

PRESIDENT DONALD TRUMP'S WAR ON FEDERAL JUDICIAL DIVERSITY

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In Donald Trump's 2016 presidential campaign, the candidate promised to nominate and confirm federal judges who would possess ideologically conservative perspectives. Across President Trump's first twenty-seven months, the chief executive implemented numerous actions to effectuate his campaign pledge. Indeed, federal judicial selection may be the area in which President Trump has achieved the most substantial success throughout his first twenty-seven months in office, as many of Trump's supporters within and outside the government recognize. Nevertheless, the chief executive's achievements, principally when nominating and confirming stalwart conservatives to the appellate court bench, have imposed numerous critical detrimental effects. Most important for the purposes of this Article, a disturbing pattern that implicates a stunning paucity of minority nominees materialized rather quickly. Moreover, in the apparent rush to install staunch conservative ideologues in the maximum possible number of appeals court vacancies, the Republican White House and Senate majority have eviscerated numerous invaluable, longstanding federal judicial selection conventions. Although it is comparatively early in the service of those judges whom the Trump Administration has confirmed, some jurists have already issued opinions that undermine the rights of ethnic minorities, women, as well as lesbian, gay, bisexual, transgender and queer individuals or that make the judiciary seem equally partisan and politicized as the political branches. These developments have undercut public respect for the selection process, the presidency, the Senate, and the

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judiciary. Because the 133 current vacancies present an unusual opportunity, the compelling dearth of minority representation among Trump’s judicial nominees and confirmees as one critical front in his administration’s “war on diversity” deserves evaluation.

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I. INTRODUCTION

In Donald Trump’s 2016 presidential campaign, the candidate promised to “make America great again”¹ as a general proposition and pledged to “make the federal judiciary great again,”² specifically by nominating and confirming federal judges who would: (1) possess ideologically conservative perspectives,³ especially regarding social policy issues respecting the “culture wars”;⁴ (2) defer to the President when the official exercises executive branch power; (3) narrowly

1. *About*, DONALD J. TRUMP FOR PRESIDENT, <https://www.donaldjtrump.com/about/> (last visited May 12, 2019).

2. Press Release, White House Office of the Press Sec’y, President Donald J. Trump Announces Five Additions to Supreme Court List (Nov. 17, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-announces-five-additions-supreme-court-list/>; Carl Tobias, Essay, *Appointing Lesbian, Gay, Bisexual, Transgender and Queer Judges in the Trump Administration*, 96 WASH. U. L. REV. ONLINE 11, 11 (June 3, 2018).

3. Tobias, *supra* note 2, at 17.

4. See, e.g., *Trump’s Campaign Promises—Has He Delivered on Them?*, BBC NEWS (Dec. 24, 2018), <https://www.bbc.com/news/world-us-canada-37982000> (quoting President Trump as stating, “I am looking for judges . . . [who will] respect the Second Amendment and what it stands for and what it represents”); Aaron Blake, *Trump Makes Clear Roe v. Wade Is on the Chopping Block*, WASH. POST (July 2, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/07/02/trump-makes-clear-roe-v-wade-is-on-the-chopping-block> (quoting President Trump as remarking, “I am putting pro-life justices on the court”).

interpret the United States Constitution and statutes that Congress passes; and (4) not legislate from the bench.⁵ Across President Trump's first 27 months, the chief executive implemented numerous actions that would effectuate his campaign promise. The White House nominated and confirmed myriad individuals who possessed these attributes and who have displayed those qualities once the United States Senate confirmed the individuals to the federal bench.⁶

The President has incessantly reminded the American people about his enormous success in nominating and appointing jurists who exhibit these characteristics.⁷ He even campaigned on this issue during the 2018 midterm Senate elections, admonishing the electorate to vote for Republican upper chamber candidates because retaining a Grand Old Party ("GOP") Senate majority was critical to continuing Trump's outsized success in nominating and confirming the particular types of circuit and district court members whom he had promised to appoint.⁸ Indeed, federal judicial selection may be the area in which President Trump has realized the most impressive success throughout his first 27 months in office, as many Trump supporters within and outside the government recognize.⁹ However,

5. See Press Release, White House Office of the Press Sec'y, Remarks by President Trump and Justice Gorsuch at Swearing-in of Justice Gorsuch to the Supreme Court (Apr. 10, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-justice-gorsuch-swearing-justice-gorsuch-supreme-court/>.

6. See, e.g., Brent Kendall & Jess Bravin, *Justice Neil Gorsuch Leans Conservative, Fulfilling Expectations*, WALL ST. J. (June 27, 2017, 7:00 PM), <https://www.wsj.com/articles/justice-neil-gorsuch-leans-conservative-fulfilling-expectations-1498604442> ("Justice Neil Gorsuch early on has lined up consistently with the Supreme Court's most conservative justices, much as President Donald Trump promised."). But see Richard Wolf, *Conservatives' Takeover of Supreme Court Stalled by John Roberts-Brett Kavanaugh Bromance*, USA TODAY, (Apr. 8, 2019), <https://www.usatoday.com/story/news/politics/2019/04/07/supreme-court-bromance-john-roberts-brett-kavanaugh-tie-up-court/3342377002/> ("[T]he conservative takeover of the Supreme Court that was anticipated following President Donald Trump's two selections has been stalled by a budding bromance between the senior and junior justices").

7. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 20, 2018, 4:32 AM), <https://twitter.com/realdonaldtrump/status/1042738383720726528>; Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 1, 2017, 3:03 PM), <https://twitter.com/realdonaldtrump/status/925845770724618240>.

8. See Press Release, White House Office of the Press Sec'y, Remarks by President Trump in Press Conference After Midterm Elections (Nov. 7, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-press-conference-midterm-elections>.

9. See Burgess Everett & Elana Schor, *McConnell's Laser Focus on Transforming the Judiciary*, POLITICO (Oct. 17, 2018, 4:41 PM), <https://www.politico.com/story/2018/10/17/senate-gop-judges-911935>; Deanna Paul, *Keep Those Judges Coming: Conservatives Praise Trump's Success in Filling the Courts*, WASH. POST (Nov. 16, 2018), <https://www.washingtonpost.com/politics/2018/11/16/keep-those-judges-coming-conservatives-praise-trumps-success-filling-courts>.

even some of the President's foremost detractors, including Democratic senators, acknowledge that this White House has enjoyed remarkable success when appointing circuit judges¹⁰ and has actually established records for appellate confirmations compared to other modern Presidents.¹¹

Nonetheless, Trump's attainments, primarily when nominating and confirming staunch conservatives to the federal appeals courts, have produced numerous crucial deleterious impacts. Most significant for the purposes of this Article, a troubling pattern that involved a striking dearth of minority nominees materialized comparatively rapidly.¹² The White House has established a confirmation record through its appointment of 37 court of appeals jurists in President Trump's first 27 months and its considerable success in nominating candidates for empty circuit and district court positions. Despite these achievements, merely 9 out of 95 appellate court and district court appointees are ethnic minority judges, only 23 in 174 nominees are persons of color,¹³ and only 2 nominees constitute lesbian, gay, bisexual, transgender or queer ("LGBTQ") individuals.¹⁴

Moreover, in the seeming hurry to place stalwart conservative ideologues in the greatest number of appeals court vacancies, the Republican Executive Branch and Senate majority have undermined or deemphasized a number of critical, longstanding federal judicial selection rules and customs. Most significantly, the White House has failed to undertake assiduous, comprehensive consultation with home state senators before tendering nominations and throughout the confirmation process.¹⁵ More specifically, President Trump selected

10. See Lydia Wheeler, *Dems Push for Increased Scrutiny of Trump's Court Picks*, HILL (Dec. 23, 2018, 7:14 PM), <https://thehill.com/homenews/senate/422270-dems-push-for-increased-scrutiny-of-trumps-court-picks> (explaining Senate Democrats' attempt to restore the "blue-slip rule" to slow nomination of judges).

11. Tessa Berenson, *President Trump Appointed Four Times as Many Federal Appeals Judges as Obama in His First Year*, TIME (Dec. 15, 2017), <http://time.com/5066679/donald-trump-federal-judges-record/>.

12. Carrie Johnson & Renee Klahr, *Trump Is Reshaping the Judiciary. A Breakdown by Race, Gender and Qualification*, NPR (Nov. 15, 2018, 5:00 AM), <https://www.npr.org/2018/11/15/667483587/trump-is-reshaping-the-judiciary-a-breakdown-by-race-gender-and-qualification>; Thomas Kaplan, *Trump is Putting Indelible Conservative Stamp on Judiciary*, N.Y. TIMES (July 30, 2018), <https://www.nytimes.com/2018/07/31/us/politics/trump-judges.html>.

13. Johnson & Klahr, *supra* note 12 (follow "[View the full spreadsheet here.](#)" hyperlink).

14. Brooke Sopelsa, *Trump Nominates Openly Gay Conservative to Federal Appeals Court*, NBC NEWS (Oct. 16, 2018, 4:15 PM), <https://www.nbcnews.com/feature/nbc-out/trump-nominates-openly-gay-conservative-federal-appeals-court-n920831>. *But see infra* note 121 (renominating Patrick Bumatay to the Southern District of California rather than the Ninth Circuit).

