file with the Washington and Lee Law Review).

Democrats represent, although these jurisdictions face plentiful emergencies, such as California’s mammoth thirteen and New York’s massive eight.<sup>30</sup> The latter had openings in up to fifteen appellate court and district court positions (ten emergencies); however, the White House neglected to recommend even one district choice before April of last year, and since then, had failed to tender any suggestions regarding numerous other district court vacancies before November of this year, while the administration did not confirm a single jurist for the New York district court openings until October 2019.<sup>31</sup> In April 2018, Trump proposed Judge Richard Sullivan for the Second Circuit, in October of that year named Judge Sullivan’s colleague, Joseph Bianco, and Michael Park and in September 2019 recommended Steven Menshi as Second Circuit nominees.<sup>32</sup> The chamber subsequently

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30. *Judicial Emergencies*, *supra* note 29; *but see President Donald J. Trump Announces Ninth Wave of Judicial Nominees and Tenth Wave of United States Attorney Nominees*, WHITE HOUSE (Dec. 20, 2017), <https://perma.cc/F5S4-PV9U> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review) (nominating greater numbers of appellate court and district court nominees from “blue” states); *infra* notes 88, 96.

31. Data verify the priority that the Republican Senate majority accords “red” states. Trump confirmed ninety-one appellate court and district court judges and nominated 108 prospects in two-GOP senator states, and confirmed thirty-three judges and nominated fifty-three candidates in two-Democratic senator states. *Archive of Judicial Vacancies*, *supra* note 5 (spanning 2017 through 2019); *Confirmation Listing*, ADMIN. OFFICE OF THE U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/confirmation-listing> (last visited Nov. 4, 2019) [hereinafter *Confirmation Listing*] (on file with the Washington and Lee Law Review).

32. *President Donald J. Trump Announces Thirteenth Wave of Judicial Nominees and Seventh Wave of United States Marshal Nominees*, WHITE HOUSE (Apr. 26, 2018), <https://perma.cc/WTN2-HZYK> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review); *President Donald J. Trump Announces Eighteenth Wave of Judicial Nominees, Eighteenth Wave of United States Attorney Nominees, and Thirteenth Wave of United States Marshal Nominees*, WHITE HOUSE (Oct. 10, 2018), <https://perma.cc/Z93Y-TLCV> (last visited Nov. 4, 2019) [hereinafter *Oct. 2018 Announcement*] (on file with the Washington and Lee Law Review); *President Donald J. Trump Announces Judicial Nominees, United States Attorney Nominees, and United States Marshal Nominees*, WHITE HOUSE (Aug. 14, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-united-states-attorney-nominees-united-states-marshal-nominees/> (last visited Nov. 8, 2019) [hereinafter *Aug. 2019 Announcement*] (on file with the Washington and Lee Law Review).

confirmed Sullivan, Bianco, Park and Menashi.<sup>33</sup> In May 2018, the president in turn adeptly nominated Gary Brown, Diane Gujarati, Eric Komitee and Rachel Kovner in the Eastern District; Lewis Liman and Mary Kay Vyskocil to the Southern District; and John Sinatra for the Western District;<sup>34</sup> while that November, the White House nominated Thomas Marcelle to the Northern District and one year later named John Cronan and Iris Lan to the Southern District.<sup>35</sup>

Trump has eschewed or downplayed the constructive route of improving minority judicial representation.<sup>36</sup> For example, the

33. *Archive of Judicial Vacancies*, *supra* note 5, *Confirmation Listing*, *supra* note 31.

34. *Archive of Judicial Vacancies*, *supra* note 5; *President Donald J. Trump Announces Fourteenth Wave of Judicial Nominees, Thirteenth Wave of United States Attorney Nominees, and Eighth Wave of United States Marshal Nominees*, WHITE HOUSE (May 10, 2018), <https://perma.cc/JW66-YJLU> (last visited Nov. 4, 2019) [hereinafter *May 2018 Announcement*] (on file with the Washington and Lee Law Review).

35. *Oct. 2018 Announcement*, *supra* note 32; *Twelve Nominations Sent to the Senate*, WHITE HOUSE (May 21, 2019), <https://perma.cc/UP5W-Z5UG> (last visited Nov. 4, 2019) [hereinafter *May 2019 Announcement*] (on file with the Washington and Lee Law Review); *President Donald J. Trump Announces Judicial Nominations*, WHITE HOUSE (Apr. 8, 2019), <https://perma.cc/ARH2-MAYB> (last visited Nov. 4, 2019) [hereinafter *Apr. 2019 Announcement*] (renominating nominees) (on file with the Washington and Lee Law Review); *President Donald J. Trump Announces Intent to Nominate Judicial Nominees*, WHITE HOUSE (Jan. 22, 2019), <https://perma.cc/5D5V-JRPK> (last visited Nov. 4, 2019) [hereinafter *Jan. 2019 Announcement*] (renominating Marcelle and nominating Philip Halpern to the Southern District) (on file with the Washington and Lee Law Review); *President Donald J. Trump Announces Intent to Nominate Judicial Nominees*, WHITE HOUSE (Jan. 30, 2019), <https://perma.cc/94FE-J24U> (last visited Nov. 4, 2019) (nominating California nominees) (on file with the Washington and Lee Law Review); *Eight Nominations and Three Withdrawals Sent to the Senate*, WHITE HOUSE (Sept. 19, 2019), <https://perma.cc/EU2B-7QFH> (concerning the withdrawal of Northern District of New York nominee Thomas Marcelle purportedly because Sen. Gillibrand did not return her blue slip); Robert Gavin & Mike Goodwin, *Gillibrand Blocked Judge's Nomination to the Federal Bench*, ALBANY TIMES UNION (Aug. 29, 2019), [https://www.timesunion.com/news/article/U-S-Attorney-in-Albany-picked-for-federal-14397720.php?utm\\_campaign=CMS%20Sharing%20Tools%20\(Desktop\)&utm\\_source=share-by-email&utm\\_medium=email](https://www.timesunion.com/news/article/U-S-Attorney-in-Albany-picked-for-federal-14397720.php?utm_campaign=CMS%20Sharing%20Tools%20(Desktop)&utm_source=share-by-email&utm_medium=email); *President Donald J. Trump Announces Judicial Nominees*, WHITE HOUSE (Nov. 6, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-8/> (last visited Nov. 8, 2019) [hereinafter *Nov. 2019 Announcement*] (on file with Washington and Lee Law Review).

