

# Confirming Circuit Judges in a Presidential Election Year

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## ABSTRACT

*Over 2016, President Barack Obama tapped accomplished, mainstream candidates for seven of twelve federal appeals court vacancies. Nevertheless, the Senate Judiciary Committee has furnished a public hearing and vote for merely three nominees and did not conduct a hearing for any other prospect this year. 2016 concomitantly is a presidential election year in which appointments can be delayed and stopped—a conundrum that Justice Antonin Scalia’s Supreme Court vacancy exacerbates. Because appellate courts comprise tribunals of last resort for practically all cases and critically need each of their members to deliver justice, the appointments process merits scrutiny.*

*The Essay first evaluates the records which nominees have previously assembled, President Obama’s judicial appointments process, and the appeals courts. It finds that the seven nominees are dynamic, consensus prospects. Republican senators have not collaborated with the Obama Administration, particularly since 2015 when they captured an upper chamber majority, a phenomenon that this presidential election year intensifies. The courts desperately need all of their jurists to rapidly, economically, and fairly treat growing dockets. The last section, accordingly, surveys proposals for Senate review.*

## INTRODUCTION

Across 2016, President Barack Obama chose superb, mainstream prospects for seven of twelve empty federal appellate court posts. However, the Senate Judiciary Committee has granted a public hearing and report for merely three nominees and failed to promptly schedule a hearing for any remaining candidate this year.<sup>1</sup> Moreover, 2016 is a presidential election year in which appointments can be delayed and halted—a complication that Justice Antonin Scalia’s Supreme Court vacancy worsens.<sup>2</sup> Because

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<sup>1</sup> See *Hearings & Meetings*, U.S. S. COMM. ON THE JUDICIARY, <https://www.judiciary.senate.gov/hearings> (last visited Oct. 4, 2016) (refine results by year 2016) (showing that the Senate has only held three nomination hearings and votes for Courts of Appeals nominees in 2016—the results include two additional nomination hearings, but those hearings were not for Courts of Appeals nominees).

<sup>2</sup> See Amber Phillips, *Obama Just Chose Merrick Garland for the Supreme Court. Republicans Still Won’t Confirm Him.*, WASH. POST: THE FIX (Mar. 16, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/02/13/can-republicans-really->

appellate tribunals are courts of last resort for virtually every appeal and critically need all of their members to deliver justice,<sup>3</sup> the confirmation procedures warrant scrutiny.

The Essay first addresses the records which the nominees have already compiled, President Obama's judicial selection process, and the circuits. It ascertains that the seven nominees comprise dynamic, moderate picks. Republican senators have not collaborated with the Obama Administration, particularly since they captured an upper chamber majority,<sup>4</sup> a phenomenon that this presidential election year intensifies.<sup>5</sup> The tribunals desperately require each jurist to swiftly, inexpensively, and fairly treat growing cases.<sup>6</sup> The last section, therefore, details proposals for Senate review.

### I. NOMINEE QUALIFICATIONS

The nominees are highly qualified, consensus, diverse appellate court possibilities.<sup>7</sup> For instance, Judge Abdul Kallon and Judge Lucy Haeran Koh have provided remarkable federal district court service over a half decade; Justice Lisabeth Tabor Hughes and Justice Myra Selby have concomitantly performed as exceptional jurists on the Kentucky Supreme Court and the

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block-obamas-supreme-court-nomination-for-a-year-probably/ (discussing the "Thurmond Rule," which unofficially calls for the Senate to delay consideration of judicial nominations in election years).

<sup>3</sup> See ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, THE IMPACT OF JUDICIAL VACANCIES ON FEDERAL TRIAL COURTS 1, 8 (2014), <https://www.brennancenter.org/sites/default/files/publications/Impact%20of%20Judicial%20Vacancies%20072114.pdf> (discussing the impact of judicial vacancies on courts' ability to administer justice).

<sup>4</sup> See Carl W. Tobias, *Filling Federal Court Vacancies in a Presidential Election Year*, 50 U. RICH. L. REV. ONLINE 35, 38 (2016) [hereinafter Tobias, *Presidential Election Year*].

<sup>5</sup> See Seung Min Kim & Burgess Everett, *Angry GOP Senate Freezes Out Obama Nominees*, POLITICO (Oct. 14, 2015, 5:06 AM), <http://www.politico.com/story/2015/10/gop-senate-barack-obama-cotton-214700> (explaining that Republicans' desire to win the 2016 presidential election and appoint conservative judges is a reason that they have not confirmed more of President Obama's judicial nominees).

<sup>6</sup> See Carl Tobias, *Filling the Federal Appellate Court Vacancies*, 17 U. PA. J. CONST. L. ONLINE 3 (2015) [hereinafter Tobias, *Federal Appellate Court Vacancies*]; Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2253 (2013) [hereinafter Tobias, *Senate Gridlock*]; *Judicial Vacancies Fact Sheet*, FED. B. ASS'N, [http://www.fedbar.org/vacancies-fact\\_sheet](http://www.fedbar.org/vacancies-fact_sheet) (last visited Oct. 4, 2016).

<sup>7</sup> See STANDING COMM. ON THE FED. JUDICIARY, AM. BAR ASS'N, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES 114TH CONGRESS (2016), [http://www.americanbar.org/content/dam/aba/uncategorized/GAO/WebRatingChart114.auth\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/WebRatingChart114.auth_checkdam.pdf). Four earned the highest American Bar Association rating; five, like forty-two percent of President Obama's federal court appointees, are women. *Id.*; Jeffrey Toobin, *The Obama Brief*, NEW YORKER (Oct. 27, 2014), <http://www.newyorker.com/magazine/2014/10/27/obama-brief>.

Indiana Supreme Court.<sup>8</sup> Rebecca Ross Haywood and Jennifer Klemetsrud Puhl have also supplied upper echelon federal prosecutorial leadership.<sup>9</sup> Donald Schott has correspondingly been a very fine partner over years with Quarles & Brady, a well-regarded law firm.<sup>10</sup> Judge Koh is the first Northern District of California Asian-American jurist;<sup>11</sup> Haywood, Judge Kallon, and Justice Selby constitute excellent African-American candidates.<sup>12</sup>

Thus, all of the prospects merit chamber analysis and resemble

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<sup>8</sup> See Press Release, White House, Office of the Press Sec'y, President Obama Nominates Judge Abdul K. Kallon to Serve on the United States Court of Appeals (Feb. 11, 2016) [hereinafter *Kallon Press Release*], <https://www.whitehouse.gov/the-press-office/2016/02/11/president-obama-nominates-judge-abdul-k-kallon-serve-united-states-court>; Press Release, White House, Office of the Press Sec'y, President Obama Nominates Judge Lucy Haeran Koh to Serve on the United States Court of Appeals (Feb. 25, 2016) [hereinafter *Koh Press Release*], <https://www.whitehouse.gov/the-press-office/2016/02/25/president-obama-nominates-judge-lucy-haeran-koh-serve-united-states>; Press Release, White House, Office of the Press Sec'y, President Obama Nominates Justice Lisabeth Tabor Hughes to Serve on the United States Court of Appeals (Mar. 17, 2016) [hereinafter *Hughes Press Release*], <https://www.whitehouse.gov/the-press-office/2016/03/17/president-obama-nominates-justice-lisabeth-tabor-hughes-serve-united>; Press Release, White House, Office of the Press Sec'y, President Obama Nominates Two to Serve on the United States Court of Appeals (Jan. 12, 2016) [hereinafter *Selby Press Release*], <https://www.whitehouse.gov/the-press-office/2016/01/13/president-obama-nominates-two-serve-united-states-court-appeals> (Justice Selby).

<sup>9</sup> See Press Release, White House, Office of the Press Sec'y, President Obama Nominates Jennifer Klemetsrud Puhl to Serve on the United States Court of Appeals (Jan. 28, 2016) [hereinafter *Puhl Press Release*], <https://www.whitehouse.gov/the-press-office/2016/01/29/president-obama-nominates-jennifer-klemetsrud-puhl-serve-united-states>; Press Release, White House, Office of the Press Sec'y, President Obama Nominates Rebecca Ross Haywood to Serve on the United States Court of Appeals (Mar. 15, 2016) [hereinafter *Haywood Press Release*], <https://www.whitehouse.gov/the-press-office/2016/03/15/president-obama-nominates-rebecca-ross-haywood-serve-united-states-court>.