15. See Chris Coons, *Road to the Bench*, 36 DEL. LAW. 16, 16–17 (2018); Sopelsa, *supra* note 14.

two appellate court and four district court nominees whom the American Bar Association (“ABA”) Standing Committee on the Federal Judiciary evaluated and assigned “not qualified” ratings.¹⁶ The GOP Senate majority, in the apparent haste to rubberstamp confirmation of many conservative jurists, has concomitantly undercut numerous effective, longstanding rules and traditions. These strictures and customs govern the confirmation process and senatorial courtesy, particularly as manifested in the lack of respect accorded to the blue slips that protect home state senators’ prerogatives in the nomination and confirmation processes for judges who will serve in their jurisdictions. The Republican White House and senators have essentially ignored ABA examinations and ratings throughout the nomination and confirmation processes. The practices identified might well have substantially reduced the number of accomplished, mainstream, and diverse candidates who received nomination and confirmation.

Even though it remains somewhat early in the tenure of President Trump’s Administration, this evaluation ascertains that the rampant partisanship, systematic divisiveness, and nonstop paybacks, which have long attended the judicial nomination and confirmation processes, have continued their counterproductive downward spiral. Although it is comparatively early in the service of those judges whom the Trump Administration has confirmed, some jurists have already issued opinions that undercut the rights of ethnic minorities, women, and LGBTQ individuals or which make the judiciary seem equally partisan and politicized as the political branches.¹⁷ The striking lack of ethnic minorities, LGBTQ individuals, and women may correspondingly forfeit or restrict the benefits of a diverse judiciary, such as improved federal court decision making, more equitable decision making, and greater public confidence in the court system. These phenomena have undermined citizen regard for the judicial selection process, the presidency, the Senate, and the judiciary.

It is essential to remember that when Donald Trump campaigned for the presidency and captured the White House, he vowed to serve as President for all of the American people. Trump’s failure to honor this pledge means that increased judicial diversity assumes even greater significance. Because the 133 circuit and district court vacancies as of April 29, 2019, present an unusual opportunity, the compelling dearth of minority representation among Trump’s judicial

16. Standing Committee on the Federal Judiciary, *Ratings of Article III and Article IV Judicial Nominees: 115th Congress*, ABA, <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Web%20rating%20Chart%20Trump%20115.pdf> (last updated Dec. 13, 2018).

17. See Kevin Schaul & Kevin Uhrmacher, *How Trump Is Shifting the Most Important Courts in the Country*, WASH. POST (Sept. 4, 2018), https://www.washingtonpost.com/graphics/2018/politics/trump-federal-judges/?utm_term.

nominees and confirmees as one essential front in his administration's "war on diversity"¹⁸ deserves evaluation. This Article undertakes that effort.

Part II of the Article explores the historical background of the appointments process, which implicates expanded diversification respecting the federal bench and why that enhancement is crucial. This Part highlights that increased minority representation improves the quality of judicial determinations, reduces biases that undermine the delivery of justice, and expands public confidence in the federal judiciary by making the courts reflect the populace. Part III reviews how modern Presidents and contemporary Senates have treated diversity when they nominate and confirm jurists. This Part ascertains that Democratic Presidents and senators generally favor increasing diversity on the federal bench for the reasons denominated in the first segment, while Republican chief executives and Senate members typically evince less concern about emphasizing diversity and greater interest in nominating and appointing ideological conservatives and stressing the concept of "merit." GOP politicians emphasize these phenomena, principally because upper echelon executive branch officials who have responsibility for selection and Senate members apparently believe that conservative nominees will become superior judges, that the "pool" of highly-qualified ethnic minority, female, and LGBTQ candidates is not substantial enough, and that too many of those individuals who are well qualified are insufficiently conservative.

Part IV examines the selection record that Trump has assembled, finding that this White House confirmed the fewest persons of color, women, and LGBTQ jurists since Ronald Reagan's presidency, when dramatically fewer ethnic minority, female, and LGBTQ individuals were practicing lawyers. Part V assesses the consequences of the nomination and confirmation processes detailed, especially since the current presidency's advent. The Trump Administration commenced during 2017, which provides this White House considerable time for remedying its deficient nomination and appointment of highly-qualified, diverse individuals, whose nomination and confirmation would furnish numerous advantages. Part VI of this Article supplies recommendations that might help confirm substantially greater numbers of ethnic minority, female, and LGBTQ nominees to the federal bench.

18. Dara Lind, *The Trump Administration Is Waging War on Diversity*, VOX (Aug. 4, 2017, 11:20 AM), <https://www.vox.com/policy-and-politics/2017/8/4/16091406/raise-act-diversity-trump>.

II. THE ORIGINS AND DEVELOPMENT OF FEDERAL COURT DIVERSITY

A. *The Appointments Process*

The Office of White House Counsel (“White House Counsel”) assumes chief responsibility for nominations and some responsibility for confirmations.¹⁹ The Department of Justice (“DOJ”) provides assistance with critical selection and important confirmation duties, primarily analyzing candidates whom home state politicians suggest and helping to prepare nominees for hearings.²⁰ The Federal Bureau of Investigation (“FBI”) undertakes background checks of these aspirants.²¹ Moreover, the ABA evaluates and rates candidates, an invaluable service that the ABA has provided since Dwight Eisenhower’s Administration.²² However, the Trump Administration officers’ discharge of their selection responsibilities and the Republican Senate majority’s fulfillment of its advice and consent duties have both sharply confined the ABA’s responsibilities and frequently denigrated the organization as a “political group.”²³ President Trump and GOP senators have essentially ignored the ABA’s examinations and rankings, and certain lawmakers have even attacked some evaluations and ratings as politically motivated.²⁴ The Senate Judiciary Committee discharges multiple obligations across the confirmation process, specifically investigating designees as well as staging hearings, committee discussions, and votes on nominees.²⁵ Particular senators from jurisdictions that experience openings play central roles in the nomination and confirmation processes, mostly identifying strong prospects for White House consideration and selection, and familiarizing colleagues with the individuals whom the President nominates.²⁶

B. *Diversity’s Benefits*

Improved minority judicial representation affords substantial benefits. People of color, women, as well as LGBTQ court members

19. See DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., R43762, THE APPOINTMENT PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: AN OVERVIEW 14 (2014).

20. *Id.*

21. *Id.*

22. *Id.* at 15.

23. See, e.g., 163 CONG. REC. S7288 (daily ed. Nov. 16, 2017) (statement of Senator Sasse) (describing the ABA as a liberal political interest group); Seung Min Kim, *ABA Deems Another Trump Judicial Nominee ‘Not Qualified,’* POLITICO (Oct. 10, 2017, 2:56 PM), <https://www.politico.com/story/2017/10/30/aba-trump-judicial-nominee-not-qualified-244327> (providing Senator Sasse’s accusation that ABA is driving a “political agenda”).

24. See, e.g., Tim Ryan, *Senate Scours American Bar Association for Liberal Bias*, COURTHOUSE NEWS (Nov. 15, 2017), <https://www.courthousenews.com/senate-scours-american-bar-association-liberal-bias/>.

25. RUTKUS, *supra* note 19, at 18–20.

26. *Id.* at 21.

supply efficacious, nuanced “outsider” perspectives²⁷ and different, constructive insights about crucial social policy questions regarding abortion, criminal procedure, employment discrimination, and related daunting issues regarding many important questions, which federal jurists resolve.²⁸ They can also confine ethnic, gender, and sexual orientation prejudices that often undercut courts’ efforts to deliver litigants justice.²⁹ Moreover, judges who reflect the nation instill public confidence in the courts by saliently demonstrating that ample people of color serve proficiently on the bench, and they can better appreciate certain situations that could prompt minorities to appear before federal courts.³⁰

Individuals and organizations that criticize activities that would confirm numerous additional persons of color, women, and LGBTQ people for service on the federal judiciary claim that supplementing representation will dilute merit because the candidate pool of strongly qualified potential minority nominees remains overly small or the U.S. bar includes too few conservative prospects.³¹ However, those notions are substantially less convincing today when abundant people of color, women, and LGBTQ individuals are superb, conservative lawyers, phenomena manifested by the twenty-three excellent, conservative and moderate, people of color, the thirty-nine analogously qualified women, as well as the two similarly capable lesbian and gay individuals whom President Trump has already

27. 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); John McCain & Jeff Flake, *Federal Judge Diane Humetewa*, 40 HUMAN RTS MAG. 22, 22 (2017), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/federal-judge-diane-humetewa/. LGBTQ means openly disclosed sexual preference, which particular individuals may have been unwilling to divulge. Female and LGBTQ judges and individuals are considered “minorities” and included in this history and throughout this Article.

28. Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005). But see Stephen J. Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504, 505 (2011).

29. See 164 CONG. REC. S1258 (daily ed. Feb. 28, 2018) (statement of Senator Schumer) (“Having a diversity of views and experience on the Federal bench is necessary for the equal administration of justice.”); FINAL REPORT OF THE NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS & ETHNIC FAIRNESS (1997); FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990).

30. 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); Jeffrey Toobin, *The Obama Brief*, NEW YORKER (Oct. 27, 2014), <https://www.newyorker.com/magazine/2014/10/27/obama-brief>; see also WILLIAM ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999).