36. Carl Tobias, *President Donald Trump's War on Federal Judicial Diversity*, 54 WAKE FOREST L. REV. 531, 547–563 (2019); Hailey Fuchs, *Democrats*

White House instituted negligible activity to pursue, cultivate, evaluate and confirm accomplished, conservative ethnic minorities or lesbian, gay, bisexual, transgender and queer (LGBTQ) candidates by, for instance, employing diverse appointments staff or requesting that home state politicians search for, identify, examine and submit numerous well qualified minority candidates.<sup>37</sup> Of Trump’s 162 confirmees, merely one is a lesbian and only twenty are persons of color.<sup>38</sup> Of 227 marshaled nominees, merely one is gay and only thirty-three are ethnic minorities—consisting of sixteen Asian Americans, eight Latino/as, nine African Americans (although no one in the last ethnic group was nominated for a court of appeals position), and one Jamaican.<sup>39</sup> Of the New York appellate court and district court aspirants, Trump nominated four women, but merely Park, Gujarati and Lan are lawyers of color.<sup>40</sup>

### B. Confirmation Process

The appointments system resembles the nomination process’ detrimental elements in several ways, primarily by abolishing or changing rules and conventions that have long operated quite efficaciously. Illustrative are selective modifications of (1) the hundred-year-old policy for blue slips—which permit committee

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*Question Absence of Black or Hispanic Nominees Among Trump’s 41 Circuit Court Judges*, WASH. POST (July 8, 2019), <https://perma.cc/95QC-DJ5U> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review).

37. LGBTQ means openly disclosed sexual preference, which some judicial candidates, nominees and confirmees may have not divulged. LGBTQ individuals are considered “minorities” throughout this piece. *See* sources cited *infra* note 52 (contending that Trump’s nomination pattern evidences hostility to the LGBTQ community).

38. Northern District of Illinois Judge Mary Rowland is the sole lesbian appointee. Tobias, *supra* note 36, at 555, 556 n.124; *Archive of Judicial Vacancies*, *supra* note 5, Confirmation Listing, *supra* note 31.

39. Ninth Circuit nominee Patrick Bumatay is the sole gay nominee. *See* sources cited *supra* note 38; *Sept. 2019 Announcement*, *supra* note 32 (scrutinizing the composition of Trump’s nominees).

40. *Apr. 2019 Announcement*, *supra* note 35 (renominating Eastern District of New York nominee Diane Gujarati as well as Northern District of Illinois nominees Martha Pacold and Mary Rowland in April); *Jan. 2019 Announcement*, *supra* note 35 (renominating Park); *Nov. 2019 Announcement*, *supra* note 35 (nominating Lan).

hearings only when both senators provide slips—and (2) panel hearings.

During fall 2017, Senator Chuck Grassley (R-IA), as then-Judiciary Committee Chair, announced the institution of a new “circuit exception” for prospects who lack blue slips provided by the two senators who represent home states of the prospects, especially due to “political or ideological” opposition.<sup>41</sup> He amended the slip concept, which *both* the Republican and Democratic parties had strictly followed throughout all eight years in Obama’s presidency—the most recent, salient precedent.<sup>42</sup> With the committee processing numerous choices, this situation declined when Grassley nominally supported granting himself as Chair substantial responsibility for determining whether Trump had “adequately consulted,” although the White House only minimally consulted with practically all Democratic home state senators.<sup>43</sup> Particularly relevant for New York was each senator’s marked opposition to Bianco and Park, which Senator Lindsey Graham (R-SC), the next Chair, characterized as an “ideological dispute,” even though full consultation had promoted Sullivan’s prompt installation.<sup>44</sup>

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41. 163 CONG. REC. S7,174 (daily ed. Nov. 13, 2017) (statement of Sen. Grassley); *id.* at S7,285 (daily ed. Nov. 16, 2017); *Prepared Statement by Senator Chuck Grassley of Iowa*, S. JUDICIARY COMM. (Nov. 29, 2017), <https://perma.cc/QG7F-A429> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review); Carl Hulse, *Judge’s Death Gives Trump a Chance to Remake a Vexing Court*, N.Y. TIMES (Apr. 8, 2018), <https://perma.cc/4S2R-Y5XQ> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review).

42. As Chair, Grassley strictly adhered to this blue slip policy across Obama’s final two years, and Patrick Leahy (D-VT) followed the policy during Obama’s initial six years. *Executive Business Meeting*, S. COMM. JUDICIARY (Feb. 15, 2018), <https://perma.cc/6YAU-JHF8> (last visited Nov. 4, 2019) (statements of Sens. Grassley & Leahy) [hereinafter *Feb. 15 Meeting*] (on file with the Washington and Lee Law Review); see also Carl Tobias, *Senate Blue Slips and Senate Regular Order*, 37 YALE L. & POL’Y REV. INTER ALIA 1, 8–9 (Nov. 20, 2018) (recounting the history of the blue slip policy during Grassley’s and Leahy’s time as Chair).

43. *Feb. 15 Meeting*, *supra* note 42 (statements of Sens. Feinstein & Leahy); see sources cited *supra* note 22–24 (honoring a very small number of blue slips); Tobias, *supra* note 42, at 23–26 (arguing that little precedent supports a circuit exception).

44. For the processes, see *Executive Business Meeting*, S. JUDICIARY COMM. (Nov. 7, 2019), <https://www.judiciary.senate.gov/meetings/11/07/2019/executive-business-meeting> (last visited Nov. 8, 2019) [hereinafter *Nov. 7 Meeting*] (on file

Grassley explicitly acknowledged that blue slips were meant to insure that presidents thoroughly consult home state lawmakers while protecting the legislators' judicial selection prerogatives and the interests of the electorate whom senators represent, but Grassley and Graham have respected slips for district court picks.<sup>45</sup> However, Republican senators had persistently deployed slips to exclude talented, centrist Obama appellate court nominees, for political or ideological reasons, the same premises which Grassley had expressly declared illegitimate.<sup>46</sup>

Republicans, as the Senate majority party, share responsibility for the problems detailed by changing effective hearing rules and customs. During the Trump Administration, the GOP has prescribed *fifteen* hearings which featured multiple nominees comprising two appeals court, and four trial level, nominees without the minority's permission; this notion contrasted to *three* similar hearings throughout Obama's eight

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with Washington and Lee Law Review); *Executive Business Meeting*, S. COMM. JUDICIARY (Mar. 7, 2019), <https://perma.cc/8FM8-F9J5> (last visited Nov. 4, 2019) [*hereinafter Mar. 7 Meeting*] (on file with the Washington and Lee Law Review); *Nominations*, S. COMM. JUDICIARY (Sept. 11, 2019), <https://www.judiciary.senate.gov/meetings/09/11/2019/nominations> (last visited Nov. 8, 2019) [*hereinafter Menashi Hearing*] (Graham conducting Menashi hearing despite New York senators' opposition); *Nominations*, S. COMM. JUDICIARY (Feb. 13, 2019), <https://perma.cc/T8NY-TVMH> (last visited Nov. 4, 2019) [*hereinafter Bianco and Park Hearing*] (on file with the Washington and Lee Law Review); *Executive Business Meeting*, S. COMM. JUDICIARY (Sept. 13, 2018), <https://perma.cc/2534-687M> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review); *Nominations*, S. COMM. JUDICIARY (Aug. 1, 2018), <https://perma.cc/EQ8T-ZNY8> (last visited Nov. 4, 2019) [*hereinafter Sullivan Hearing*] (on file with the Washington and Lee Law Review); 164 CONG. REC. S6,799–800 (daily ed. Oct. 11, 2018) (confirming Sullivan); 165 CONG. REC. S2,710 (daily ed. May 8, 2019) (confirming Bianco); *id.* at 2,762 (daily ed. May 9, 2019) (confirming Park); *id.* at 6,596 (daily ed. Nov. 14, 2019) (confirming Menashi); sources cited *supra* note 32 (nominating Sullivan, Bianco, Park & Menashi).