<sup>10</sup> See *Selby Press Release*, *supra* note 8. See generally *Quarles & Brady Named in 2015 "Best Law Firms" Rankings*, QUARLES & BRADY, LLP (Nov. 3, 2014), <http://www.quarles.com/class-action-defense/news/quarles-brady-named-in-2015-%E2%80%9C%E2%80%9D-rankings/> (demonstrating the firm's high regard).

<sup>11</sup> Press Release, Congressman Mike Honda, Honda Applauds Koh Nomination (Feb. 26, 2016), <https://honda.house.gov/news/press-releases/honda-applauds-koh-nomination>.

<sup>12</sup> See Maureen Groppe, *Obama Nominates Indiana Lawyers to Federal Bench*, INDIANAPOLIS STAR (Jan. 12, 2016, 8:09 PM), <http://www.indystar.com/story/news/politics/2016/01/12/Obama-nominates-indiana-lawyers-federal-bench/78710858>; Press Release, Nan Aron, President, All. for Justice, AFJ Commends President Obama for his Nomination of Rebecca Haywood to the United States Court of Appeals for the Third Circuit (Mar. 15, 2016), <http://www.afj.org/press-room/press-releases/afj-commends-president-obama-for-his-nomination-of-rebecca-haywood-to-the-united-states-court-of-appeals-for-the-third-circuit>; Press Release, People for the Am. Way, PFAW Praises Nomination of Abdul Kallon, Will Be First African American from Alabama on 11th Circuit (Feb. 11, 2016), <http://www.pfaw.org/press-releases/2016/02/pfaw-praises-nomination-abdul-kallon-will-be-first-african-american-alabama-1>.

numerous strong, mainstream, diverse Obama nominees whose confirmations yield manifold advantages. Circuits that have all of their judges can more promptly, economically, and fairly review substantial numbers of cases.<sup>13</sup> Increased ethnic, gender, and sexual orientation diversity improves comprehension and resolution of core questions which tribunals face,<sup>14</sup> and minority jurists decrease biases that undermine justice.<sup>15</sup> Federal courts that mirror the American populace concomitantly help to enhance public confidence in the judiciary.<sup>16</sup> The Grand Old Party's ("GOP") treatment of President Obama's nominees reveals that the seven will confront difficulties realizing approval over the 2016 presidential election year.<sup>17</sup>

## II. JUDICIAL SELECTION IN THE OBAMA ADMINISTRATION

The selection procedures operated rather efficaciously throughout President Obama's initial six years when Democrats possessed a chamber majority.<sup>18</sup> The President assertively consulted home state elected officials—notably Republicans—pursuing able, moderate, diverse candidates, and he normally adhered to these officials' guidance.<sup>19</sup> Those initiatives fostered cooperation, as members from jurisdictions with vacancies receive deference because they can stop processing through "blue

<sup>13</sup> See Tobias, *Senate Gridlock*, *supra* note 6, at 2253.

<sup>14</sup> See Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG 2D 45, 52–53 (2009) (discussing gender); Ciara Torres-Spelliscy, *A Bench that Looks Like America: Diversity Among Appointed State Court Judges*, 48 JUDGES' J. 12, 13 (2009) (stating that "judicial diversity improves judicial decisionmaking"). These questions include issues related, for example, to abortion, affirmative action, and civil rights. See Tobias, *Federal Appellate Court Vacancies*, *supra* note 6, at 6; Carl Tobias, *Filling Federal Appellate Vacancies*, 41 ARIZ. ST. L. J. 829, 865 (2009) [hereinafter Tobias, *Filling Federal Appellate Vacancies*]; NATIONAL WOMEN'S LAW CENTER, WOMEN IN THE FEDERAL JUDICIARY: STILL A LONG WAY TO GO 1 (2016); Peg Perl, *We Need More Female Judges*, DENVER POST (Sept. 12, 2013, 11:49 AM), <http://www.denverpost.com/2013/09/12/we-need-more-female-judges/>. But see generally Stephen Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504 (2011) (finding that gender generally does not affect judicial decisionmaking).

<sup>15</sup> Tobias, *Senate Gridlock*, *supra* note 6, at 2249.

<sup>16</sup> See Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L. J. 1423, 1442 (2008).

<sup>17</sup> *Hearing on Nominations Before the S. Comm. on the Judiciary*, 114th Cong. (June 21, 2016) (statement of Sen. Patrick Leahy (D-Vt.)), <https://www.judiciary.senate.gov/imo/media/doc/06-21-16%20Leahy%20Statement.pdf>.

<sup>18</sup> Tobias, *Presidential Election Year*, *supra* note 4, at 36.

<sup>19</sup> See Sheldon Goldman et al., *Obama's First Term Judiciary*, 97 JUDICATURE 7, 8–17 (2013); Tobias, *Senate Gridlock*, *supra* note 6, at 2241 (observing that in the past, President Obama has displayed considerable deference to home state politicians on judicial appointments).

slip” retention.<sup>20</sup> Notwithstanding persistent solicitous Administration cultivation of numerous lawmakers, many legislators only nominally coordinated by delaying adoption of procedures or forwarding individuals.<sup>21</sup>

Republicans collaborated to schedule panel hearings, but they “held over” discussions and votes a week for all except one of sixty-one competent, mainstream appellate picks.<sup>22</sup> The GOP slowly concurred on these recommendations’ floor debates, when necessary, and final ballots, requiring talented, centrist aspirants to languish weeks until Democrats petitioned for cloture.<sup>23</sup> Republicans also demanded roll call votes and debate time on fine, moderate choices, numbers of whom easily secured appointment, thereby wasting rare floor hours.<sup>24</sup> Those practices stalled confirmations and left between twelve and twenty-one circuit openings unfilled for over four-plus years after September 2009.<sup>25</sup>

In the 2012 presidential election year, these stratagems grew.<sup>26</sup> The GOP continued this dilatory behavior, halting final appellate ballots in

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<sup>20</sup> Goldman, *supra* note 19, at 17; Ryan J. Owens et al., *Ideology, Qualifications, and Covert Senate Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347, 351; Tobias, *Presidential Election Year*, *supra* note 4, at 36. The return of both home state senators’ blue slips means that they are willing to have the committee afford nominees hearings and allows nominees to proceed. See Owens et al., *supra*, at 369–70.

<sup>21</sup> See Goldman et al., *supra* note 19, at 17. Some senators have tendered no recommendations or slowly provided suggestions. See *id.*; John Cornyn and Ted Cruz’s Texas: A State of Judicial Emergency, ALL. FOR JUST., <http://www.afj.org/our-work/issues/judicial-selection/texas-epicenter-of-the-judicial-vacancy-crisis> (last updated Sept. 6, 2016).

<sup>22</sup> ALLIANCE FOR JUSTICE, POLITICS OVER JUSTICE: JUDICIAL SELECTION IN THE 114TH CONGRESS 5 (2015) (discussing the holding over of nominees); BARRY J. McMILLION, CONG. RESEARCH SERV., R43931, U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS DURING PRESIDENT OBAMA’S FIRST SIX YEARS (2009–2014): COMPARATIVE ANALYSIS WITH RECENT PRESIDENTS 4 (2015) (providing the number of appellate nominations during Obama’s first six years).

<sup>23</sup> See Goldman et al., *supra* note 19, at 27; Tobias, *Presidential Election Year*, *supra* note 4, at 37.

<sup>24</sup> See Tobias, *Presidential Election Year*, *supra* note 4, at 37.

<sup>25</sup> See, e.g., *Vacancy Summary for July 2012*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2012/07/summary/html> (last visited Oct. 4, 2016) (twelve vacancies); *Vacancy Summary for December 2010*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2010/12/summary/html> (last visited Oct. 4, 2016) (twenty-one vacancies). Twenty vacancies comprise eleven percent of the appellate court judgeships. See *Chronological History of Authorized Judgeships - Courts of Appeals*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-courts-appeals> (last visited Oct. 4, 2016) (listing the total number of judgeships for each federal appellate court).