31. For analysis of the concepts of merit and the pool, see SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 335 (1999); Carl Tobias, *Justifying Diversity in the Federal Judiciary*, 106 NW. U. L. REV. COLLOQUY 283, 294–96 (2012).

nominated, many of whom have rather smoothly captured appointment.³²

C. *The Early History*

Before the Carter Administration, nearly all chief executives devoted relatively minimal attention to nominating and confirming ethnic minorities, women, and LGBTQ individuals.³³ This disinterest, and even opposition, resulted partly because white males dominated the legal profession, comparatively small numbers of minorities were practicing attorneys, and there was considerable discomfort with, and even racism, sexism, and homophobia directed toward, ethnic minorities, women, and LGBTQ individuals practicing law, much less potentially serving as federal judges.³⁴

President Franklin Delano Roosevelt nominated and confirmed Florence Allen as the initial female appellate court jurist in 1934, but his administration confirmed no ethnic minorities to Article III judgeships.³⁵ President Harry Truman appointed African American William Hastie to the United States Court of Appeals for the Third Circuit and Burnita Shelton Matthews to the United States District Court for the District of Columbia.³⁶ President Eisenhower appointed African American Scovel Richardson and Mary Donlon to the United States Customs Court.³⁷

President John Kennedy appointed Sarah Hughes to the United States District Court for the Northern District of Texas, while he appointed African Americans Thurgood Marshall to the United States Court of Appeals for the Second Circuit, James Parsons to the United States District Court for the Northern District of Illinois, Wade McCree to the United States District Court for the Eastern District of Michigan, and Spottswood Robinson to the United States District

32. See *infra* note 120 and accompanying text. But see *infra* note 142 and accompanying text.

33. Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587, 588 (2011).

34. See, e.g., GOLDMAN, *supra* note 31, at 268 (observing that during the Carter Administration, female and ethnic minority judicial candidates tended to receive lower ratings from the ABA); Maya Sen, *How Judicial Qualification Ratings May Disadvantage Minority and Female Candidates*, 2 J.L. & CTS. 11, 11–12 (2014) (providing similar observation regarding contemporary judicial qualification ratings).

35. GOLDMAN, *supra* note 31, at 51. President Roosevelt did grant William Hastie a term appointment to the district court in the Virgin Islands. *Id.* at 55. President Calvin Coolidge did appoint Genevieve Cline to the U.S. Customs Court. *Id.* at 51 n.q.

36. *Id.* at 90, 96–97. President Truman did confirm African American Irvin Mollison to the U.S. Customs Court. *Id.* at 98.

37. *Id.* at 143–44.

Court for the District of Columbia.³⁸ President Lyndon Johnson appointed Shirley Hufstедler to the United States Court of Appeals for the Ninth Circuit, African American Constance Baker Motley to the United States District Court for the Southern District of New York, and June Green to the District of Columbia District Court, while the chief executive elevated Thurgood Marshall to the United States Supreme Court and Spottswood Robinson to the United States Court of Appeals for the District of Columbia Circuit.³⁹

President Nixon appointed Cornelia Kennedy to the United States District Court for the Eastern District of Michigan, while he placed six African Americans on the district court bench.⁴⁰ President Gerald Ford confirmed Mary Ann Richey to the United States District Court for the District of Arizona, and he confirmed three African Americans to district courts.⁴¹ Although these Presidents nominated minorities, in light of all the judicial appointments they made, the Presidents devoted relatively little attention to diversifying the federal judiciary.

III. MODERN HISTORY OF DIVERSIFYING THE FEDERAL COURTS

A. *The Carter Administration*

Only with the advent of the Carter Administration did chief executives devote comparatively serious attention to diversity on the federal bench. Contemporary Presidents and senates have comprehensively deployed rather analogous practices when nominating and confirming jurists.⁴² The chief executives and chambers have also carefully evaluated the issue of enhancing minority representation across the courts, although individual Democratic and Republican Presidents and senators have accorded differing emphases to the idea.⁴³ All Democratic chief executives and most Democratic senate members have generally stressed diversity, even as numerous Republican Presidents and many GOP senators have deemphasized or even ignored the concept.⁴⁴

38. President Kennedy nominated African American Leon Higginbotham to the Eastern District of Pennsylvania whom the Senate confirmed after Kennedy's assassination. *Id.* at 180, 183–84, 184 n.dd.

39. *Id.* at 180–82, 185–86. President Johnson named African American James Watson to the U.S. Customs Court. *Id.* at 186 n.ff. President Carter elevated Judge Higginbotham to the Third Circuit. *Id.* at 184 n.dd; *see supra* note 38.

40. *Id.* at 220, 222. President Carter elevated Judge Kennedy to the Sixth Circuit. *Id.* at 269.

41. *Id.* at 221, 225–26.

42. *See, e.g.*, Jennifer Segal Diascro & Rorie Spill Solberg, *George W. Bush's Legacy on the Bench: Policy in the Face of Diversity*, 92 JUDICATURE 289, 291 (2009).

43. Carl Tobias, *President Donald Trump and Federal Bench Diversity*, 74 WASH. & LEE L. REV. ONLINE 400, 406–08 (2018).

44. *Id.*

The records for nominating and confirming talented, conservative and mainstream ethnic minority, female, and LGBTQ individuals, which modern chief executives assembled, illuminate the complications entailed in realizing enhanced diversity, which implicates ethnicity, gender, and sexual orientation. The federal appellate and district courts encompassed minuscule numbers of ethnic minority and female judges and no LGBTQ jurists before Jimmy Carter won his presidential election, as recounted earlier.⁴⁵ The Carter Administration deployed effective procedures to nominate and confirm highly qualified people of color and women for the circuit and district courts.⁴⁶

A critical instrument that Carter employed was United States Circuit Judge Nominating Commissions, which the President explicitly instructed to enhance the nomination and confirmation of ethnic minority and female jurists.⁴⁷ When Carter determined that his Administration and the Senate were achieving insufficient progress regarding diversity, the President issued a revised executive order, elaborating on a previous order, that enunciated additional guidance on judicial selection, increased representation for people of color and women, and expressly required “special efforts to identify qualified minority and female candidates.”⁴⁸

In a May 1978 speech to the Los Angeles County Bar Association, Carter decided to reinforce his initiative by criticizing the “abominable record” of minority and female judicial appointments, which the United States had compiled, emphasizing that a new judgeship statute would provide a “unique opportunity to make our judiciary more fully representative of our population.”⁴⁹ In October of that same year, Congress passed the Omnibus Judgeships legislation, which authorized the federal judiciary’s greatest expansion in United States history by creating thirty-five new appellate court positions and 117 new district court positions on which the Carter Administration capitalized to diversify the bench.⁵⁰ The President concomitantly asked that senators implement

45. Elliot E. Slotnick, *Lowering the Bench or Raising It Higher?: Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POL’Y REV. 270, 271 (1983); see Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 18–19 (2001); see, e.g., GOLDMAN, *supra* note 31 and accompanying text. There also were no openly LGBTQ jurists.

46. GOLDMAN, *supra* note 31, at 238.

47. LARRY C. BERKSON & SUSAN B. CARBON, THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES (1980); see Exec. Order No. 11,972, 3 C.F.R. 96–99 (1977); see also GOLDMAN, *supra* note 31, at 238–50.

48. Exec. Order No. 12,059, 3 C.F.R. 180–183 (1978); see Remarks at the 100th Anniversary Luncheon of the Los Angeles County Bar Association, 1 PUB. PAPERS 838–39 (May 4, 1978); see also *supra* note 15.

49. PUB. PAPERS, *supra* note 48; see GOLDMAN, *supra* note 31, at 244–45.

50. Pub. L. No. 95-486, 92 Stat. 1629 (1978); see GOLDMAN, *supra* note 31, at 241–42.

concerted endeavors to recommend many strong, diverse aspirants when district court openings arose in their jurisdictions.⁵¹ Carter ultimately placed on the appeals and district courts forty-one women, thirty-four African Americans, fifteen Latinos, two Asian Americans, and the first Native American.⁵²

B. Republican Administrations

Republican chief executives who served after Carter achieved comparatively limited progress in enhancing diversity on the federal judiciary. This was principally because the Presidents refused to emphasize diversity, but also because the chief executives adopted very few, if any, comprehensive efforts that would improve minority representation on the federal bench.⁵³

President Reagan's Administration helpfully demonstrates most of these phenomena. For example, the chief executive pledged to nominate and confirm well qualified, ideological conservatives, asserting that the individuals would exercise judicial restraint once appointed.⁵⁴ President Reagan specifically opposed Carter's diversity initiative and even disbanded his predecessor's United States Circuit Judge Nominating Commission and reinstated the pre-Carter selection methods whereby senators and other entities and individuals proffered recommendations for candidates to DOJ.⁵⁵ Reagan concomitantly instituted virtually no special endeavors to recruit, identify, nominate, and confirm women and even fewer actions to pinpoint, tap, and appoint ethnic minorities. Therefore, it should not have been surprising that the President compiled the worst record for confirming African Americans since the Eisenhower Administration, even though Reagan did appoint relatively many Latinos.⁵⁶ During his presidential tenure, Reagan seated thirty-one women, seven African Americans, fourteen Latinos, and two Asian

51. Merit selection commissions, which senators have increasingly employed, mainly for district court vacancies, promoted confirmations. See generally ALAN H. NEFF, UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: ITS MEMBERS, PROCEDURES AND CANDIDATES (1981); see also Elliott E. Slotnick, *The Changing Role of the Senate Judiciary Committee in Judicial Selection*, 62 JUDICATURE 502, 503 (1979).