45. See sources cited *supra* note 42. Senator Graham, who became Chair in January, vowed to follow Grassley's policy, and did so with Judges Bianco, Park and Menashi as well as numerous other appellate court nominees, especially for appellate court vacancies in jurisdictions represented by Democratic senators. *Executive Business Meeting*, S. COMM. JUDICIARY (Feb. 7, 2019), <https://perma.cc/8XVC-XGFL> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review); sources cited *supra* note 44.

46. Numerous senators even offered no reasons. See sources cited *supra* notes 15, 42 (concerning senators' use of blue slips).



years, which happened only in peculiar situations and when Republicans consented.<sup>47</sup> Most pertinent to New York, Bianco and Park received a single hearing together with three district court candidates and Sullivan’s hearing included six additional district court candidates, although neither hearing enjoyed minority party assent.<sup>48</sup> The hearings were so packed that senators had negligible time to undertake probing queries.<sup>49</sup> Sessions, especially with these prospects, seemed rushed and lacking appropriate care for people who may earn life tenure.<sup>50</sup> Some circuit and district court nominees delayed by repeating questions, deflected queries or failed to remark on whether, after confirmation, they would dutifully recuse when matters treated issues on which the nominees had labored or about which many held extreme perspectives.<sup>51</sup> A third of Trump nominees have compiled distinctly anti-LGBTQ records.<sup>52</sup>

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47. See, e.g., Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2174–76 (2011) (Ranking Member “Senator Sessions agreed to the unusual practice of furnishing the two [Fourth Circuit] nominees a single panel hearing, which Senators Burr and Hagan attended to express their support for the nominees.”); 163 CONG. REC. S8,021–24 (daily ed. Dec. 14, 2017) (statement of Sen. Leahy) (“Multiple circuit court nominees are regularly stacked on single panels.”).

48. *Bianco and Park Hearing*, *supra* note 44; *Sullivan Hearing*, *supra* note 44; *Menashi Hearing*, *supra* note 44 (Menashi and three district court nominees); Tobias, *supra* note 7, at 901 (describing similarly packed hearings).

49. *Bianco and Park Hearing*, *supra* note 44; *Sullivan Hearing*, *supra* note 43; *Executive Business Meeting*, S. COMM. JUDICIARY (Apr. 4, 2019), <https://perma.cc/EKN6-CRST> (last visited Nov. 4, 2019) (suggesting lack of resources for the minority party to prepare for packed hearings) (on file with the Washington and Lee Law Review).

50. Most senators had merely five minutes to pose queries. See sources cited *supra* notes 22, 49; 163 CONG. REC. S8021–24 (daily ed. Dec. 14, 2017) (statement of Sens. Feinstein & Leahy) (regarding lack of care in the Republican-led hearings).

51. Judges Park and Menashi exhibited these characteristics. *Bianco and Park Hearing*, *supra* note 44; *Menashi Hearing*, *supra* note 44; *Nov. 7 Meeting*, *supra* note 44; see also 28 U.S.C. § 455 (2012) (requiring that a federal judge recuse when the jurist has a “personal bias or prejudice” concerning a party, served as a lawyer on the matter, or participated in the proceedings as a governmental employee). The considerations reviewed above can appear to make these hearings meaningless exercises in which participants exchange few substantive ideas.

52. *Stacking the Courts: The Fight Against Trump’s Extremist Nominees*, LAMBDA LEGAL, <https://perma.cc/5WHV-JQGV> (last updated Jan. 31, 2019) (listing reasons for opposing the confirmation of extreme nominees one third of

One important departure from regular order was Grassley's mistaken choice to not wait on American Bar Association evaluations and ratings *before* committee hearings, and even votes, despite incessant requests from Dianne Feinstein (D-CA), the Ranking Member, to have this information *after* completion. He strenuously argued that the external "political group" should never dictate panel scheduling.<sup>53</sup> Most notorious was the hearing for Judge Sullivan and the many New York trial level picks.<sup>54</sup> It, thus, was foreseeable that controversial submissions received party-line ballots.<sup>55</sup>

Once nominees win approval, similar dynamics circumscribe efficacious review: Democrats promote cloture votes and secure roll call ballots on practically all nominees; GOP and Democratic members consistently vote in lockstep with their respective parties; and Democrats' explosion of the powerful 2013 "nuclear option" means that nominees can be appointed on majority ballots.<sup>56</sup> Perhaps most critical, Republicans rammed four

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whom had compiled anti-LGBTQ records) (on file with the Washington and Lee Law Review); see Eleanor Clift, *What Trump's Judicial Nominees Have in Common: They Really Don't Want LGBTQ People to Have Rights*, DAILY BEAST (Mar. 12, 2018), <https://perma.cc/XR67-UHXR> (last updated Mar. 12, 2018) (last visited Nov. 4, 2019) ("One in three has something explicit in their record and/or their writings that is hostile to LGBTQ rights.") (on file with Washington and Lee Law Review).

53. *Sullivan Hearing*, *supra* note 43 (statements of Sens. Grassley & Feinstein).

54. On the hearing date, the ABA contributed evaluations and ratings on four district nominees but only delivered input on the other two nominees subsequently. *Id.*; see Tobias, *supra* note 15, at 36 (suggesting "the President might correspondingly facilitate American Bar Association candidate assessments . . . while urging speedy chamber analysis" as a part of regular order).

55. See, e.g., *Executive Business Meeting*, S. COMM. JUDICIARY (Dec. 7, 2017), <https://perma.cc/ZT5R-RQVP> (last visited Nov. 4, 2019) (approving Eighth Circuit nominee Leonard Steven Grasz) (on file with the Washington and Lee Law Review); *Executive Business Meeting*, S. COMM. JUDICIARY (Feb. 15, 2018), <https://perma.cc/EE3C-6EAU> (last visited Nov. 4, 2019) (approving Seventh Circuit nominee Michael Brennan) (on file with the Washington and Lee Law Review).