<sup>26</sup> See generally Goldman et al., *supra* note 19, at 37 (discussing the delay tactics that Republicans deployed during 2012).

June.<sup>27</sup> With President Obama's reelection, Democrats hoped that Republicans would cooperate more,<sup>28</sup> yet they did not.<sup>29</sup> Recalcitrance peaked over 2013 when the White House suggested three excellent, mainstream, diverse possibilities for the U.S. Court of Appeals for the District of Columbia Circuit, the nation's second most important tribunal.<sup>30</sup> Republicans denied the nominees floor votes, and lengthy obstruction provoked the Democratic majority to cautiously unleash the "nuclear option" that restricted filibusters while allowing chamber ballots on the three<sup>31</sup> and myriad other lower court submissions.<sup>32</sup> Across 2014, Democrats concentrated on appellate nominees, promptly scheduling cloture and final votes practically each week that Congress was in session.<sup>33</sup>

During 2015, after the GOP captured a majority,<sup>34</sup> already negligible coordination plummeted even further. The leadership incessantly exclaimed that it would again bring to the chamber regular order, the system which pertained before Democrats ostensibly eroded the scheme.<sup>35</sup> In early January, Senator Mitch McConnell (R-Ky.), the new Majority Leader, proclaimed: "We need to return to regular order."<sup>36</sup> Moreover, Senator

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<sup>27</sup> See *id.*

<sup>28</sup> See, e.g., Jordan Blum, *Vitter Removes Block on Judicial Nominee*, THE ADVOC. (Nov. 29, 2012, 11:46 AM), <http://theadvocate.com/news/4546540-123/vitter-removes-block-on-judicial> (Mary Landrieu (D-La.) strongly argued that after President Obama's reelection in 2012, there was "no reason to slow down [the] process [of judicial nominations] at all.").

<sup>29</sup> See Tobias, *Federal Appellate Court Vacancies*, *supra* note 6, at 2–3.

<sup>30</sup> See *id.*

<sup>31</sup> 159 CONG. REC. S8,584 (daily ed. Dec. 10, 2013) (Judge Patricia Millett); 159 CONG. REC. S8,667 (daily ed. Dec. 11, 2013) (Judge Cornelia Pillard); 160 CONG. REC. S283 (daily ed. Jan. 13, 2014) (Judge Robert Wilkins).

<sup>32</sup> See Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L. J. 121, 141 (2015) (discussing the Republican delay and the Democrats' use of the nuclear option, which led to the D.C. Circuit and many additional confirmations). See *Judicial Confirmations for January 2015*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2015/01/confirmations/html> (last visited Oct. 4, 2016). The 113th Senate confirmed 134 judges. See *id.* Republicans forced Democrats to seek cloture on all pre-2015 nominees. Tobias, *Presidential Election Year*, *supra* note 4, at 38.

<sup>33</sup> Tobias, *Federal Appellate Court Vacancies*, *supra* note 6, at 4; see Burgess Everett, *How Going Nuclear Unclogged the Senate*, POLITICO (Aug. 22, 2014, 5:03 AM), <http://www.politico.com/story/2014/08/how-going-nuclear-unclogged-the-senate-110238>.

<sup>34</sup> Jerry Markon et al., *Republicans Win Senate Control as Polls Show Dissatisfaction with Obama*, WASH. POST (Nov. 4, 2014), [https://www.washingtonpost.com/politics/senate-control-at-stake-in-todays-midterm-elections/2014/11/04/e882353e-642c-11e4-bb14-4cfeae1e742d5\\_story.html](https://www.washingtonpost.com/politics/senate-control-at-stake-in-todays-midterm-elections/2014/11/04/e882353e-642c-11e4-bb14-4cfeae1e742d5_story.html).

<sup>35</sup> See Alexander Bolton, *McConnell Promises Dramatic Change*, THE HILL (Jan. 7, 2015, 10:28 AM), <http://thehill.com/blogs/floor-action/senate/228746-mcconnell-promises-dramatic-change>.

<sup>36</sup> *Id.* Senator McConnell has incessantly repeated the mantra ever since. See, e.g., 161

Chuck Grassley (R-Iowa), the new Judiciary Chair, enunciated similar ideas.<sup>37</sup> Despite a multitude of analogous pledges, Republicans have slowly provided choices for President Obama's assessment, committee nominee hearings with ballots, and chamber debates and votes. In late 2015, these complications meant eight in nine appellate vacancies—which the U.S. Courts designated emergencies—lacked nominees, and these vacancies plagued jurisdictions that GOP members represented.<sup>38</sup> The Senate approved *one* circuit jurist last year.<sup>39</sup>

In November 2014, President Obama attempted to place Kara Farnandez Stoll, an experienced, consensus attorney, on the Federal Circuit, and District Judge Luis Felipe Restrepo, a talented, moderate jurist, on the Third Circuit.<sup>40</sup> He proposed *no* additional candidate over 2015, mainly because Republicans hailed from all but one state (California) with appellate openings that lacked nominees, while GOP senators collaborated little with the

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CONG. REC. S27 (daily ed. Jan. 7, 2015) (statement of Sen. McConnell); Press Release, Senator Mitch McConnell, We'll Continue Moving Forward with the Appropriations Process (May 17, 2016), [http://www.mcconnell.senate.gov/public/index.cfm/](http://www.mcconnell.senate.gov/public/index.cfm/pressreleases?ID=08EE524C-0F6C-4101-8C85-BD0778EC1FEE)

[pressreleases?ID=08EE524C-0F6C-4101-8C85-BD0778EC1FEE](http://www.mcconnell.senate.gov/public/index.cfm/pressreleases?ID=08EE524C-0F6C-4101-8C85-BD0778EC1FEE). Despite Senator McConnell's statements about returning to regular order, Republicans continued to delay the nomination process. See 161 CONG. REC. at S2,949 (daily ed. May 18, 2015) (statement of Sen. Reid) (explaining that Republicans were continuing to delay even after Senator McConnell's claim).

<sup>37</sup> Press Release, Senator Chuck Grassley, Judiciary Committee Holds First Nominations Hearing (Jan. 21, 2015), <http://www.grassley.senate.gov/news/news-releases/judiciary-committee-holds-first-nominations-hearing> (demonstrating that Senator Grassley pledged to deploy regular order when the panel assesses nominees).

<sup>38</sup> *Judicial Vacancy List for December 2015*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2015/12/vacancies> (last updated 1 Dec. 1, 2015) (showing that nine in ten vacancies lacked nominees); *Judicial Emergencies for January 2016*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2016/01/emergencies> (last updated Jan. 1, 2016); *Nomination Statistics*, JUDICIALNOMINATIONS.ORG (Jan. 16, 2016), [<https://web.archive.org/web/20160116223409/http://judicialnominations.org/statistics>] (see map titled "Current and Future Circuit Court Vacancies" showing that as of December 31, 2015, all but one of the states with appellate openings without nominees were states with at least one Republican senator).

<sup>39</sup> *Judicial Confirmations for January 2016*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2016/01/confirmations> (last updated Jan. 1, 2016).

<sup>40</sup> Press Release, White House, Office of the Press Sec'y, President Obama Nominates Two to Serve on the U.S. Courts of Appeals (Nov. 12, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/12/president-obama-nominates-two-serve-united-states-courts-appeals>. Each is a Latina/o. Michael Oleaga, *Obama Nominates Judges: Two Latinos Nominated to Serve on U.S. Courts of Appeals*, LATIN POST (Nov. 14, 2014, 5:00 AM), <http://www.latinpost.com/articles/25790/20141114/obama-nominates-judges-two-latinos-named-serve-courts-appeals.htm>.