52. Eastern District of Oklahoma Judge Frank Howell Seay was the first Native American who secured confirmation to the federal bench. Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 322, 325 (1989). "Native American" is a descendant of the indigenous peoples of the Americas. See generally M. Alexander Pearl, *How to Be an Authentic Indian*, 5 CALIF. L. REV. CIRCUIT 392 (2014).

53. Tobias, *supra* note 43, at 406–07.

54. GOLDMAN, *supra* note 31, at 290–91, 298–302, 327–35; Goldman, *supra* note 52, at 319–20.

55. GOLDMAN, *supra* note 31, at 290–91.

56. *Id.* at 328, 335.

Americans on the federal courts, but failed to confirm a single Native American or LGBTQ jurist.⁵⁷

President George H.W. Bush remarked that he would institute judicial selection procedures that mirrored the practices that Reagan had implemented, and the Bush Administration conducted very few distinctive actions that would search for, discover, nominate, and confirm highly qualified minorities.⁵⁸ President H.W. Bush appointed thirty-six women, eleven African Americans, and eight Latinos; however, the President failed to confirm a single Asian American, Native American, or LGBTQ jurist.⁵⁹

President George W. Bush enjoyed somewhat greater success than his father because he apparently dedicated considerable resources to increasing particular dimensions of representation, although he clearly enjoyed a considerably larger pool of individuals to draw upon than his father.⁶⁰ For instance, President W. Bush appointed seventy-one women, twenty-four African Americans, thirty Latinos, and four Asian Americans, yet the Bush Administration did not confirm any Native American or LGBTQ judges, similarly to his father's presidency.⁶¹

The lack of interest in promoting enhanced diversity throughout the GOP Administrations of Presidents Reagan, George H.W. Bush, and George W. Bush seemingly can be attributed to multiple factors, which enjoyed varying importance and emphases in the three administrations. Perhaps most significant of these factors was the substantial explicit significance that all three Presidents attached to (1) nominating and confirming the maximum number of ideologically conservative, highly qualified candidates; (2) the concomitant perception that relatively small numbers of female prospects held that political viewpoint; and (3) the perception that even fewer ethnic

57. *Biographical Directory of Article III Federal Judges, 1788-Present*, FED. JUD. CTR. (2019), <https://www.fjc.gov/history/judges/search/advanced-search> (last visited Apr. 5, 2019).

58. Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 285–86 (1993); see also Frank J. Murray, *Bush Changes Course in Naming Judges*, WASH. TIMES, Mar. 26, 1992, at A5 (Bush wanted judges “who won't legislate from the bench”). But see Goldman, *supra*, at 286 (Bush Administration implementation of special efforts to nominate and confirm more women); Murray, *supra* (Bush nominated “women, blacks and Hispanics at twice the rates they are represented among all lawyers”).

59. *Biographical Directory*, *supra* note 57; see Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477 (1991). But see Bob Egelko, *Judge Vaughan Walker and the Prop. 8 Trial*, S.F. GATE (Apr. 20, 2014, 11:09 PM), <https://www.sfgate.com/lgbt/article/Judge-Vaughn-Walker-tells-his-side-of-Prop-8-5416851.php> (President Bush nominated and confirmed Judge Vaughan Walker to the Northern District of California, who was not openly gay when he was confirmed).

60. Diascro & Solberg, *supra* note 42, at 291; Goldman, *supra* note 58, at 284.

61. *Biographical Directory*, *supra* note 57; see Diascro & Solberg, *supra* note 42, at 292 (Bush valued diversity and considered it in selecting judges, but he emphasized ideology and policy factors.).

minority and LGBTQ potential candidates shared this perspective.⁶² Another specific perception that appeared to have much importance was that the number of female lawyers who possessed the requisite qualifications to serve as federal judges was insufficiently substantial, the “pool” of talented ethnic minorities was considerably smaller, and the number of qualified LGBTQ individuals was even tinier.⁶³

C. Democratic Administrations

Contemporary Democratic Presidents have achieved considerably greater success in expanding diversity on the federal bench. This is principally because the chief executives initiated special endeavors to recruit, denominate, propose, and confirm substantial numbers of extremely competent persons of color, women, and LGBTQ individuals. For example, President Bill Clinton expressly requested that a multitude of home state elected politicians search for, designate, and suggest numerous, mainstream, exceptional ethnic minority, female, and LGBTQ candidates, while the chief executive instructed White House and DOJ officials to institute efforts that would promote increased federal court diversity.⁶⁴ President Clinton created records for appointing people of color, women, and LGBTQ judges, confirming 106 women, sixty-one African Americans, twenty-four Latinos, five Asian Americans,

62. See, e.g., Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 878, 886–91 (2005); Timothy B. Tomasi & Jess A. Velona, Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766, 766–70, 792–93 (1987); *Ronald Reagan's Big Impact on the Supreme Court*, NAT'L CONST. CTR.: CONST. DAILY (Feb. 6, 2017), <https://constitutioncenter.org/blog/ronald-reagans-big-impact-on-the-supreme-court>; Richard Wolf, *George H.W. Bush Left Both a Liberal and Conservative Legacy at the Supreme Court*, USA TODAY (Dec. 3, 2018, 9:54 AM), <https://www.usatoday.com/story/news/politics/2018/12/02/george-bush-liberal-and-conservative-legacy-supreme-court/2183452002/>.

63. Sen, *supra* note 34; Mark Joseph Stern & Sofie Werthan, *Boys on the Bench*, SLATE (July 26, 2018, 6:48 PM), <https://slate.com/news-and-politics/2018/07/trump-female-judges-all-the-lame-excuses-conservatives-are-making-to-explain-the-presidents-overwhelmingly-male-nominees.html>; Tobias, *supra* note 2, at 11–15, 17.

64. George, *supra* note 45, at 10–11; Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 265, 266 (1999). See generally Sheldon Goldman et al., *Clinton's Judges: Summing up the Legacy*, 84 JUDICATURE 228 (2001).

the second Native American⁶⁵ and the first lesbian.⁶⁶ At President Barack Obama's 2009 inauguration, women comprised approximately 20% of all federal jurists, African Americans constituted 10%, Latinos 7%, and Asian Americans comprised 1%.⁶⁷

President Obama, who implemented thorough, special efforts⁶⁸ to propel ethnic, gender, and sexual preference diversity,⁶⁹ merits somewhat greater assessment because these efforts were the most recent, relevant, and extraordinarily successful. The President's selection techniques included contacting numerous less-conventional sources for nominations—ethnic minority, women's, and LGBTQ political and interest groups and bar organizations—while rigorously considering and nominating manifold highly competent, mainstream women, persons of color, and substantial numbers of gay and lesbian candidates.⁷⁰ The Obama Administration carefully pursued assistance from myriad knowledgeable, well-connected political figures, who encompassed minority, female, and LGBTQ elected officers, while conscientiously asking that home state senators adopt initiatives to recommend plentiful numbers of extremely qualified, consensus, diverse prospects.⁷¹ Furthermore, the White House and DOJ appointments staff included numerous experienced minority, female, and LGBTQ employees.⁷²

65. Eastern District of Oklahoma Judge Michael Burrage was the second Native American federal judge. See *Michael Burrage to Be Inducted into Oklahoma Hall of Fame in 2016*, SE. OKLA. ST. U. (May 20, 2016), <https://www.se.edu/news/michael-burrage-to-be-inducted-into-oklahoma-hall-of-fame-in-2016/>.

66. Southern District of New York Judge Deborah Batts was the first lesbian district judge. *HLS to Unveil Portrait of Judge Deborah A. Batts*, HARV. L. TODAY (Oct. 24, 2001, 1:10 PM), <https://today.law.harvard.edu/hls-to-unveil-portrait-of-judge-deborah-a-batts/>; sources cited *supra* note 64.

67. Of approximately 1400 jurists, Seay was the lone Native American judge and Batts the sole lesbian, as Burrage had departed the bench. See *Burrage, Billy Michael*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/burrage-billy-michael> (last visited Mar. 26, 2019); *Seay, Frank Howell*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/seay-frank-howell> (last visited Mar. 26, 2019); *Batts, Deborah A.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/batts-deborah> (last visited Mar. 26, 2019).

68. Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2239 (2013); see also Sheldon Goldman et al., *Obama's Judiciary at Midterm: The Confirmation Drama Continues*, 94 JUDICATURE 262, 262 (2011); Jeffrey Toobin, *Bench Press: Are Obama's Judges Really Liberals?*, NEW YORKER (Sept. 21, 2009), <https://www.newyorker.com/magazine/2009/09/21/bench-press>.

69. Letter from Gregory Craig, White House Counsel, to President Barack Obama (Nov. 13, 2009), <https://foreignpolicy.com/2009/11/13/whats-behind-greg-craigs-resignation/>; see Tobias, *supra* note 31, at 286–87.