56. 159 CONG. REC. S8,418 (daily ed. Nov. 21, 2013) (limiting deployment of the filibuster regarding appellate court and district court nominees by requiring a majority rather than sixty votes for cloture). Cloture ballots and roll call votes can torpedo weak nominations; majority confirmation votes may confirm strong nominations. It is important to remember that the Republican Senate majority detonated the nuclear option to eliminate filibusters of Supreme Court nominees

appellate judges' debates with chamber votes into one 2017 week and pressed six court of appeals jurists over a 2018 week; they followed cryptic notice.<sup>57</sup> The many nominees and their mammoth records left Democrats comparatively few resources to prepare.<sup>58</sup> Some floor debates' uninformative quality resembles that in panel discussions.<sup>59</sup>

The Republican Senate majority prioritizes appellate court over district court approvals, curing non-emergency and red state vacant court posts, and seating conservative white males.<sup>60</sup> This

and to slash the number of post-cloture debate hours for district court nominees from thirty to two. *See* Tobias, *supra* note 14, at 1096, 1107; sources cited *infra* note 59. Actions involving judicial selection instituted by the president, the senators, and the Democratic and Republican political parties reflect which party controls the presidency and the Senate.

57. *Schedule for Pro Formas and Monday, May 7, 2018*, SENATE DEMOCRATS (Apr. 26, 2018), <https://perma.cc/KAL5-B63R> ("Each nomination is subject to a cloture vote and then, if cloture is invoked, up to 30 hours of post-cloture debate prior to a vote on confirmation.") (on file with the Washington and Lee Law Review); *Schedule for Thursday, Apr. 26, 2018*, SENATE DEMOCRATS (Apr. 25, 2018), <https://perma.cc/Q4LW-2MS8> (on file with the Washington and Lee Law Review); *Schedule for Tuesday, Oct. 31, 2017*, SENATE DEMOCRATS (Oct. 30, 2017), <https://perma.cc/82RK-2FLX> (on file with the Washington and Lee Law Review); *Schedule for Thursday, Oct. 26, 2017*, SENATE DEMOCRATS (Oct. 25, 2017), <https://perma.cc/M892-P7BV> (on file with the Washington and Lee Law Review).

58. *Executive Business Meeting*, S. COMM. JUDICIARY (Nov. 2, 2017), <https://perma.cc/FJJ3-7VD6> (last visited Nov. 4, 2019) (statement of Sen. Feinstein) (advocating for testimony, evaluations and ratings from the American Bar Association as a critical aspect of the committee hearing process before hearings proceed) (on file with the Washington and Lee Law Review). President Bush never attempted to confirm this many appellate court nominees in one week; President Obama only confirmed that many nominees in a week once and in special circumstances when the nominations had been pending for a protracted period and the Senate was adjourning for the congressional session. Tobias, *supra* note 7, at 902.

59. *See* sources *supra* notes 47–51 (discussing conduct during several appellate court nomination hearings); 165 CONG. REC. S2,220 (daily ed. Apr. 3, 2019) (reducing post-cloture debate hours for district court nominees from thirty to two); Burgess Everett & Marianne Levine, *McConnell Preps New Nuclear Option to Speed Trump Judges*, POLITICO (Mar. 6, 2019), <https://perma.cc/MX47-W27R> (last updated Mar. 6, 2019) (last visited Nov. 4, 2019) (describing preparation of the nuclear option for district court nominees and stating that "President Donald Trump's stream of judges is about to become a torrent.") (on file with the Washington and Lee Law Review).

60. The confirmation process priorities cataloged mirror the nominating regime. *See* sources cited *supra* notes 16–25, 29–40 (surveying Trump's procedures for recommending nominees). Three of four New York Second Circuit nominees who captured appointment are white males. Six of nine Trump New

inattention to district court nominations and emergency openings was undeserved for several reasons: trial jurists comprise the federal judiciary’s plowhorses and resolve substantial litigation; the emergency classification only applies in exceptional circumstances; senators’ party affiliation should not drive court judicial resource dissemination; and minority jurists present numerous benefits.<sup>61</sup> These factors were magnified by the need to fill a Supreme Court vacancy and 103 appellate court and district court openings at Trump’s inauguration; Mitch McConnell (R-KY), the chamber leader, orchestrated each by delaying confirmations in the Obama Administration.<sup>62</sup>

These priorities helped Trump achieve the court of appeals record across his first half term and continue attaining success throughout 2019. Yet, the Senate left twenty-three district court nominees without confirmation, significant vacancies at 2017’s close with more upon the next year’s conclusion, emergencies to immensely proliferate, and few “blue” state and minority confirmees.<sup>63</sup> New York appellate court and district court openings soared from eight to fifteen and emergencies in fact multiplied from a pair to eight.<sup>64</sup> However, Trump appointed only a single New York candidate across his initial twenty-seven months, and

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York district court nominees who currently await confirmation are white males, but the lone district appointee is a white woman.

61. See *supra* notes 26, 29–31 (discussing judicial emergencies, district court vacancies, and Trump’s “red” state priority); *infra* notes 70–75 and accompanying text (summarizing the importance of district court judges and the advantages proffered by nominating and confirming diverse candidates).

62. Michael A. Cohen, *Mitch McConnell, Republican Nihilist*, N.Y. REV. BOOKS (Feb. 25, 2019), <https://perma.cc/C3ZS-K9T3> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review); Charles Homans, *Mitch McConnell Got Everything He Wanted. But at What Cost?*, N.Y. TIMES (Jan. 22, 2019), <https://perma.cc/NL4Q-YUJ8> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review); see generally MITCH MCCONNELL, *THE LONG GAME* (2016).

63. For 2017 statistics and individual nominees, see U.S. SENATE, EXECUTIVE CALENDAR ISS. NO. 188 (2017); *Archive of Judicial Vacancies*, *supra* note 5. For 2018 statistics and individual nominees, see 165 CONG. REC. S33 (daily ed. Jan. 2, 2019); *Archive of Judicial Vacancies*, *supra* note 5. For 2019 statistics and individual nominees, see *Archive of Judicial Vacancies*, *supra* note 5.

64. See *Archive of Judicial Vacancies*, *supra* note 5 (indexing judicial openings and emergencies during Trump Administration); sources cited *supra* notes 32–35 (collecting Trump’s appellate court and district court nominations in New York).

all district choices with panel approval lacked confirmation at 2018's close, yet were only renamed during this April.<sup>65</sup> The sole nominees of color whom Trump marshaled were Park, Gujarati and Lan.