President.<sup>41</sup> However, President Obama did choose seven prospects this year.<sup>42</sup>

Judge Stoll's March 2015 hearing proceeded smoothly,<sup>43</sup> yet there was not a committee ballot until late April.<sup>44</sup> On June 4, Senator McConnell intimated that the GOP would stop confirming President Obama's circuit picks, a suggestion which he apparently has not elucidated.<sup>45</sup> Senator Harry Reid (D-Nev.), the Minority Leader, next assailed the Majority Leader's violation of his constitutional duty in approving no one.<sup>46</sup> Senator Patrick Leahy (D-Vt.), the Judiciary Committee Ranking Member, also criticized the denial of any floor vote for weeks, namely Judge Stoll's, which may have promoted her 95–0 July ballot.<sup>47</sup> Judge Restrepo's canvass trenchantly

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<sup>41</sup> See Tobias, *Presidential Election Year*, *supra* note 4, at 45; *Nominations & Appointments*, THE WHITE HOUSE, <https://www.whitehouse.gov/briefing-room/nominations-and-appointments> (last visited Oct. 4, 2016) (filter results by Agency Name, selecting "Federal Judiciary") (showing that President Obama nominated no appellate candidates in 2015 after he renominated Judge Stoll and Judge Restrepo); see *supra* note 38 and accompanying text.

<sup>42</sup> See *supra* notes 8–12 and accompanying text; see also Lydia Wheeler, *Inside Merrick Garland's Judicial Record*, THE HILL (Mar. 19, 2016, 10:09 AM), <http://thehill.com/regulation/court-battles/273621-inside-merrick-garlands-judicial-record>. Some nominees lacked home state senator support, without which President Obama largely refused to nominate throughout the first seven years. However, his decision to nominate without that support was justified after so many years of assiduous consultation. See *supra* notes 19–21 and accompanying text; *infra* notes 87–88 and accompanying text; see also Tobias, *Filling Federal Appellate Vacancies*, *supra* note 14, at 864 (observing that the application of more confrontational methods to judicial selection can be justified after cooperative methods prove to be ineffective).

<sup>43</sup> See Carl Tobias, *The Republican Senate and Regular Order*, 101 IOWA L. REV. ONLINE 12, 28 (2016).

<sup>44</sup> See *id.*; U.S. SENATE COMM. ON THE JUDICIARY, RESULTS OF EXECUTIVE BUSINESS MEETING – APRIL 23, 2015 (2015), <https://www.judiciary.senate.gov/imo/media/doc/Results%20of%20Executive%20Business%20Meeting%20-%20April%2023,%202015.pdf>.

<sup>45</sup> See Steve Benen, *McConnell's Silent Governing Failure*, MSNBC (June 5, 2015, 3:08 PM), <http://www.msnbc.com/rachel-maddow-show/mcconnells-silent-governing-failure>; Nick Gass, *McConnell Vows to Slow Judicial Nominees*, POLITICO (June 5, 2015, 1:06 PM), <http://www.politico.com/story/2015/06/mitch-mcconnell-judicial-nominations-118674>. However, Senator McConnell's spokesperson said "[t]here's not a shutdown. We probably will have a circuit court nominee." Alexander Bolton, *McConnell Backs Away from Shutdown Talk*, THE HILL (June 6, 2015, 1:05 PM), <http://thehill.com/homenews/senate/244196-mcconnell-backs-away-from-judicial-shutdown-talk>.

<sup>46</sup> 161 CONG. REC. S3,850 (daily ed. June 8, 2015) (statement of Sen. Reid). Senator Reid contended that Senator McConnell would "not even [approve] a consensus nominee such as Kara Stoll," and pointed out that Senator McConnell had pled on the Senate floor in the past for swift confirmation of Republican circuit nominees, especially during the Bush Administration. *Id.* at S3,849–50 (statement of Sen. Reid).

<sup>47</sup> 161 CONG. REC. S4,591 (daily ed. June 24, 2015) (statement of Sen. Leahy); 161 CONG. REC. S4,678 (daily ed. July 7, 2015) (Judge Stoll vote).



epitomizes delay. The accomplished, centrist judge waited seven months for a hearing, as Senator Pat Toomey (R-Pa.) kept the blue slip past April 2015, while Senator Bob Casey (D-Pa.) had sent it the preceding November.<sup>48</sup> A June hearing went smoothly; Senator Toomey proffered support with Judge Restrepo deftly answering panel queries.<sup>49</sup> He only earned confirmation this January.<sup>50</sup> Should merely two nominees receive approval, that would be unprecedented.<sup>51</sup> Indeed, the Democratic majority helped confirm ten of President George W. Bush's appellate submissions his final two years.<sup>52</sup>

2016 is a presidential election year when appointments conventionally slow and ultimately halt, a concern which GOP refusal to process U.S. Court of Appeals for the District of Columbia Circuit Chief Judge Merrick Garland,

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<sup>48</sup> Jonathan Tamari, *A Judicial Nominee Waits; Toomey Gets Blamed*, PHILLY.COM (May 9, 2015), [http://articles.philly.com/2015-05-09/news/61952388\\_1\\_toomey-luis-felipe-restrepo-president-obama](http://articles.philly.com/2015-05-09/news/61952388_1_toomey-luis-felipe-restrepo-president-obama). Senator Toomey vigorously denied that he was stalling Judge Restrepo and finally returned the blue slip on May 14. Tracie Mauriello, *Toomey Signs Off on Nominee for Federal Appeals Court*, PITT. POST-GAZETTE (May 14, 2015, 8:12 PM), <http://www.post-gazette.com/local/region/2015/05/14/Toomey-signs-off-on-nominee-for-federal-appeals-court/stories/201505140325>; Pat Toomey, *I Am Not Delaying Judge L. Felipe Restrepo's 3rd Circuit Nomination*, PITT. POST-GAZETTE (May 13, 2015, 12:00 AM), <http://www.post-gazette.com/opinion/letters/2015/05/13/I-am-not-delaying-Judge-L-Felipe-Restrepo-s-3rd-Circuit-nomination/stories/201505130068>.

<sup>49</sup> Michael Oleaga, *Senate Judicial Confirmation Hearing: Luis Felipe Restrepo Undergoes Nomination Hearing as Kara Farnandez Stoll Awaits Vote*, LATIN POST (June 11, 2015, 10:44 AM), <http://www.latinpost.com/articles/58884/20150611/senate-judicial-confirmation-latina-judge-kara-stoll-still-waiting-vote.htm>. Republicans held over Judge Restrepo, but the committee reported him on a voice vote. See U.S. SENATE COMM. ON THE JUDICIARY, RESULTS OF EXECUTIVE BUSINESS MEETING – JUNE 25, 2015 (2015), <https://www.judiciary.senate.gov/imo/media/doc/Results%20Of%20Executive%20Business%20Meeting%20-%20June%2025,%202015.pdf> (hold over); U.S. SENATE COMM. ON THE JUDICIARY, RESULTS OF EXECUTIVE BUSINESS MEETING – JULY 9, 2015 (2015), <https://www.judiciary.senate.gov/imo/media/doc/Results%20of%20Executive%20Business%20Meeting%20-%20July%209,%202015.pdf> (voice vote).

<sup>50</sup> See Andrew Taylor, *Senate Confirms Restrepo as Other Nominees Languish Under GOP Control of Senate*, U.S. NEWS (Jan 11, 2016, 6:40 PM), <http://www.usnews.com/news/politics/articles/2016-01-11/senate-democrats-rammed-through-judges-now-gop-calls-shots>. No persuasive reason supported Judge Restrepo's delay; Judge Restrepo was a well-qualified consensus nominee, and President Obama nominated the jurist in 2014 for an emergency vacancy, making it all the more important that he secure a quick confirmation. See 162 CONG. REC. S20 (daily ed. Jan. 11, 2016) (statement of Sen. Leahy); see also *supra* text accompanying notes 43–44, 47–50 (contrasting Judge Restrepo's protracted confirmation process with Judge Stoll's).

<sup>51</sup> See Patrick Caldwell, *Senate Republicans Are Breaking Records for Judicial Obstruction*, MOTHER JONES (May 6, 2016, 6:00 AM), <http://www.motherjones.com/politics/2016/05/senate-republicans-barack-obama-judicial-nominees-courts>.

<sup>52</sup> *Judicial Nominations*, THE WHITE HOUSE, <https://georgewbush-whitehouse.archives.gov/infocus/judicialnominees/> (last visited Oct. 4, 2016).