70. See Tobias, *supra* note 31, at 286–87.

71. See Carl Tobias, *Filling the Federal Appellate Court Vacancies*, 17 U. PA. J. CONST. L. ONLINE 1, 1–2 (2015).

72. See *id.*

Legislators evaluated and tendered numerous exceptional, mainstream people of color, women, and LGBTQ choices.⁷³ Pertinent endeavors that mostly implicated lesbian and gay aspirants were the efforts of New York State Democratic Senators Chuck Schumer and Kirsten Gillibrand. They expeditiously mustered Paul Oetken, forwarded Alison Nathan in the Southern District, and recommended Pamela Ki Mai Chen for the Eastern District; Oetken was the first gay active trial court jurist, and Nathan and Chen became the only lesbian active federal judges.⁷⁴ During their respective tenures in office, Texas Republican Senators Kay Bailey Hutchison, John Cornyn, and Ted Cruz proposed and supported plentiful Latinos,⁷⁵ while their Arizona GOP colleagues, Senators John McCain and Jeff Flake, proffered several Latinos together with the third Native American.⁷⁶ California Democrats Dianne Feinstein and Barbara Boxer concomitantly pursued, delineated, and recommended many Asian American possibilities, which helped to double the number of Asian Americans who captured appointment throughout American history.⁷⁷

Obama shattered records for nominating and confirming accomplished, centrist, ethnic minority, female, and LGBTQ choices.⁷⁸ For example, he broke practically all of Clinton's diversity

73. *Id.*

74. 159 CONG. REC. S1082 (daily ed. Mar. 4, 2013) (confirming Judge Chen); 157 CONG. REC. S6493 (daily ed. Oct. 13, 2011) (confirming Judge Nathan); 157 CONG. REC. S4634 (daily ed. July 18, 2011) (confirming Judge Oetken); Devlin Barrett, *Over 12 Years, Schumer Tips Court Balance*, WALL ST. J. (Oct. 7, 2011), <https://www.wsj.com/articles/SB1000142405297020461250457661126314643794>

4. For more discussion of LGBTQ nominees and confirmees, see Carl Tobias, *Considering Lesbian, Gay, Transgender and Bisexual Nominees for the Federal Courts*, 90 WASH. U. L. REV. 579, 579 & n.13, 581–82 (2012); Tobias, *supra* note 2; Mark Joseph Stern, *Obama's Most Enduring Gay Rights Achievement*, SLATE (June 17, 2014, 4:08 PM), <https://slate.com/human-interest/2014/06/openly-gay-federal-judges-are-obamas-most-enduring-gay-rights-achievement.html>.

75. Carl Tobias, *Filling the Texas Federal Court Vacancies*, 95 TEX. L. REV. 170, 177 (2017) (recommending and powerfully supporting the nominations and confirmations of Judges Gregg Costa, Marina Garcia Marmolejo, and Diana Saldaña). Senators Cornyn and Cruz also recommended and powerfully supported the nomination and confirmation of Robert Pitman, who became the initial gay Texas federal district judge. 160 CONG. REC. S6907–08 (daily ed. Dec. 16, 2014).

76. Carl Tobias, *Filling the Arizona District Court Vacancies*, 56 ARIZ. L. REV. SYLLABUS 5, 6–10 (2014).

77. Carl Tobias, *Combating the Ninth Circuit Judicial Vacancy Crisis*, 73 WASH. & LEE L. REV. ONLINE 687, 715–16 (2017). They also sought out, and supported, Central District of California Judge Michael Fitzgerald who was the first openly gay federal judge in California. 158 CONG. REC. S1714 (daily ed. Mar. 15, 2012). Most of Trump's ethnic minority appointees comprise Asian Americans, while half of his ethnic minority nominees are Asian Americans. See sources cited *infra* notes 120–21.

78. See, e.g., Elliot Slotnick et al., *Obama's Judicial Legacy: The Final Chapter*, 5 J.L. & CTS. 363, 403–05 (2017); Michael Grunwald, *Did Obama Win*

records by appointing 136 women, sixty-one African Americans, thirty-six Latinos, twenty-one Asian Americans, ten LGBTQ jurists, and the third Native American.⁷⁹

IV. THE TRUMP ADMINISTRATION

President Trump has nominated and confirmed the fewest ethnic minority and LGBTQ candidates since the Reagan Administration, which was when significantly fewer women practiced law, there were substantially fewer attorneys of color, and dramatically fewer LGBTQ counsel.⁸⁰ Across Trump's 2016 presidential campaign, then-candidate Trump made promises to the American people that he would nominate and confirm ideological conservatives.⁸¹ He kept the pledges by marshaling and confirming Justices Neil Gorsuch and Brett Kavanaugh, as well as thirty-seven similar appellate court jurists and numerous ideologically analogous district judges during his first half term.⁸²

When nominating and confirming jurists, the President and White House Counsel, who have principal responsibility for judicial appointments, strongly focus on appellate court vacancies and depend substantially on the list of twenty-six purported Supreme Court possibilities whom the Federalist Society and Heritage Foundation comprehensively assembled.⁸³ Most of the persons nominated are exceptionally conservative, highly qualified, and extremely young. The Administration has stressed the courts of appeals because they are tribunals of last resort for practically all cases, enunciate

the Judicial Wars?, POLITICO (Aug. 8, 2016, 5:25 AM), <https://www.politico.com/story/2016/08/obama-courts-judicial-legacy-226741>.

79. He seated twenty ethnic minority, twenty-four female, and one LGBTQ circuit judge. Arizona District Judge Diane Humetewa was the Native American, and she was the first female Native American federal judge. *See supra* notes 71–77.

80. Tobias, *supra* note 77, at 702–11; Charlie Savage, *Trump Is Rapidly Reshaping the Judiciary. Here's How.*, N.Y. TIMES (Nov. 12, 2017), <https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html>.

81. *See, e.g.*, Jonah Goldberg, *Commentary: Trump Must Not Waver from His Supreme Court Top 25 List*, CHI. TRIB. (July 3, 2018, 2:50 PM), <https://www.chicagotribune.com/news/opinion/commentary/ct-perspec-goldberg-trump-supreme-court-justice-confirmation-0704-story.html>.

82. Richard Wolf, *President Trump's Conservative Court Shift May Slow Down as Liberal Judges Avoid Retirement*, USA TODAY (Nov. 19, 2018, 10:04 AM), <https://www.usatoday.com/story/news/politics/2018/11/19/donald-trumps-judges-making-courts-more-conservative-slowly/2005281002/>.

83. Savage, *supra* note 80; *see also* Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 17, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court>; *see generally* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE LEGAL COUNTERREVOLUTION (2015).

considerably greater policy than district judges, and issue rulings that govern several jurisdictions.⁸⁴

When this White House fills district court vacancies, Trump, similarly to recent Presidents, seemingly depends upon recommendations of politicians from home states and bases nominations primarily on competence vis-à-vis ability to swiftly, economically, and fairly resolve disputes.⁸⁵ Trump has apparently undertaken negligible efforts to recruit, pinpoint, nominate, and confirm accomplished, mainstream people of color or LGBTQ attorneys.

Although President Trump deploys numerous respected traditions, such as placing chief responsibility for selection in the White House Counsel,⁸⁶ this Administration peremptorily rejects and deemphasizes a multitude of longstanding customs. An essential rejection is the Trump Administration's failure to assertively consult home state senators, an efficacious convention that White Houses implement as a crucial reason to justify blue slips.⁸⁷ For example, Wisconsin Democratic Senator Tammy Baldwin accused the White House Counsel of ignoring her participation in the selection process when promoting a Seventh Circuit nominee who lacked sufficient votes from a bipartisan merit selection commission, which had evaluated, interviewed, and tendered excellent judicial candidates across multiple decades.⁸⁸

84. GOLDMAN, *supra* note 31, at 1–2; Savage, *supra* note 80; Tobias, *supra* note 68, at 2240–41.

85. Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9, 19 (2017). *But see* Seung Min Kim, *Trump's Judge Picks: 'Not Qualified,' Prolific Bloggers*, POLITICO (Oct. 17, 2017), <https://www.politico.com/story/2017/10/17/trump-judges-nominees-court-picks-243834>.

86. *See* Gabby Orr & Daniel Lippman, *GOP Senate Will Keep Cranking Out Trump Judicial, Cabinet Nominees*, POLITICO (Nov. 7, 2018, 8:29 AM), <https://www.politico.com/story/2018/11/07/trump-republican-senate-2018-midterm-elections-968313>; Michael Schmidt & Maggie Haberman, *Lawyer for President Steps Down*, N.Y. TIMES, Oct. 18, 2018, at A13 (analyzing the judicial selection efforts and the recent departure of Donald McGahn, the first White House Counsel, and Pat Cipollone, whom Trump recently chose as the second Counsel).

87. Kaplan, *supra* note 12; Zoe Tillman, *Here's How Trump Is Trying to Remake His Least Favorite Court*, BUZZFEED NEWS (Mar. 16, 2018, 9:06 AM), <https://www.buzzfeednews.com/article/zoetillman/heres-who-the-white-house-pitched-for-the-federal-appeals>.