In the final analysis, the New York state appellate court and district court nominee packages' makeup suggests the reasons for Trump's dilatory renaming of district nominees with committee reports and explains why three unoccupied positions can still be missing nominees as late as mid-November. The White House may have proffered four appeals court nominees, while the senators apparently proposed many trial level candidates.<sup>66</sup> In short, Trump promptly extracted appointment of four appellate court jurists from "trading" and seemed to delay or renege on the district choices.<sup>67</sup>

#### IV. Consequences

The nomination and confirmation processes' assessments reveal that essential ideas which Trump and the Senate employ manifest plenty of detrimental ramifications. Valuable yardsticks include the striking one appellate court, and eighty-seven trial court, vacant posts—fifty-one of which involve emergencies—with substantial percentages in the latter two categories emanating

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65. See sources cited *supra* notes 32–35, 63 (collecting Trump's New York appellate court and district court nominations and the nominees remaining at the end of 2018).

66. The New York senators retained blue slips for three New York Second Circuit nominees and returned them for one New York Second Circuit nominee who smoothly captured appointment. See *supra* note 44 (collecting the hearings, executive business meetings and confirmation debates and votes that resulted in confirmations for Sullivan, Bianco, Park and Menashi); *infra* notes 111–113 and accompanying text (suggesting that trades may impose certain detrimental effects).

67. For assessment of "trades" and bipartisan courts, see *infra* Section IV; Zoe Tillman, *The White House Has Pitched a Nominee for Manhattan's Powerful US Attorney Opening*, BUZZFEED NEWS (Aug. 7, 2017), <https://perma.cc/JEH7-JY2G> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review). Trump also seemed to taunt the California, Illinois and New York senators, who occupy positions in the Senate Democratic leadership, by slowly renaming nominees on whom all had agreed. Carl Tobias, *Filling the California Ninth Circuit Vacancies*, 92 S. CAL. L. REV. POSTSCRIPT 83 (2019); sources cited *supra* notes 31–35, 40.

from states that Democrats represent, and minuscule confirmees and nominees who constitute minority individuals, propositions which New York’s circumstances epitomize.<sup>68</sup> Indeed, before August 2019, the statistics had been worse than at Trump’s inauguration.<sup>69</sup> These elements pressure monumental numbers of litigants and their counsel as well as district courts and judges, who must swiftly, inexpensively and fairly resolve numerous cases.<sup>70</sup> Trial judges finally decide a significant percentage of civil matters, and criminal litigation receives precedence under the Speedy Trial Act.<sup>71</sup>

Certain parameters—eighty-seven district court vacancies, twelve in New York, rampant emergencies and comparatively few minority nominees and confirmees, many of whom make substantial contributions—show the necessity to appoint considerably more jurists who are diverse. Federal courts are a significant locus where people of color and LGBTQ individuals could be excessively represented as defendants in the criminal

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68. See *supra* notes 29–40 and accompanying text.

69. In February 2017, there were 108 circuit and district court openings with forty-three considered emergencies. *Archive of Judicial Vacancies*, *supra* note 5. By August 2019, there were 110 circuit and district vacancies with sixty-two designated as emergencies. *Id.* Data worsened even as status changes slowed. Tobias, *supra* note 7, at 906–07. Thirteen district nominees won confirmation at the August 2019 recess. Hailey Fuchs, *As Democrats Debated Without Mentioning Federal Judges, the Senate Confirmed 13 More Trump Nominees*, WASH. POST (Aug. 1, 2019), <https://perma.cc/QS7J-L4FS> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review).

70. FED. R. CIV. P. 1 (“[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”); Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325, 1395 (1995) (“Apart from its capacity to empower and guide particular procedural decisions, the trinity [of the “just, speedy, and inexpensive determination”], by its terms, applies to the construction and administration of all of the Rules.”). District judges are the lone jurists whom most parties face; protracted vacancies deprive judges and litigants of resources which they desperately need.

71. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–74 (2012); see Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, WALL STREET J. (Apr. 6, 2015), <https://perma.cc/BJQ4-SBR2> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review); Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL STREET J. (July 23, 2011), <https://perma.cc/MR4X-6R5N> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review).

justice system and lack enough judicial representation. New York has long been very diverse, which compels improved minority representation. Limited attention to diversity has been a lost opportunity for enhancing the quality of justice that parties need. More representation supplies benefits. Numerous persons of color, women and LGBTQ jurists can furnish different, instructive perspectives,<sup>72</sup> which encompass issues regarding abortion, constitutional and employment discrimination law and other complex questions which federal courts assess.<sup>73</sup> Diverse judges curtail ethnic, gender and sexual orientation biases that undercut justice.<sup>74</sup> Tribunals which mirror the nation increase citizens' respect for the judiciary by demonstrating that ample people of color, women and LGBTQ candidates serve efficaciously as court members.<sup>75</sup>

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72. 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 anecdotal and empirical evidence of the effect of differing perspective from diverse jurists); 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.”).

73. Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L. J. 1759, 1778 (2005) (“[A]dding a female judge to the panel more than doubled the probability that a male judge ruled for the plaintiff in sexual harassment cases (increasing the probability from 16% to 35%) and nearly tripled this probability in sex discrimination cases (increasing it from 11% to 30%).”). *But see* Mitu Gulati, Stephen Choi, Mirya Holman & Eric Posner, *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504, 527 (2011) (concluding that “female judges and male judges perform about the same,” even when they make decisions regarding “traditionally women-focused subjects”).

74. *See, e.g.*, NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS & ETHNIC FAIRNESS, FINAL REPORT 1–13 (1997) (reporting comparatively few instances of judicial bias, but finding considerably more instances of bias reported by criminal practitioners); FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990) (“Although we have confidence that the quality of the federal bench and the nature of federal law keep such problems to a minimum, it is unlikely that the federal judiciary is totally exempt from instances of [bias].”).

75. Sylvia Lazos, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L. J. 1423, 1442 (2008) (detailing George W. Bush’s appointments of numerous African-American and Latina/o appellate and district court judges and how partisan politics can undermine minority judicial representation); Jeffrey Toobin, *The Obama Brief*, NEW YORKER (Oct. 27, 2014), <https://perma.cc/2P54-8GWU> (“Thirty-six per cent of President Obama’s judges have been minorities, compared with eighteen per cent for Bush and twenty-four per cent for Clinton.”) (last visited Nov. 4, 2019) (on file with the

No plausible reason actually supports the Trump Administration's failure to improve judicial diversity. For example, conservative, accomplished individuals of color, women and LGBTQ persons—specifically Trump confirmees Michael Park, Terry Moorer, Rodolfo Ruiz and Mary Rowland, combined with Diane Gujarati who continues to await confirmation—undermine the notion that appointing copious ethnic minority, female and LGBTQ nominees confines merit, as the “pool” is minuscule.<sup>76</sup> His confirmees and nominees thus far show that plentiful superb choices distinctly offer merit *and* conservatism. Trump need only realize this potential.