President Obama's Supreme Court nominee aggravates,<sup>53</sup> so those attributes could frustrate approval. However, customs permit impressive, mainstream nominees to have votes after the Memorial Day recess.<sup>54</sup> The Senate confirmed eleven Bush *père* 1992 aspirants (six following June); two of President Bill Clinton's in January 1996; eight in 2000 (one after June); five whom President Bush mustered during 2004; and four over 2008 (none post-June either year).<sup>55</sup> All, save the Bush nominees, were the very precedents to which Senator McConnell and Senator Arlen Specter<sup>56</sup> resorted when championing swift appointment of Bush 2008 circuit nominees.<sup>57</sup> In President Bush's final year, a presidential election year, the Democratic majority helped confirm four nominees (none past June).<sup>58</sup> Judge Steven Agee's March choice, with approval nine and one-half weeks later, was most compelling because of how quickly the Senate approved him.<sup>59</sup> Five Obama nominees won confirmation prior to June 13, 2012.<sup>60</sup>

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<sup>53</sup> See Judd Legum, *What Republicans Said About Supreme Court Nominations During George W. Bush's Last Year*, THINKPROGRESS (Feb. 16, 2016, 9:30 AM), <http://thinkprogress.org/justice/2016/02/16/3749754/what-republicans-said-about-supreme-court-nominations-during-george-w-bushs-last-year/> (arguing that Republicans wanted to apply the Thurmond Rule during almost the entire last year of President Obama's presidency in sharp contrast to Bush's last year).

<sup>54</sup> Tobias, *Presidential Election Year*, *supra* note 4, at 53. Republican refusal to grant Judge Merrick Garland, the Supreme Court nominee, a hearing may be delaying the seven 2016 appellate nominees.

<sup>55</sup> See DENIS STEVEN RUTKUS & KEVIN M. SCOTT, CONG. RESEARCH SERV., RL34615, NOMINATION AND CONFIRMATION OF LOWER FEDERAL COURT JUDGES IN PRESIDENTIAL ELECTION YEARS 22, 25, 28 (2008) (1992, 1996, and 2000 confirmations); U.S. COURTS, JUDICIAL CONFIRMATIONS - 108TH CONGRESS (2004), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2004/12/confirmations/pdf> (2004 confirmations); U.S. COURTS, JUDICIAL CONFIRMATIONS - 110TH CONGRESS (2008), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2008/12/confirmations/pdf> (2008 confirmations).

<sup>56</sup> No party designation is provided for Senator Specter because he was a Republican when elected in 1980, then became a Democrat in 2009. See Carl Hulse, *Specter Switches Parties*, N.Y. TIMES: THE CAUCUS (Apr. 28, 2009, 12:13 PM), <http://thecaucus.blogs.nytimes.com/2009/04/28/specter-will-run-as-a-democrat-in-2010/>.

<sup>57</sup> 154 CONG. REC. 15,424 (statement of Sen. McConnell); 154 CONG. REC. 15,410 (statement of Sen. Specter).

<sup>58</sup> See U.S. COURTS, JUDICIAL CONFIRMATIONS - 110TH CONGRESS, *supra* note 55. Six additional appellate court nominees captured confirmation throughout 2007. See *id.*

<sup>59</sup> See *id.* Helene White was confirmed almost as quickly, in merely ten weeks. See *id.*

<sup>60</sup> See *Judicial Confirmations for December 2012*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2012/12/confirmations/html> (last visited Oct. 4, 2016). The Senate conducted no additional floor votes for circuit judges across the remainder of that year. See *U.S. Senate Roll Call Votes 112th Congress - 2nd Session (2012)*, U.S. SENATE, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/vote\\_menu\\_112\\_2.htm](http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_112_2.htm) (last visited Oct. 4, 2016). Therefore, Republicans forced five accomplished, mainstream possibilities to

In short, appointing one circuit prospect last year and a second this January markedly contrasts with Democrats' approving ten over the comparable 2007–2008 period. The statistics portend ominously for the remainder of this year, while the GOP needs to significantly escalate the pace, should the party hope to surpass Democratic achievements over President Bush's final pair of years.

### III. EXPLANATIONS FOR AND CONSEQUENCES OF PROBLEMATIC SELECTION

The reasons for the selection procedures' troubled condition are complex,<sup>61</sup> yet observers directly ascribe the modern "confirmation wars" to Circuit Judge Robert Bork's 1987 attempted Supreme Court approval.<sup>62</sup> They find the scheme has collapsed, as witnessed by corrosive partisanship, systematic paybacks, and striking divisiveness in which each party ratchets down the regime, seen with the denial to Judge Garland, President Obama's Supreme Court nominee, of any process.<sup>63</sup>

The implications currently are grave. The severely limited 2015 activity means that the bench has twelve circuit vacancies and thirty-two emergency vacancies, a crucial parameter which the GOP allowed to rise substantially.<sup>64</sup>

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wait until 2013 before the chamber accorded them confirmation votes.

<sup>61</sup> Scholars and senators debate whether selection has always been troubled. *See, e.g.*, Michael Gerhardt & Michael Stein, *The Politics of Early Justice*, 100 IOWA L. REV. 551 (2015); Orrin Hatch, *The Constitution as Playbook for Judicial Selection*, 32 HARV. J. L. & PUB. POL'Y 1035 (2009).

<sup>62</sup> *See, e.g.*, Steven V. Roberts, *We Must Not Be Enemies: Howard H. Baker, Jr., and the Role of Civility in Politics*, BAKER CTR. J. APPLIED PUB. POL'Y, Fall 2012, at 9, 13; Keith E. Whittington, *The President's Nominee: Robert Bork and the Modern Judicial Confirmation*, BAKER CTR. J. APPLIED PUB. POL'Y, Fall 2012, at 85, 96–97; Nina Totenberg, *Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever'*, NPR: IT'S ALL POLITICS (Dec. 19, 2012, 4:33 PM), <http://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever>.

<sup>63</sup> *See* Michael Teter, *Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process*, 73 OHIO ST. L. J. 287, 289 (2012); *supra* notes 22–53 and accompanying text. The latest controversy commenced with contentions that Democrats had delayed President Bush's nominees during his last two years and Republicans retaliated with unprecedented delay throughout the Obama Administration. Democrats then carefully detonated the nuclear option, which allowed the Senate to rapidly approve many judges in 2014's lame duck session. Republicans next markedly delayed nominees after 2014. Tobias, *Presidential Election Year*, *supra* note 4, at 50; *see* Neil A. Lewis, *Bitter Senators Divided Anew on Judgeships*, N.Y. TIMES (Nov. 15, 2003), <http://www.nytimes.com/2003/11/15/us/bitter-senators-divided-anew-on-judgeships.html> (discussing Democratic obstruction of Bush nominees and Republican threats of retaliation); *supra* notes 22–53 and accompanying text.

<sup>64</sup> *See* *Current Judicial Vacancies*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> (last updated Oct. 4, 2016); *Judicial*

The judiciary only has the relatively “meager” ten *after* Democrats marshaled the nuclear option that confined filibusters.<sup>65</sup> However, recent inaction will multiply the 2017 openings and emergencies, with unfilled circuit judgeships potentially increasing by over fifty percent.<sup>66</sup>

Slow approvals have clear adverse impacts.<sup>67</sup> They force nominees to place careers and lives on hold and may stop many highly respected aspirants from even contemplating the bench.<sup>68</sup> The protracted Senate confirmation process deprives tribunals of critical judicial resources and numerous litigants of speedy justice.<sup>69</sup> These effects diminish citizen regard for the process and the government branches.<sup>70</sup>

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*Emergencies*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies> (last updated Oct. 4, 2016). The number of judicial emergencies soared from twelve in early 2015 to as many as thirty-five in 2016. *Judicial Emergencies for January 2015*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2015/01/emergencies/html> (last visited Oct. 4, 2016) (twelve emergencies); *Judicial Emergencies for April 2016*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2016/04/emergencies> (last updated Apr. 1, 2016) (thirty-two emergencies); 161 CONG. REC. S3,223 (daily ed. May 21, 2015) (statement of Sen. Leahy).