88. *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Jan. 24, 2018) (statement of Senator Chuck Grassley, Chairman, S. Comm. on the Judiciary), <https://www.judiciary.senate.gov/imo/media/doc/01-24-18%20Grassley%20Statement.pdf>; 164 CONG. REC. S2600–07 (daily ed. May 10, 2018); Carl Hulse, *Republicans Escalate Bitter Fight Over Judicial Nominations*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/us/politics/republicans-democrats-judicial-nominations.html>; *see* Tobias, *supra* note 68, at 2256.

A related abandonment of effective precedent is the administration's virtually complete exclusion of the ABA from participation in judicial selection.⁸⁹ Each President installed after Eisenhower, except George W. Bush and Trump, has relied substantially on ABA evaluations and ratings when proffering candidates, and Obama dutifully refrained from marshaling designees whom the ABA ranked "not qualified."⁹⁰ However, the Trump White House chose six nominees who received this rating and the GOP Senate majority has confirmed four, two of whom are Eighth Circuit judges.⁹¹

President Trump and his appointments staff omit, change, or downplay numerous efficacious measures. For instance, the President and the White House Counsel have instituted virtually no endeavors to prioritize the selection process by first nominating candidates who might decrease the eighty-four "judicial emergency" vacancies, which the Administrative Office of the United States Courts premises on their protracted length or substantial caseloads.⁹² For example, over the period following the Republican capture of the Senate majority in November 2014, emergency vacancies more than

89. Adam Liptak, *White House Ends Bar Association's Role in Vetting Judges*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/us/politics/white-house-american-bar-association-judges.html>.

90. 163 CONG. REC. S8023–24 (daily ed. Dec. 14, 2017) (statement of Senator Feinstein); *id.* at S8042 (statement of Senator Durbin); see Kimberly Strassel, *The ABA Strikes Back*, WALL ST. J. (Nov. 29, 2018), <https://www.wsj.com/articles/the-aba-strikes-back-1543534905>.

91. Standing Committee on the Federal Judiciary, *Ratings of Art. III and Article IV Judicial Nominees: 115th Cong.*, ABA (Jan. 3, 2017), <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/WebRatingChart115.pdf>. Republican senators contested Steven Gras's rating, because they claimed that the ABA is a liberal political interest group. *Executive Business Meeting to Consider Pending Legislation and Nominations Before S. Comm. on the Judiciary*, 115th Cong. (Dec. 7, 2017) (statement of Senator Chuck Grassley, Chairman, S. Comm. on the Judiciary), <https://www.judiciary.senate.gov/imo/media/doc/12-07-17%20Grassley%20Statement.pdf>; 163 CONG. REC. S7964–65 (daily ed. Dec. 12, 2017) (Gras's approval); *Hearing to Consider Pending Nominations Before S. Comm. on the Judiciary*, 115th Cong. (Nov. 1, 2017) (statement of Senator Chuck Grassley, Chairman, S. Comm. on the Judiciary), <https://www.judiciary.senate.gov/imo/media/doc/11-01-17%20Grassley%20Statement.pdf>. GOP senators analogously challenged Jonathan Kobes' ABA rating in his hearing. *Hearing to Consider Pending Nominations Before S. Comm. on the Judiciary*, 115th Cong. (Aug. 22, 2018), <https://www.judiciary.senate.gov/meetings/08/22/2018/nominations>; 164 CONG. REC. S7395 (daily ed. Dec. 11, 2018) (Kobes' confirmation); Liptak, *supra* note 89.

92. See *Judicial Emergencies*, ADMIN. OFF. U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies> (last updated Jan. 19, 2019); see also *Judicial Emergency Definition*, ADMIN. OFF. U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition> (last visited Mar. 26, 2019) For further discussion of this issue, see Carl Tobias, *Curing the Federal Court Vacancy Crisis*, 53 WAKE FOREST L. REV. 883, 888–89 (2018).

quintupled.⁹³ Trump has also tendered relatively few prospects from states that Democratic senators represent, although a number of the jurisdictions experience many emergencies.⁹⁴ Moreover, the 174 nominees eclipse the number of choices whom the chief executive's recent predecessors had tapped by the same juncture.⁹⁵

The confirmation process resembles the nomination system's disadvantageous facets in particular ways by deleting or changing venerable traditions or jettisoning, recalibrating, or diluting efficacious measures.⁹⁶ Informative examples are modifying (1) the century-old practice regarding blue slips, which deny nominees any consideration when home state politicians keep slips,⁹⁷ and (2) several committee responsibilities that have long facilitated comprehensive, expeditious, and fair processing.⁹⁸

In November 2017, Iowa Republican Senator Chuck Grassley, the Judiciary Committee Chair, significantly altered the procedure regarding blue slips for circuit nominees by assessing candidates

93. They skyrocketed from twelve to as many as eighty-eight judicial emergency vacancies. *See Archive of Judicial Vacancies* (2015–2019), ADMIN. OFF. U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> (last visited Mar. 26, 2019). *But see* Press Release, White House Office of the Press Sec'y, President Donald J. Trump Announces Nomination of Indiana Attorney James Sweeney to Fill Judicial Emergency (Nov. 1, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-nomination-indiana-attorney-james-sweeney-fill-judicial-emergency/>. For the nomination of additional candidates from "blue" states, see Press Release, White House Office of the Press Sec'y, President Donald J. Trump Announces Tenth Wave of Judicial Nominees and Tenth Wave of United States Attorney Nominees (Dec. 20, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-ninth-wave-judicial-nominees-tenth-wave-united-states-attorney-nominees/> [hereinafter Tenth Wave]; *see also* Press Release, White House Office of the Press Sec'y, 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, (May 10, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-fourteenth-wave-judicial-nominees-thirteenth-wave-united-states-attorney-nominees-eighth-wave-united-states-marshal-nominees/> [hereinafter Thirteenth Wave]; Press Release, White House Office of the Press Sec'y, President Donald J. Trump Announces Eighteenth Wave of Judicial Nominees (Oct. 10, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-eighteenth-wave-judicial-nominees-eighteenth-wave-united-states-attorney-nominees-thirteenth-wave-united-states-marshal-nominees/> [hereinafter Eighteenth Wave].

94. *See Archive of Judicial Vacancies* (2017–2019), *supra* note 93.

95. Obama, Bush and Clinton sent fewer nominees. *See sources cited supra* notes 57, 60–61, 64–69, 73–77, 79.

96. *See, e.g.,* Bruce Moyer, *Happy Birthday (Or Bye-Bye) to the Blue Slip*, FED. BAR ASS'N (Nov. 15, 2017), <https://blog.fedbar.org/2017/11/15/washington-watch-happy-birthday-or-bye-bye-to-the-blue-slip/>.

97. *See id.*

98. *See* Russell L. Weaver, "Advice and Consent" in Historical Perspective, 64 DUKE L.J. 1717, 1738–39 (2015).

without two home state politicians' slips, particularly when senators premise opposition upon "political or ideological" reasons.⁹⁹ This decision amends the blue-slip concept that Republicans and Democrats applied throughout Obama's eight years, the most recent, relevant precedent.¹⁰⁰ That arrangement deteriorated when the Chair supplied a panel hearing for one Seventh Circuit nominee who lacked sufficient votes of a bipartisan selection commission and whose senator retained her slip, especially because Grassley modestly justified arrogating to himself as chair substantial discretion for concluding whether the White House had engaged in "adequate consultation."¹⁰¹

99. *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Nov. 29, 2017) (statement of Senator Chuck Grassley, Chairman, S. Comm. on the Judiciary), <https://www.judiciary.senate.gov/meetings/11/29/2017/nominations>; 163 CONG. REC. S7174 (daily ed. Nov. 13, 2017) (statement of Senator Chuck Grassley, Chairman, S. Comm. on the Judiciary); Letter from Sen. Chuck Grassley, Chairman, S. Comm. on the Judiciary, to Sen. Patty Murray & Sen. Maria Cantwell (Oct. 18, 2018), <https://www.judiciary.senate.gov/imo/media/doc/2018-10-18%20CEG%20to%20Murray,%20Cantwell%20-%20Eric%20D.%20Miller%20Nomination.pdf>. *But see* Letter from Sen. Patty Murray to Sen. Chuck Grassley, Chairman, S. Comm. on the Judiciary (Oct. 22, 2018), <https://www.documentcloud.org/documents/5017920-Murray-Letter-to-Grassley-10-22-18.html>. Senator Lindsey Graham (R-SC) replaces Grassley as Chair in the new Congress, because he will lead the Finance Committee. Elana Schor, *Grassley to Trade Judiciary Gavel for Finance*, POLITICO (Nov. 16, 2018, 1:54 PM), <https://www.politico.com/story/2018/11/16/grassley-finance-committee-996195>.

100. Grassley respected this policy during Obama's final two years; Patrick Leahy (D-VT) followed the policy during Obama's initial six. *See Executive Business Meeting to Consider Pending Legislation and Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Feb. 15, 2018) (statements of Senator Chuck Grassley, Chairman, S. Comm. on the Judiciary, and Senator Patrick Leahy), <https://www.judiciary.senate.gov/meetings/02/15/2018/executive-business-meeting>.