By omitting and deemphasizing cogent rules and conventions with quick approval of so many conservative, young and competent appellate court jurists, Trump undercut the discharge of presidential constitutional responsibilities to nominate and confirm talented judges for the eighty-six trial level openings and the fifty district court emergencies. Prompt confirmation of analogous candidates by diluting blue slips and violating or constricting related profitable ideas erodes the Senate constitutional duty to advise and consent. The vacancies' monumental number and protracted character distinctly impair the judiciary's responsibility to expeditiously, inexpensively and equitably resolve civil and criminal litigation.<sup>77</sup>

In sum, Trump has nominated plenty of choices and seated manifold circuit jurists, who are quite conservative, young and capable, but the White House and the chamber perverted and downplayed constructive solutions that have recently produced approvals, which mean that eighty-seven openings plague many

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Washington and Lee Law Review).

76. Tobias, *supra* note 7, at 908–09 n. 151 (providing additional accomplished, conservative appointees); sources *supra* notes 38–40 (demonstrating the dearth of minority appointees by Trump), *infra* note 83 and accompanying text (suggesting that Trump could renominate diverse nominees who secured 2016 committee approval).

77. See sources *supra* notes 70–71 (regarding the courts' responsibility to litigants to speedily resolve disputes). Nonstop, ideological emphasis in the judicial selection process can make judges resemble politicians and erode public trust. *Mar. 7 Meeting*, *supra* note 44; Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices As Advocates*, 94 NOTRE DAME L. REV. 1161, 1186 (2019); PEOPLE FOR THE AM. WAY, *Confirmed Judges, Confirmed Fears* (2019), <https://perma.cc/L9JJ-4AF4>.



federal districts today. New York must confront twelve, eight of which implicate emergencies; Trump did not confirm a single district court nominee until October and merely appointed one New York Second Circuit judge before May 2019. Therefore, the last part surveys practices which address New York's twelve trial level vacancies.

### *V. Suggestions for the Future*

Trump must capitalize on numerous effective techniques. Thus far, his administration has invoked a few helpful mechanisms. One was renaming seven talented district court prospects with reports whose nominations expired this January but drew April renewal.<sup>78</sup> That idea was efficient; the designees have intensive committee, FBI, and ABA scrutiny, which requires cursory updating, and compile easily discovered, thorough records, while they must only capture panel and chamber votes.<sup>79</sup> The suggestion is efficacious. New York merits appointing numerous district jurists to increase the quality of justice administered by its district courts. Fairness also mandates that nominees be promptly reviewed; that every component of the Trump/in-state-politician “deal” be honored and that court judicial resource distribution not track the president's shifting, malleable political necessities or senator party affiliation.<sup>80</sup>

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78. Trump renamed fifty-four nominees during January 2019. Nevertheless, the White House only sent April nominees to the Senate on May 21. *Archive of Judicial Vacancies*, *supra* note 5; *May 2018 Announcement*, *supra* note 34.

79. The Senate Judiciary Committee has required that no nominees who had hearings in the prior Congress—like Judges Brown and Gren Scholer—have another. Tobias, *supra* note 7, at 911.

80. See sources *supra* notes 23, 32–34 (describing the disputes between the Trump White House and Senators Gillibrand and Schumer over the home state Second Circuit nominees), *infra* notes 108–10 and accompanying text (discussing the efficacy of trading). Presidents and senators must honor their pledges when formulating deals or they will not operate effectively. Burgess Everett & Marianne Levine, *Josh Hawley Rattles Republicans as He Derails GOP Judge*, POLITICO (June 12, 2019), <https://perma.cc/BK7E-V5ZM> (last updated June 12, 2019) (last visited Nov. 4, 2019) (“[Michael] Bogren joins a small group of Trump nominees, including Brett Talley, Jeff Mateer, Ryan Bounds and Thomas Farr, who tanked amid opposition from Republicans,” and Bogren's recent withdrawal epitomizes deals that come unraveled) (on file with the Washington and Lee Law Review).

Trump could similarly recommend again certain of the plentiful accomplished, conservative, and moderate, 2016 Obama district court nominees whom the panel approved but lack confirmation.<sup>81</sup> This may enable fast appointment, because those nominees have to win merely committee and floor ballots.<sup>82</sup> Trump renamed fifteen, including Gary R. Brown, his consensus Eastern District nominee; most of these nominees secured appointment while others can promote minority representation and fill district openings.<sup>83</sup>

A somewhat related concept which Trump uses is elevating numbers of highly talented, centrist magistrate judges whom Article III jurists in the district courts appoint for eight-year terms. The construct is pragmatic and equitable, because these nominees have compiled accessible, comprehensive records and develop immense relevant experience.<sup>84</sup> Illustrations comprise Moorer, one able Trump confirnee, and Gary R. Brown, his competent Eastern District nominee.<sup>85</sup>

Trump should revive or improve other effective procedures that the White House currently omits and deemphasizes, including consulting home state senators, prioritizing emergencies and selecting diverse nominees. It would be crucial to assiduously

81. Tobias, *supra* note 26, at 18 (reviewing opportunity to preserve valuable time, money and energy); *Executive Business Meeting*, S. COMM. JUDICIARY (June 20, 2019), <https://perma.cc/7NPP-H884> (last visited Nov. 4, 2019) [hereinafter *June 2019 Meeting*] (approving Judge Brown, a renominee, with a voice vote) (on file with the Washington and Lee Law Review).

82. Tobias, *supra* note 26, at 18–19; *see supra* note 77 (discussing how the committee, FBI, and ABA assessments of nominees only need updating).

83. Tobias, *supra* note 26, at 21–22 (providing examples of five others who secured 2016 committee approval but lacked confirmation whom Trump has not yet renominated). This concept is pragmatic, efficient and fair, as all individuals have waited years, and this practice may facilitate appointments. Trump renamed Gujarati in 2018, one of twenty-eight additional Obama nominees lacking 2016 panel approval, yet only renominated her this April, even as Trump has yet to renominate any other nominee who was among the twenty-eight. *See* sources cited *supra* notes 34, 39.

84. 28 U.S.C. § 631 (2012); *see also* Tobias, *supra* note 7, at 910 (assessing the practice of elevating district appointees to circuit positions). They also have FBI background checks.

85. Carl Tobias, *This Judicial Nominee Deserves a Vote*, *NEWSDAY* (June 25, 2019), <https://perma.cc/U3Y7-BFJV> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review); *Current Judicial Vacancies*, *supra* note 29; *see also* sources cited *supra* notes 33–34, 38–40, 81.

consult home state politicians, which facilitates most nominations and confirmations and is a major reason for blue slips.<sup>86</sup> The successful confirmation of the seven highly capable, mainstream New York district aspirants whom Trump renamed in April may pertinently demonstrate the success of these procedures.<sup>87</sup> Although the maximum consultation will not always yield the Republican and Democratic political parties' strongest preferences, the solution could spur more nominations and might resolve disputes that can undermine the selection process and interparty collaboration.<sup>88</sup> Those attributes show the profound exigency to resume cooperative discussions which involve (1) those renominees' immediate appointment and (2) the expeditious confirmation of judges to all of the remaining district positions, several of which lack nominees.