<sup>65</sup> See *supra* notes 32–33 and accompanying text.

<sup>66</sup> See *Future Judicial Vacancies*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> (last Oct. 4, 2016).

<sup>67</sup> See, e.g., Tobias, *Senate Gridlock*, *supra* note 6, at 2238, 2253; Andrew Cohen, *In Pennsylvania, the Human Costs of Judicial Confirmation Delays*, ATLANTIC (Sept. 9, 2012), <http://www.theatlantic.com/politics/archive/2012/09/inpennsylvaniathehumancostsofjudicialconfirmationdelays/261862/>.

<sup>68</sup> BARRY J. McMILLION, CONG. RESEARCH SERV., R42732, LENGTH OF TIME FROM NOMINATION TO CONFIRMATION FOR “UNCONTROVERSIAL” U.S. CIRCUIT AND DISTRICT COURT NOMINEES: DETAILED ANALYSIS 16 (2012); Tobias, *Senate Gridlock*, *supra* note 6, at 2253; Jennifer Bendery, *Federal Judges Are Burned Out, Overworked and Wondering Where Congress Is*, HUFFINGTON POST (Oct. 1, 2015) [http://www.huffingtonpost.com/entry/judgefederalcourtsvacancies\\_us\\_55d77721e4b0a40aa3aaf14b](http://www.huffingtonpost.com/entry/judgefederalcourtsvacancies_us_55d77721e4b0a40aa3aaf14b); Todd Ruger, *Nominees Are Living on Hold; Caught in a Political Game, Judicial Candidates Get Used to Waiting*, NAT’L L. J. (Dec. 17, 2012), <http://www.nationallawjournal.com/id=1202581557603/Nominees-are-living-on-hold>.

<sup>69</sup> See JOHN ROBERTS, SUPREME COURT OF THE U.S., 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2010), <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf>; Cohen, *supra* note 67; Tobias, *Senate Gridlock*, *supra* note 6, at 2238. The Ninth Circuit addresses the largest caseload while its appeals consume the greatest period, and Wisconsin’s Seventh Circuit position has been empty longest. TABLE B-4 UNITED STATES COURTS OF APPEALS—MEDIAN TIME INTERVALS IN MONTHS FOR TERMINATIONS ON THE MERITS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPT. 30, 2015 (2015), <http://www.uscourts.gov/statistics/table/b-4/judicial-business/2015/09/30>; Jennifer Bendery, *Get in Line, SCOTUS. This Court Has Been Waiting 2,296 Days for a Judge.*, HUFFINGTON POST (Apr. 21, 2016, 3:32 PM) [http://www.huffingtonpost.com/entry/ron-johnson-circuit-court-vacancy\\_us\\_5717c796e4b0479c59d6bcef](http://www.huffingtonpost.com/entry/ron-johnson-circuit-court-vacancy_us_5717c796e4b0479c59d6bcef).

<sup>70</sup> Tobias, *Presidential Election Year*, *supra* note 4, at 51; Tobias, *Senate Gridlock*, *supra* note 6, at 2253.

In sum, this examination indicates that the appointments procedures deserve enhancement, and the Senate must promptly review the seven nominees. First, it has a constitutional duty to evaluate the nominees.<sup>71</sup> Second, multiple precedents are relevant. For instance, the chamber approved four Bush 2008 circuit designees; two submitted after February captured appointment nine weeks later.<sup>72</sup> Earlier precedent is more compelling, and extensive conventions favor assessing the seven possibilities.<sup>73</sup> Justice Scalia's vacancy ought to not postpone consideration; so long as the GOP refuses to move President Obama's Supreme Court nominee, it will have plentiful time for canvassing the circuit nominees.<sup>74</sup> Even if the party does relent on Judge Garland, legislators might felicitously analyze the seven appellate nominees over 2016. Third, everyone is highly capable and will afford the valuable contributions—such as ethnic, gender, and experiential diversity, increased judicial resources, decreased biases that undermine justice, and improved public confidence in the judiciary—documented above,<sup>75</sup> and each nominee embodies the type of person who can secure appointment in a presidential election year.<sup>76</sup> Finally, the circuits need all of their jurists.<sup>77</sup>

#### IV. SUGGESTIONS FOR THE CONFIRMATION PROCESS

The fight which implicates Justice Scalia's vacancy demonstrates that neither the politics of judicial selection nor the politics of a presidential election year should drive lower federal court assessment. Judge Kallon and Judge Koh are sitting federal judges, which can facilitate the confirmation process because FBI background checks and American Bar Association ("ABA") evaluations and ratings only need updating; the jurists were already confirmed and they have compiled lengthy, accessible records.<sup>78</sup> Moreover,

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<sup>71</sup> See 161 CONG. REC. S3,850 (daily ed. June 8, 2015) (statement of Sen. Reid).

<sup>72</sup> See *supra* notes 55, 58–59 and accompanying text.

<sup>73</sup> See *supra* notes 52–55, 58 and accompanying text.

<sup>74</sup> See *supra* note 54; see generally Legum, *supra* note 53 (discussing the Garland nomination and delay).

<sup>75</sup> See *supra* notes 7–12 and accompanying text.

<sup>76</sup> See Geoffrey R. Stone, *The Supreme Court Vacancy and the Constitutional Responsibilities of the Senate*, HUFFINGTON POST (Feb. 24, 2016, 4:43 PM), [http://www.huffingtonpost.com/geoffrey-r-stone/the-supreme-court-vacancy\\_b\\_9310498.html](http://www.huffingtonpost.com/geoffrey-r-stone/the-supreme-court-vacancy_b_9310498.html) (explaining that the Senate typically confirms qualified, mainstream nominees, even in election years); *supra* notes 7–12 and accompanying text (describing the nominees' qualifications); *infra* text accompanying note 98.

<sup>77</sup> See *supra* notes 67–70 and accompanying text.

<sup>78</sup> Cf. Carl Tobias, *Filling the Judicial Vacancies in a Presidential Election Year*, 46 U. RICH. L. REV. 985, 992 (2012) (explaining that nominating presently-sitting judges has been a successful nomination strategy because the judges' records have already been examined by

President Obama should continue assiduous cultivation of both parties' senators, notably the leadership and individual panel members.<sup>79</sup>

The committee has rather expeditiously analyzed Judges Koh, Puhl, and Schott, prospects with filed blue slips,<sup>80</sup> through pervasive coordination with the FBI, the ABA, and the Justice Department.<sup>81</sup> However, the panel only recently granted the three nominees hearings and panel votes.<sup>82</sup> Home state senators have not returned blue slips provided for Haywood, Justice Hughes, Judge Kallon, and Justice Selby.<sup>83</sup> These legislators ought to consult the efforts of Senator John Hoeven (R-N.D.), who supported Judge Puhl's nomination and lauded her at her hearing;<sup>84</sup> and Senator Ron Johnson (R-Wis.), who partly depended on a merit selection commission's proposal of Schott.<sup>85</sup> Senator Toomey at least conversed with Haywood before issuing a press release that expressed dissatisfaction about some of her answers,<sup>86</sup>

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the White House, FBI, ABA, and senators, who have already confirmed them once); *supra* note 8. Justice Hughes and Justice Selby have been state supreme court justices who compiled substantial, accessible records, but they lack previous FBI and ABA checks. *See supra* note 8 and accompanying text.

<sup>79</sup> *See generally* 162 CONG. REC. S968 (daily ed. Feb. 24, 2016) (statement of Sen. Reid) (discussing President Obama's attempts to carefully cooperate with senators on judicial nominations).

<sup>80</sup> ALL. FOR JUSTICE, BLUE SLIP STATUS FOR PENDING JUDICIAL NOMINATIONS 2, 5 (2015), <http://www.afj.org/wp-content/uploads/2015/09/BlueSlip.pdf>.

<sup>81</sup> Open lines of communication between these groups and the Senate can reveal pitfalls that may prevent confirmation. The analysis of Judge Kallon and Judge Koh can be brief because each was rather recently vetted. *See supra* note 78.