101. *Id.*; *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 116th Cong. (Mar. 13, 2019) (conducting a hearing when Senators Dianne Feinstein and Kamala Harris of California retained their blue slips), <https://www.judiciary.senate.gov/meetings/nominations-hearing>; *Hearing to Consider Pending Nominations Before the S. Comm. On the Judiciary*, 116th Cong. (Feb. 13, 2019) (conducting a hearing when Senators Chuck Schumer and Kirsten Gillibrand of New York retained their blue slips), <https://www.judiciary.senate.gov/meetings/02/13/2019/nominations>; *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Nov. 13, 2018) (conducting a hearing when Senators Bob Menendez and Cory Booker of New Jersey retained their blue slips), <https://www.judiciary.senate.gov/meetings/11/13/2018/nominations>; *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Oct. 24, 2018) [hereinafter *Oct. 24 Hearing*] (conducting a hearing when Pennsylvania Senator Patty Murray and Senator Maria Cantwell of Washington retained their blue slips), <https://www.judiciary.senate.gov/meetings/10/24/2018/nominations>; *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Oct. 10, 2018) [hereinafter *Oct. 10 Hearing*] (conducting a hearing when Ohio Senator Sherrod Brown retained his blue slip),

Grassley also modified numerous customs and mechanisms regarding panel hearings. Perhaps most critical, he arranged ten hearings during 2017–18 in which two circuit court and four district court nominees appeared without the minority party’s permission; this number acutely contrasts to Democrats’ employment of three hearings in Obama’s entire presidency which the GOP had clearly allowed.¹⁰² Many sessions for circuit nominees can appear rushed with a lack of sufficient care for designees who might become life-tenured appointees on courts of last resort in their regions of the country.¹⁰³

Most debates before committee votes analogously lack content and context. For example, members rarely engage on issues related to crucial judicial qualifications.¹⁰⁴ One peculiar departure from “regular order” is Grassley’s determination to set panel hearings, and even votes, *before* the ABA assembles candidate ratings, notwithstanding incessant pleas from California Democratic Senator Dianne Feinstein, the Ranking Member, to have ballots *after* the ABA concludes ratings.¹⁰⁵ He vociferously argues that this external political organization cannot dictate panel scheduling.¹⁰⁶ It was

<https://www.judiciary.senate.gov/meetings/10/10/2018/nominations>; *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (June 6, 2018) (conducting a hearing when Pennsylvania Senator Bob Casey retained his slip), <https://www.judiciary.senate.gov/meetings/06/06/2018/nominations>. The hearings for California Ninth Circuit and New York Second Circuit nominees demonstrate that Senator Graham has continued Senator Grassley’s blue slip practice for appellate court nominees. *See* sources cited *supra* notes 87–88; *see also* sources cited *infra* note 109.

102. *See, e.g., Oct. 24 Hearing, supra* note 101; *Hearing on Judicial Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Oct. 17, 2018), <https://www.judiciary.senate.gov/meetings/10/17/2018/nominations> (showing how the Oct. 17 and the Oct. 24 hearings were unprecedented because they were held in a Senate recess to campaign in the 2018 midterm elections); *see also supra* note 101 (California and New York appellate court nominee hearings demonstrate that Senator Graham has continued Senator Grassley’s blue slip practice for appellate nominees); Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2174–76 (2011) (illustrating President Obama’s consultation of Senators Kay Hagan and Richard Burr regarding two North Carolina nominations and one of three hearings in his tenure for two North Carolina Fourth Circuit nominees).

103. *See* 163 CONG. REC., *supra* note 90, at S8023–24 (statement of Senator Feinstein); *see also Executive Business Meeting, supra* note 100 (statement of Senator Leahy).

104. *See* 163 CONG. REC. S8021–22 (statement of Senator Leahy).

105. *See Executive Business Meeting to Consider Pending Legislation and Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (June 14, 2018) (statement of Senator Chuck Grassley, Chairman, S. Comm. on the Judiciary), <https://www.judiciary.senate.gov/meetings/06/14/2018/executive-business-meeting-1>.

106. *See id.*; *see also* 163 CONG. REC., *supra* note 90, at S8022 (statement of Senator Leahy on ABA’s input value); Patrick Gregory, *ABA Rates Picks Not Qualified*, BLOOMBERGLAW (Sept. 17, 2018), <https://www.bna.com/aba-rates->

predictable, accordingly, that the Judiciary Committee approved all controversial, and even some uncontroversial, nominees along strict party-line, eleven-ten votes in the 115th Congress.¹⁰⁷

These phenomena did not apply to a Hawaii Ninth Circuit vacancy because White House Counsel McGahn fully consulted Democratic Senators Mazie Hirono and Brian Schatz in promoting Mark Bennett's nomination, which led the politicians to support him, witnessed by the prompt hearing, and the GOP to furnish rapid consideration.¹⁰⁸ In contrast, Grassley's determination to not honor blue slips' retention by Oregon Democratic Senators Ron Wyden and Jeff Merkley and to instead process Ninth Circuit nominee Ryan Bounds undercut the purpose of slips.¹⁰⁹ However, when South Carolina Republican Senator Tim Scott ventilated concerns about the nominee's detrimental writings, which involved diversity, people of color, and the LGBTQ community, Trump withdrew Bounds as a candidate for the federal bench.¹¹⁰

Once the panel reports nominees, similar, albeit less problematic, dynamics prevent efficacious processing. Some examples of this include: (1) Republicans and Democrats mandate cloture and roll call ballots on nominees; (2) both parties' members vote in lockstep; and (3) the nuclear option's 2013 detonation allows nominees to secure confirmation on majority ballots.¹¹¹ Particularly appalling was the compression of six 2018 appellate court nominees' final debates and votes into one week;¹¹² this left the minority with deficient resources

trump-n73014482574/; Strassel, *supra* note 90; sources cited *supra* notes 83–84 and accompanying text (external group).

107. For approval and confirmation of Judge Michael Brennan, see *Executive Business Meeting*, *supra* note 100; see also 164 CONG. REC. S2607, *supra* note 88; sources cited *supra* note 91 (approval and confirmation of Judge Grasz).

108. 164 CONG. REC. S4858 (daily ed. July 10, 2018); *Executive Business Meeting to Consider Pending Legislation and Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (May 10, 2018), <https://www.judiciary.senate.gov/meetings/05/10/2018/executive-business-meeting>. See David Lat, *President Trump's Eleventh Wave of Judicial Nominees*, ABOVE THE LAW (Feb. 23, 2018), <https://abovethelaw.com/2018/02/president-trumps-eleventh-wave-of-judicial-nominees/> (discussing the process that led to Mark Bennett's nomination).

109. The committee members failed to discuss Bounds before voting. *Executive Business Meeting to Consider Pending Legislation and Nominations Before Before the S. Comm. on the Judiciary*, 115th Cong. (June 7, 2018) (statement of Senator Chuck Grassley, Chairman, S. Comm. on the Judiciary), <https://www.judiciary.senate.gov/meetings/06/07/2018/executive-business-meeting>.

110. 164 CONG. REC. S5098 (daily ed. July 19, 2018) (Bounds nomination's withdrawal).

111. Republican senators vote in lockstep more often than Democrats. Indeed, throughout 2017, merely one GOP senator cast one no final vote on a judicial nominee. 163 CONG. REC. S7351 (daily ed. Nov. 28, 2017).

112. See *Schedule for Pro Formas and Monday, May 7, 2018*, U.S. SENATE DEMOCRATS (Apr. 26, 2018), <https://www.democrats.senate.gov/2018/04/26/schedule-for-pro-formas-and-monday-may-7-2018>. President Bush and President Obama never approved so many in one week. See *Archive of Judicial*

for preparing.¹¹³ The quality of Senate debates resembles that for numerous committee discussions,¹¹⁴ and most of the thirty hours reserved for debate after cloture explores issues that are unrelated to specific nominees.¹¹⁵

The nomination regime highlights that both President Trump and the Republican chamber majority prioritize seating: (1) appellate court, over district court, judges; (2) nominees from jurisdictions represented by GOP lawmakers; (3) conservative white males; and (4) picks for nonemergency openings.¹¹⁶ Those dimensions permitted Trump to establish appellate confirmation records, but they resulted in significant consequences, including twenty-plus district court nominees tapped during 2017 without final votes, few prospects receiving appointment in states with a pair of Democrats, only two ethnic minority nominees receiving confirmation, and emergency vacancies skyrocketing.¹¹⁷

Vacancies, *supra* note 93 (Judicial Confirmations under President George W. Bush (2001–2009)); *see also* *Archive of Judicial Vacancies*, *supra* note 93 (Judicial Confirmations under President Obama (2009–2017)).

113. 2017 notice on four came Thursday evening as senators recessed for the week. *See Executive Business Meeting to Consider Pending Legislation and Nomination Before the S. Comm. on the Judiciary*, 115th Cong. (Nov. 2, 2017), <https://www.judiciary.senate.gov/meetings/11/02/2017/executive-business-meeting> (statement of Senator Feinstein); *see also* *Schedule for Tuesday, October 31, 2017*, U.S. SENATE DEMOCRATS (Oct. 30, 2017), https://www.senate.gov/legislative/LIS/executive_calendar/2017/10_26_2017.pdf.

114. *See supra* notes 106–07 and accompanying text.