Trump could rethink the quick approval of so many extremely conservative, young appellate court jurists—which is the dominant explanation for the colossal number of trial level openings across the country and New York's twelve district court vacancies—while closely reviewing actions to decrease the unoccupied trial level judgeships. For instance, he may want to prioritize nominees who might remedy the plentiful New York emergencies.<sup>89</sup> Trump can stress the myriad district court openings in New York,<sup>90</sup> and this may help rectify the paucity of blue state confirmees and nominees.<sup>91</sup>

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86. See sources cited *supra* notes 22–23, 41–46 (relating Senators Gillibrand's and Schumer's blue slipping of Trump appellate court nominees and Senator Grassley's change to the appellate court blue slip policy).

87. All seven had smooth 2018 panel approval, no confirmation debate and vote and April 2019 renomination. See sources cited *supra* notes 35, 44 (collecting nominations and hearings). The Senate did confirm one of the district court nominees, Rachel Kovner, in October. 165 CONG. REC. S5,829 (daily ed. Oct. 16, 2019). Another Trump district nominee, Thomas Marcelle whom the president nominated to the Northern District of New York, withdrew ostensibly because Sen. Gillibrand decided to retain her blue slip. See sources cited *supra* note 35.

88. See sources cited *supra* notes 22–23, 43–44 and accompanying text (discussing New York and other states' nomination disputes with the Trump Administration White House).

89. See *Judicial Emergencies*, *supra* note 29 (listing the New York judicial emergencies).

90. *Id.* (showing that California experiences thirteen vacancies, Illinois encounters five and New Jersey confronts six).

91. *Id.* Trump should continue to follow home state senators' proposals of

The White House could also expand judicial diversity, which marshals benefits that Park, Gujarati and Lan clearly exemplify; New York demographics warrant promoting those advantages.<sup>92</sup> Trump can increase minority judicial representation and communicate to all citizens and selection participants that he favors enhanced diversity. The White House Counsel should head this activity, conveying that representation has priority analogous to conservatism. Cipollone could focus his efforts on the White House Counsel Office, the Department of Justice, the Judiciary Committee plus the New York senators, who would emphasize diversity by meticulously pursuing and submitting numerous fine, conservative minority attorneys.<sup>93</sup> Counsel next might interview and proffer these choices, asking that Trump seriously contemplate naming all of them. Trump may lead by example with his nominations, convincing politicians to support and promptly consider individuals whom the administration tenders.

In short, the president and the Senate must evaluate near-term procedures which might curb the significant New York vacancies and may quell the persistent confirmation wars. The latter are reflected by (1) the White House eschewing consultation and delaying renomination of seven, plus naming of six more, New York trial level candidates, (2) Democrats' rarely agreeing on confirmation votes, and frequently demanding roll call ballots, and (3) the chamber's substantially altering court of appeals slips

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well qualified, mainstream picks, even though the many well qualified New York nominees arguably mean that Trump and the Senate could have less need for expert ABA input. ABA STANDING COMM. ON FEDERAL JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES 116TH CONGRESS (2019), <https://perma.cc/Y7LZ-T6N3>; ABA STANDING COMM. ON FEDERAL JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES 115TH CONGRESS (2018), <https://perma.cc/BY3Z-DX5D>.

92. See generally Beiner, *supra* note 72 (examining the effect of diversity on the judiciary); McCain & Flake, *supra* note 72 (same); Peresie, *supra* note 73 (same); NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS & ETHNIC FAIRNESS, *supra* note 74 (same); see also *Apr. 2019 Announcement*, *supra* note 35 (renominating Gujarati); *Jan. 2019 Announcement*, *supra* note 35 (renaming Park); *Nov. 2019 Announcement*, *supra* note 35 (announcing the nomination of Lan).

93. For the senators' ongoing efforts and more recommendations for expanding diversity, see Carl Tobias, *Appointing Lesbian, Gay, Bisexual, Transgender and Queer Judges in the Trump Administration*, 96 WASH. U. L. REV. ONLINE 11, 16, 20-22 (2018).

and dramatically reducing trial level nominee debate hours from thirty to two.<sup>94</sup> Many concerns show that 2019 is past time for effectuating solutions that would permanently improve the failing rules and customs.<sup>95</sup>

Trump and senators might change the present system with a bipartisan judiciary that allows the party which lacks the chief executive to afford a comparatively small percentage of designees.<sup>96</sup> New York senators introduced this construct in the 1970s.<sup>97</sup> Pennsylvania supplies a modern example.<sup>98</sup> What New York recently did may accurately be conceptualized as a bipartisan court process. For instance, Trump apparently championed four appeals court nominees and the senators forwarded most of the trial level candidates. The nomination procedures functioned rather smoothly, but tardily. Yet the appointment practices followed with Second Circuit Judges Joseph Bianco, Michael Park and Steven Menashi and many district choices performed less suitably; Trump partly addressed the final complication by

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94. John Gramlich, *Judicial Picks Have Become More Contentious, and Trump's Are No Exception*, PEW RESEARCH CTR. (Mar. 7, 2018), <https://perma.cc/Q5C4-L8XX> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review); sources cited *supra* notes 22–23, 35, 41–44, 56, 59, 63–64.

95. Longer-term suggestions for improvement warrant 2020 adoption, because limited clarity on the outcome of White House and Senate elections provides incentives to agree—neither party knows who will benefit from the agreement. For more longer-term recommendations, see Michael Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 298–311 (2012); Tobias, *supra* note 18, at 2255–65.

96. Michael Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 688 (2003) (listing alternative arrangements reached between past presidents and senators); Carl Tobias, *Fixing the Federal Judicial Selection Process*, 65 EMORY L. J. ONLINE 2051 (2016) (arguing that President Obama could have benefited from a similar arrangement).

97. The New York senator whose party lacked the presidency recommended one in three or four nominees. Tobias, *supra* note 7, at 915 n.182 (citing JOAN BISKUPIC, *BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE* 59 (2014)).