<sup>82</sup> *Executive Business Meeting of the S. Comm. on the Judiciary*, 114th Cong. (Sept. 15, 2016); *Executive Business Meeting of the S. Comm. on the Judiciary*, 114th Cong. (July 14, 2016) (Puhl vote); *Hearing on Nominations Before the S. Comm. on the Judiciary*, 114th Cong. (July 13, 2016) (Judge Koh hearing); *Hearing on Nominations Before the S. Comm. on the Judiciary*, 114th Cong. (June 21, 2016) (Puhl hearing); *Executive Business Meeting of the S. Comm. on the Judiciary*, 114th Cong. (June 16, 2016) (Schott vote); *Hearing on Nominations Before the S. Comm. on the Judiciary*, 114th Cong. (May 18, 2016) (Schott hearing).

<sup>83</sup> ALL. FOR JUSTICE, *supra* note 80.

<sup>84</sup> *See* Patrick Springer, *Senate Hearing Friendly for Appointment to Replace Fargo-Based Appeals Judge*, DICKINSON PRESS (June 21, 2016, 2:52 PM), <http://www.thedickinsonpress.com/news/north-dakota/4059230-senate-hearing-friendly-appointment-replace-fargo-based-appeals-judge>; ALL. FOR JUSTICE, *supra* note 80.

<sup>85</sup> *See* Ron Johnson, *Cooperation Only Goes So Far with Sen. Tammy Baldwin*, MILWAUKEE J. SENTINEL (Mar. 11, 2016), <http://www.jsonline.com/news/opinion/cooperation-only-goes-so-far-with-sen-tammy-baldwin-b99685832z1-371825211.html>; Letter from Wis. Law Professors to Senator Ron Johnson on the Donald Schott Nomination (Feb. 23, 2016), <http://www.afj.org/wp-content/uploads/2016/02/Law-Prof-Ltr-Schott.pdf>.

<sup>86</sup> *Toomey's Statement on the Nomination of Rebecca Haywood to the Third Circuit*, SEN. PAT TOOMEY (Mar. 16, 2016), <http://www.toomey.senate.gov/?p=news&id=1702>; *see also* Jonathan Tamari & Jeremy Roebuck, *Obama's Pick for Judgeship Here Draws Toomey's Ire*, PHILLY.COM (Mar. 17, 2016), <http://articles.philly.com/2016-03-17/news/>

but he needs to reexamine this decision. Senator McConnell curtly rejected Justice Hughes's nomination the day on which President Obama made it, asserting that the chief executive failed to notify him.<sup>87</sup> This seemed implausible, as multiple Kentucky outlets had earlier reported her possible nomination.<sup>88</sup> Senator McConnell should now interview Justice Hughes or perhaps suggest a pick whom he considers more desirable.<sup>89</sup>

Once blue slips arrive, the Chair ought to promptly schedule hearings, as the tribunals which the choices would join require that each post be filled, and he should dutifully reciprocate for Democrats' processing of 2007–2008 candidates.<sup>90</sup> If Senator Grassley rejects, or slowly arranges, hearings, lawmakers must prevail upon him. For example, Senator Dianne Feinstein

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71576667\_1\_pat-toomey-obama-supreme-court-president-obama. However, having the entire committee probe relevant issues in public hearings would be preferable to private meetings between senators and nominees.

<sup>87</sup> See Joseph Gerth, *McConnell Rejects Obama Choice of KY Judge*, COURIER-J. (Mar. 18, 2016, 7:04 PM), <http://www.courier-journal.com/story/news/politics/2016/03/18/mcconnell-says-he-kill-6th-circuit-nomination/81971446/>; Curtis Tate, *Mitch McConnell Won't Consider Obama Judicial Nominee from Kentucky*, MIAMI HERALD (Mar. 18, 2016, 5:19 PM), <http://www.miamiherald.com/news/politics-government/article66940532.html>. For similar treatment of Judge Kallon by Senator Jeff Sessions and Senator Richard Shelby and of Justice Selby by Senator Dan Coats, who called for deployment of a merit selection commission that would make recommendations to the senators, see Mary Troyan, *Obama Appoints Judge Abdul Kallon to 11th Circuit*, MONTGOMERY ADVERTISER (Feb. 12, 2016, 1:15 PM), <http://www.montgomeryadvertiser.com/story/news/2016/02/11/obama-appoints-judge-abdul-kallon-11th-circuit/80253358/> (Judge Kallon), and Groppe, *supra* note 12 (Justice Selby). These senators should follow the ideas proffered for Senator McConnell, *infra* note 89 and accompanying text.

<sup>88</sup> E.g., Andrew Wolfson, *Kentucky Supreme Court Justice in Line for Court of Appeals Job*, COURIER-J. (Mar. 10, 2014, 11:02 PM), <http://www.courier-journal.com/story/news/local/2014/03/10/kentucky-supreme-court-justice-in-line-for-court-of-appeals-job/6269697/>; see Pierre Bergeron, *Potential New Sixth Circuit Judge?*, SIXTH CIR. APP. BLOG (Mar. 12, 2014), <http://www.sixthcircuitappellateblog.com/news-and-analysis/potential-new-sixth-circuit-judge/>.

<sup>89</sup> He may prefer District Judge Amul Thapar. See Gerth, *supra* note 87; see also Megan Carpentier, *Trump's Supreme Court Picks: From Tea Party Senator to Anti-Abortion Crusader*, THE GUARDIAN (Sept. 24, 2016, 12:00 PM), <https://www.theguardian.com/law/2016/sep/24/donald-trump-supreme-court-nominations-names> (describing Thapar's qualifications and Republican presidential nominee Donald Trump's inclusion of Thapar on list of potential Supreme Court nominees in his administration).

<sup>90</sup> See Press Release, Senator Dan Coats, Coats, Donnelly Express Support for U.S. District Court Nominee Winfield Ong During Senate Judiciary Committee Hearing (May 18, 2016), <https://www.coats.senate.gov/newsroom/press/release/coats-donnelly-express-support-for-us-district-court-nominee-winfield-ong-during-senate-judiciary-committee-hearing> (Senator Joe Donnelly (D-Ind.) urging the Senate Judiciary Committee to expeditiously conduct a hearing, even though Senator Coats had failed to return his blue slip for Justice Selby); *supra* notes 55, 58, 72 and accompanying text.

(D-Cal.) should remind the Chair of her pivotal support for a number of disputed prospects whom President Bush tendered.<sup>91</sup>

After Senator Grassley schedules hearings, the panel should conduct brief sessions which would permit members to rigorously question aspirants who carefully answer.<sup>92</sup> Because numerous President Obama choices are competent moderates who have decided, or assumed positions on, relatively few controversial issues,<sup>93</sup> the hearings would essentially resemble the dynamic of Judge Restrepo's session: several senators posed general queries to which the judge diligently and candidly responded.<sup>94</sup> If any of the seven choices appears controversial, the preferable treatment would be asking probing questions during hearings.<sup>95</sup> Following the sessions, politicians would have one week to craft written queries, which designees frequently answer rapidly.<sup>96</sup>

The Chair would next schedule debates and ballots a few weeks later. Committee members participate in the discussions, which, for nominees like the seven possibilities, are cursory,<sup>97</sup> and then vote. Many nominees whom

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<sup>91</sup> See, e.g., Nick Anderson, *Bush Appellate Nominee Sutton Wins Senate OK*, L.A. TIMES (Apr. 30, 2003), <http://articles.latimes.com/2003/apr/30/nation/na-judges30> (Judge Jeffrey Sutton); Bob Egelko, *Feinstein Draws Fire Over Vote for Judge*, SFGATE (Aug. 4, 2007, 4:00 AM), <http://www.sfgate.com/politics/article/Feinstein-draws-fire-over-vote-for-judge-2549435.php> (Judge Leslie Southwick).

<sup>92</sup> Nominees provide five-minute opening statements, and members employ five-minute rounds for questioning. *Hearing on Nominations Before the S. Comm. on the Judiciary*, 114th Cong. (June 10, 2015), <http://www.judiciary.senate.gov/meetings/nominations-06-10-15> (the video on this page provides an example of such a hearing).