98. *Id.* at 916 (“Senators Bob Casey (D) and Pat Toomey (R) now rely on bipartisan merit-selection panels, which have canvassed and chosen individuals since 2011 . . .”). Additional jurisdictions, namely California and Illinois, apply comparatively similar regimes. *Id.*; see sources cited *supra* notes 32–35, 40 (showing four California, and three Illinois, district nominees whom Trump renamed in January and April).

renaming this April the seven nominees who enjoyed June committee approval but six of those nominees still await confirmation debates and ballots.<sup>99</sup>

Politicians should yoke bipartisan courts to legislation which authorizes additional New York district jurists.<sup>100</sup> That may institute Judicial Conference of the United States recommendations for lawmakers, which the policymaking arm of the federal courts astutely derives from conservative work and case load estimates that increase judicial resources.<sup>101</sup> Those actions should become effective in 2021.<sup>102</sup> Linking a bipartisan judiciary with four new posts will yield sound benefits. Bipartisan courts and more judgeships would grant each party incentives to cooperate, result in the nomination and confirmation of jurists who manifest diverse expertise, ideology, ethnicity, gender and sexual orientation, and increase court judicial resources. Fall 2020 adoption with implementation the next year can limit either party's unfair advantage, yet initiation might need care,<sup>103</sup> because execution may actually be rather complex.<sup>104</sup>

Should these proposals falter, as the GOP impedes Democrats' selection endeavors,<sup>105</sup> the chamber minority could apply relatively

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99. *June 2019 Meeting, supra* note 81; *see* sources cited *supra* notes 67, 96 (including more specific explanation of bipartisan courts and trades, such as the New York senators and Trump each proposing some for the three New York district court vacancies which still lack nominees). Because the White House consulted the New York senators about Judge Richard Sullivan, who seemed to be comparatively moderate, the jurist's nomination and confirmation processes proceeded comparatively smoothly.

100. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: MAR. 12, 2019, JUDICIAL CONFERENCE OF THE U.S. 26-27 (2019); Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L. J. 121, 140 (2015).

101. JUDICIAL CONFERENCE OF THE U.S., *supra* note 100; *see* Federal Judgeship Act of 2013, S. 1385, 113th Cong. (2013) (providing the most recent comprehensive judgeships legislation).

102. *See supra* note 95 and accompanying text (asserting that when the parties reach agreement *before* the elections, neither party knows which may benefit from the results).

103. Tobias, *supra* note 7, at 917–18 (offering more comprehensive treatment of numerous specific issues that can arise).

104. Congress can address numerous concerns. *Id.* at 918. Some customs, such as votes on many able, centrist district nominees at recesses, could restore regular order.

105. Slowly renaming the seven 2018 New York district court nominees, minimally consulting the New York Democratic senators on six additional

drastic relief. Promising ideas emerge from blue slips, despite restrictions pertaining to courts of appeals.<sup>106</sup> Democrats might choose to not return slips on district prospects in home states, until Trump proffers aspirants whom home state politicians may favor. The New York legislators urged renaming the seven 2018 nominees, which the White House ultimately did, but the lawmakers have three other vacancies that they can insist be filled by people whom both recommend.<sup>107</sup> Democrats might also retain slips for every district court nominee pending Republican agreement on honoring appellate court slips.<sup>108</sup> Collective action involving their powerful leverage derived from eighty-seven empty district court positions and merely one appellate court opening may prompt the GOP to accede.<sup>109</sup>

A related possible solution is “trades.”<sup>110</sup> For example, the New York court nominee packages show that Trump and the legislators each proposed a number of picks.<sup>111</sup> The White House confirmed three appellate court jurists opposed by the lawmakers, who apparently submitted most of the trial court nominees.<sup>112</sup> Yet,

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openings, slowly nominating candidates for those vacancies, rejecting appellate court slips and slashing post-cloture district nominee debate time demonstrate how Republican senators undermine Democrats’ work as well as Senate rules and customs.

106. See sources cited *supra* notes 41–44. I depend substantially here and below on the perspectives of Christopher Kang, who spearheaded many of President Obama’s White House judicial nomination and confirmation initiatives. Jeremy Stahl, *Republicans Are Abolishing Judicial Appointment Norms Again*, SLATE (Feb. 22, 2019), <https://perma.cc/GF3F-3MU5> (last visited Nov. 4, 2019) (on file with the Washington and Lee Law Review).

107. See *id.* (claiming that Democrats less avidly champion their candidates with Trump than Republican senators did with Obama).

108. *Id.*; see sources cited *supra* notes 22–23, 41–44. The GOP denied Judge Garland and seven Obama circuit nominees final votes in 2016); Everett & Levine, *supra* note 59 (describing how Schumer offered honoring the slips for two-hour district debates but Republicans refused).

109. Stahl, *supra* note 106 (“What individual senators can do is commit to withhold them for vacancies in their states.”); *Current Judicial Vacancies*, *supra* note 29 (showing that there is merely one appellate court vacancy throughout the country); see *August 2019 Announcement*, *supra* note 32.

110. See sources cited *supra* notes 32–35, 67, 96.

111. Trades, bipartisan courts and the ideas in the above paragraph about collective action apparently overlap. See sources cited *supra* notes 96–109.

112. Judges Park and Menashi appear to be extremely conservative and they are young; Judges Sullivan and Bianco, the other New York Second Circuit judges, were Bush district appointees who seem comparatively moderate. See

“judge trading” might trigger deleterious impacts: the appeals court prospects lacked slips but won fast appointment while the president could only rename this April the district nominees with 2018 reports, making the nominees wait a protracted time for confirmation in the Republican-controlled Senate.<sup>113</sup> Similar issues plague Senate work “boycotting” that can publicize and clarify adverse effects of the GOP’s obstruction, yet boycotts could signal defeat and the problems that they create may surpass the benefits.<sup>114</sup>

### VI. Conclusion

President Trump and the Republican Senate majority have worsened the tendentious confirmation wars. New York has been a prominent front, which illustrates the systemic morass, precisely epitomized by the White House’s dilatory renaming of the seven district court nominees and mustering of nominees for the multiple remaining openings which lack them. Nonetheless, the president and the chamber should productively treat the desperate straits with prompt approval of the remaining six of the seven highly competent, moderate nominees and concerted activities that confirm accomplished, mainstream jurists for the other vacancies,

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sources *supra* notes 44, 66–67 (showing that consultation works through Sullivan’s confirmation). Practically all of the district nominees apparently are comparatively centrist.

113. See sources *supra* notes 35, 44, 66–67; Tobias, *supra* note 18, at 2260 n.126 (suggesting trades for lengthy vacancies during the Obama Administration, but affording examples of controversy surrounding trades). The district nominees whom Trump renamed in April may only be confirmed after the Senate considers many other nominees. Indeed, the Senate has confirmed merely one nominee, Judge Kovner, and that happened in October. See *supra* note 87 and accompanying text. Moreover, the November 2019 nominees, Cronan and Lan, will not receive confirmation this year. See *supra* note 35 and accompanying text. Because 2020 is a presidential election year when the confirmation process slows and halts, the November nominees and certain of the April 2019 renominees may encounter difficulty attaining confirmation. Finally, the three vacancies that lack nominees could remain open until 2021. Accordingly, trades should be reserved for dire situations.

114. Thus, boycotts should be a last resort. See Stahl, *supra* note 106 (discussing whether eliminating blue slips could allow Trump to “run completely roughshod” over district court nominations).



thus providing a constructive roadmap for bipartisan appointments nationwide.