<sup>93</sup> See, e.g., Tom Goldstein, *An Assessment of Judge Sri Srinivasan's Rulings (or, "I Read All These FERC Cases so You Don't Have To")*, SCOTUSBLOG (Mar. 14, 2016, 9:58 AM), <http://www.scotusblog.com/2016/03/an-assessment-of-judge-sri-srinivasans-rulings-or-i-read-all-these-ferc-cases-so-you-dont-have-to/> (explaining that the opinions of Judge Sri Srinivasan, an Obama pick for the D.C. Circuit, did not demonstrate a strong ideological bent); Wheeler, *supra* note 42 (explaining that Judge Garland's record on controversial issues was limited and did not hint at his positions on such issues).

<sup>94</sup> *Hearing on Nominations Before the S. Comm. on the Judiciary*, *supra* note 92. Senator David Perdue (R-Ga.) chaired and asked questions. See *id.*

<sup>95</sup> Public hearings are preferable to premising the retention of blue slips and effectively one-senator vetoes on nominees' answers to senators' queries in private interviews. See *supra* note 86.

<sup>96</sup> See *Hearing on Nominations Before the S. Comm. on the Judiciary*, *supra* note 92 (during this hearing, Senator Perdue announced the possibility that senators might submit written questions within the next week).

<sup>97</sup> See, e.g., *Executive Business Meeting of the S. Comm. on the Judiciary*, 114th Cong. (July 14, 2016), <http://www.judiciary.senate.gov/meetings/07/04/2016/executive-business-meeting> (video demonstrating that the discussion preceding the panel vote on Puhl was cursory); *Executive Business Meeting of the S. Comm. on the Judiciary*, 114th Cong. (June 16, 2016), <http://www.judiciary.senate.gov/meetings/06/16/2016/executive-business-meeting-1> (video demonstrating that the discussion preceding the panel vote on Schott was



President Obama has proffered have easily received committee approval because they were very qualified, uncontroversial submissions.<sup>98</sup>

The Majority Leader ought to provide a floor debate and a chamber ballot shortly after the panel reports every nominee. This would dutifully implement the regular order that he dramatically trumpets and would respect the customs seen during recent presidential election years, such as the 2008 precedents.<sup>99</sup> If Senator McConnell eschews chamber debates and votes on the seven nominees, their proponents should pursue unanimous consent<sup>100</sup> and, if that is rejected, seek cloture. Accomplished, mainstream nominees have conventionally merited yes or no ballots.<sup>101</sup> Accordingly, politicians who honor tradition must favor cloture.<sup>102</sup>

Once nominees arrive on the floor, the Majority Leader should promptly orchestrate debate that carefully scrutinizes numerous relevant questions while being dignified and respectful of the candidates and contrary ideas. After exacting ventilation of pertinent issues, the Senate must expeditiously vote.<sup>103</sup>

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cursory).

<sup>98</sup> See, e.g., *supra* note 97 (showing that Puhl and Schott easily received committee votes). This was especially true for judges whom President Obama elevated, such as Judge Costa and Judge Nguyen, who easily won approval, as they had already captured panel and final votes in their district court confirmations. See *Executive Business Meeting of the S. Comm. on the Judiciary*, 112th Cong. (Dec. 1, 2011), <http://www.judiciary.senate.gov/meetings/executive-business-meeting-2011-12-01> (showing easy committee approval for Judge Nguyen); Ben Kamisar, *Texas Judge Costa Moves to Full Senate Vote*, DALL. MORNING NEWS: TRAIL BLAZERS BLOG (Mar. 27, 2014, 11:58 AM), <http://trailblazersblog.dallasnews.com/2014/03/texas-judge-costa-moves-to-full-senate-vote.html/> (showing easy committee approval for Judge Costa).

<sup>99</sup> See *supra* notes 55, 57–59, 72 and accompanying text (discussing the 2008 precedent when the Democratic Senate majority helped confirm four of President Bush’s circuit nominees, with Senator McConnell strenuously urging approval of those nominees and many others in floor speeches).

<sup>100</sup> E.g., 162 CONG. REC. S1,368 (daily ed. Mar. 9, 2016) (statement of Sen. Mikulski); 162 CONG. REC. S2,655 (daily ed. May 10, 2016) (statements of Sens. Casey, Cardin, and Coons); 162 CONG. REC. S5,045 (daily ed. July 13, 2016) (statements of Sens. Schumer, Warren, and Hirono). Senator Ted Cruz (R-Tex.) has promised that he will filibuster any 2016 Supreme Court nominee, but it remains unclear whether Senator Cruz or other senators will block any of the seven appellate nominees once the committee votes them to the floor. See Ted Cruz, *The Scalia Seat: Let the People Speak*, WALL ST. J. (Mar. 6, 2016, 6:35 PM), <http://www.wsj.com/articles/the-scalia-seat-let-the-people-speak-1457307358>.

<sup>101</sup> See, e.g., 158 CONG. REC. S2,912 (daily ed. May 7, 2012) (confirmation of Judge Nguyen); 160 CONG. REC. S3,175 (daily ed. May 20, 2014) (confirmation of Judge Costa).

<sup>102</sup> See *supra* text accompanying notes 54–60.

<sup>103</sup> Even if the responsibilities to proffer advise and consent on the President’s nominees and provide a coequal branch adequate resources to discharge its constitutional responsibilities do not foster greater GOP cooperation, self-interest, practicality, and political realities may. For example, the Republican presidential nominee might not win, and

If the endeavors cataloged are not productive, Democrats may seriously contemplate, and perhaps rely on, less customary approaches. For instance, the President can engage in “trades”—a notion that President Obama and Georgia legislators seemed to employ.<sup>104</sup> Democrats and Republicans might concomitantly adopt a bipartisan judiciary in which the party not in control of the White House suggests a percentage of nominees.<sup>105</sup> More dramatic could be recess appointments; however, several complex legal, practical, and political complications accompany that solution, which probably should be reserved for grave emergencies.<sup>106</sup>

### CONCLUSION

Early in 2016, President Obama tapped seven excellent, consensus, diverse appellate nominees. Because the individuals constitute remarkable, moderate prospects and the courts need all of their members to deliver justice, the chamber should not allow this presidential election year or GOP resistance to impede the choices’ swift review.

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Republicans will have to defend twice as many chamber seats as Democrats. Therefore, Republicans may favor accomplished, consensus Obama nominees, like the seven tapped this year, over jurists whom Hillary Clinton would appoint, especially if the GOP loses the chamber. Kristina Peterson, *GOP Senate Plots Its Path on Merrick Garland Supreme Court Nomination*, WALL ST. J. (Mar. 17, 2016, 4:35 PM), <http://www.wsj.com/articles/gop-plots-its-path-on-merrick-garland-supreme-court-nomination-1458169679>.

<sup>104</sup> See Mike Lillis, *Controversial Obama Judicial Nominee Moving Forward in Senate*, THE HILL (May 8, 2014, 7:34 PM), <http://thehill.com/homenews/senate/205663-controversial-obama-judicial-nominee-moving-forward-in-senate>. He might trade confirming Justice Hughes or Judge Kallon for approving Kentucky or Alabama senators’ suggested district picks. This may be controversial. See 143 CONG. REC. 4254 (1997) (statement of Sen. Biden).

<sup>105</sup> Cf. Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 688 (2003) (suggesting that both parties could “alternat[e] in making recommendations to the President”); Carl W. Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 790 (2010) (proposing that the party that controls the presidency could trade a judgeships law for the opposing party’s suggestion of nominees). This would become effective in 2017, so neither party can game the system. The aforementioned practices can leverage the selection process by publicizing and dramatizing how the confirmation wars undercut justice. For numerous other suggestions, see Michael L. 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, *Senate Gridlock*, *supra* note 6, at 2255–65.

<sup>106</sup> For the legal, practical, and political complications that accompany invocation of recess appointments, see *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) and see generally *Forty-Fifth Annual Administrative-Law Symposium: Is the Appointments Process Broken? Insights from Practice, Process, and Theory*, 64 DUKE L. J. 1499 (2015).