115. When senators engage in debate about nominees, few colleagues actually appear on the floor to hear them. Republican senators decided that the thirty-hour post-cloture rule was so unhelpful that they exploded the nuclear option to reduce the number to two for district nominees. *Improving Procedures for the Consideration of Nominations in the Senate: Markup of S. Res. 355 Before the S. Comm. on Rules & Admin.*, 115th Cong. (Apr. 25, 2018), <https://www.rules.senate.gov/hearings/improving-procedures-for-the-consideration-of-nominations-in-the-senate> (approving resolution); *A Resolution to Improve Procedures for the Consideration of Nominations in the Senate: Hearing on S. Res. 355 Before the S. Comm. on Rules & Admin.*, 115th Cong. (Dec. 19, 2017), <https://www.rules.senate.gov/hearings/hearing-to-review-s-res-355>; S. Res. 50, 116th Cong. (2019); 165 CONG. REC. S2220 (daily ed. Apr. 3, 2019) (detonating the “nuclear option” to institute the rule change on a majority vote); Carl Hulse, *A ‘Nuclear’ Tit for Tat with No End in Sight*, N.Y. TIMES, Apr. 5, 2019, at A14.

116. *See* Brent Kendall, *Trump Has Named a Lot of Judges, But Courts’ Ideological Balance Is Slow to Shift*, WALL ST. J. (Oct. 26, 2018), <https://www.wsj.com/articles/trump-has-named-a-lot-of-judges-but-courts-ideological-balance-is-slow-to-shift-1540558801>; *see also* sources cited *supra* notes 83–85, 92–94.

117. *See* Executive Calendar: Dec. 23, 2017, U.S. SENATE, https://www.senate.gov/legislative/LIS/executive_calendar/2017/12_23_2017.pdf; *see also* Executive Calendar: Dec. 3, 2018, U.S. SENATE (leaving thirty-one nominees awaiting floor votes); *see also* *Archive of Judicial Vacancies* (2019), *supra* note 93 (showing 125 district openings); *see also id.* (showing eighty-four judicial emergency circuit and district vacancies).

Most relevant to the federal bench's diversification is the eschewal and deemphasis by Trump and the 115th and 116th Senate of increasing minority and LGBTQ individuals' federal court representation, particularly vis-à-vis Democratic Presidents and senators.¹¹⁸ This White House has initiated no efforts that help to identify, suggest, nominate, and confirm ethnic minority or LGBTQ possibilities.¹¹⁹

Careful scrutiny of the individual nominees and confirmees places these propositions into perspective. Among President Trump's ninety-five confirmees, only Amul Thapar, James Ho, John Nalbandian, Neomi Rao, Karen Gren Scholer, Jill Otake, Fernando Rodriguez, Terry Moorner, and David Morales are persons of color.¹²⁰ Of 174 Trump nominees, twenty-three are people of color: the initial six confirmed, Patrick Bumatay, Kenneth Lee, Michael Park, Diane Gujarati, Martha Pacold, and Nicholas Ranjan comprise Asian Americans, Rodriguez, Morales, Raúl Arias-Marxuach, and Rodolfo Ruiz are Latinos, and Moorner, Rodney Smith, Rossie Alston, Milton Younge, Jason Pulliam, Stephanie Dawkins, and Ada Brown are African Americans—with only two nominees being LGBTQ persons—Bumatay identifies as gay and Mary Rowland identifies as lesbian.¹²¹

118. See *supra* notes 45, 47–52, 64–69, 73–77, 79–80, 83–85, 87–88, 90–95, 99–103, 106–117 and accompanying text; see also Michael Nelson & Rachael Hinkle, *Trump Appoints Lots of White Men as Federal Judges. Here's Why It Matters.*, WASH. POST (Mar. 13, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/12/trump-appoints-lots-of-white-men-to-be-federal-judges-heres-why-it-matters>.

119. See *supra* p. 551.

120. For confirmees, see 165 CONG. REC. S2375 (daily ed. Apr. 10, 2019) (confirming Morales); 165 CONG. REC. S1819 (daily ed. Mar. 13, 2019) (confirming Rao); 164 CONG. REC. S5981 (daily ed. Aug. 28, 2018) (confirming Moorner); 164 CONG. REC. S5590 (daily ed. Aug. 1, 2018) (confirming Otake); 164 CONG. REC. S2661 (daily ed. May 15, 2018) (confirming Nalbandian); 164 CONG. REC. S1332–33 (daily ed. Mar. 5, 2018) (confirming Scholer); 164 CONG. REC. S2981 (daily ed. June 5, 2018) (confirming Rodriguez); 163 CONG. REC. S8033 (daily ed. Dec. 14, 2017) (confirming Ho); 163 CONG. REC. S3179 (daily ed. May 25, 2017) (confirming Thapar).

121. For nominees, see Press Release, White House Office of the Press Sec'y, President Donald J. Trump Announces Nomination of Judicial Nominees (Apr. 8, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominations/> (renominating Pacold and Rowland whose nominations had expired on Jan. 2, 2019); Press Release, White House Office of the Press Sec'y, President Donald J. Trump Announces His Intent to Nominate Judicial Nominees (Jan. 30, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judicial-nominees-2/> (renominating Lee to the Ninth Circuit and Bumatay to the Southern District of California whose nominations had expired on Jan. 2, 2019); President Donald J. Trump Announces His Intent to Nominate Judicial Nominees (Jan. 22, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judicial-nominees/> (renominating Park, Ranjan, Morales, Arias-Marxuach, Ruiz, Smith, Alston and Younge whose nominations had expired on Jan. 2, 2019); Press Release, White House Office of the Press Sec'y, President Donald J. Trump Announces Judicial

Trump's numbers and percentages of African American and Latinos nominees and confirmees strikingly contrast with Obama's numbers and percentages at similar junctures and even unfavorably compare with George W. Bush nominees and appointees.¹²² Trump's numbers and percentages of female nominees and confirmees constitute half of the Obama nominees and confirmees by the analogous time and at his presidency's end, while they match those at a similar juncture in Bush's tenure and upon his Administration's conclusion, even though many fewer women practiced law in Bush's era.¹²³ However, 52% of the Trump ethnic minority nominees and two-thirds of the appointees comprise Asian Americans, so his figures rival those compiled by Obama, who doubled the number of Asian American federal judges appointed throughout U.S. history.¹²⁴

Nominees (Mar. 15, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-2/>; Press Release, White House Office of the Press Sec'y, President Donald J. Trump Announces Judicial Nominees (Mar. 8, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees/>; Press Release, White House Office of the Press Sec'y, President Donald J. Trump Announces Judicial Nominees, a United States Attorney Nominee, and United States Marshal Nominees, <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-united-states-attorney-nominee-united-states-marshal-nominees/>; Press Release, White House Office of the Press Sec'y, President Donald J. Trump Announces Nomination of OIRA Administrator Neomi Rao to Replace Justice Brett Kavanaugh on the D.C. Circuit (Nov. 14, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-announces-nomination-oira-administrator-neomi-rao-replace-justice-brett-kavanaugh-d-c-circuit/>; Press Release, White House Office of the Press Sec'y, President Donald J. Trump Announces Seventh Wave of Judicial Nominees (Sept. 7, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-seventh-wave-judicial-candidates/>; Tenth Wave, *supra* note 93; Press Release, White House Office of the Press Sec'y, President Donald J. Trump Announces Twelfth Wave of Judicial Nominees (Apr. 10, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-twelfth-wave-judicial-nominees-twelfth-wave-united-states-attorneys-sixth-wave-united-states-marshals/>; Thirteenth Wave, *supra* note 93; Press Release, White House Office of the Press Sec'y, President Donald J. Trump Announces Fifteenth Wave of Judicial Nominees (June 7, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-fifteenth-wave-judicial-nominees-fourteenth-wave-united-states-attorney-nominees-ninth-wave-united-states-marshal-nominees/>; Eighteenth Wave, *supra* note 93.

122. Trump's numbers and percentages of African American and Latino/a confirmees sharply contrast with those at the Bush and Obama presidencies' end. See *Archive of Judicial Vacancies*, (Judicial Confirmations 2009, 2017–2018), *supra* note 93; see also *Biographical Directory*, *supra* note 57.

123. See sources cited *supra* note 121. Trump's numbers and percentages of LGBTQ nominees match those at a similar point in Obama's time, but Obama did confirm three LGBTQ jurists in his first term. See sources cited *supra* note 74.

124. See sources cited *supra* notes 77, 121. If this trajectory continues, Trump may eclipse Obama's record.

Detecting why Trump has compiled such a mediocre diversity record that involves people of color and LGBTQ individuals cannot be easily discerned from the limited information that the White House provides on its selection process, but the chief executive's approach resembles that which most GOP administrations have followed.¹²⁵ However, today there certainly are significantly greater numbers of capable ethnic minority and LGBTQ choices than ever—a fact demonstrated by Trump's nine ethnic minority confirmees as well as the twenty-three persons of color and two LGBTQ people whom he nominated.¹²⁶

One important explanation for Trump's diversity record is that he dedicates negligible attention to recruiting, nominating, and appointing strong minority and LGBTQ prospects.¹²⁷ In sharp contrast to Democrats, Trump has adopted very few endeavors that seek out, tap, and confirm qualified people of color and LGBTQ individuals.¹²⁸ There are multiple examples in the recruiting and nominating context. First, the White House commits minuscule numbers of minority and LGBTQ employees to appointments.¹²⁹ Trump also has not insisted, or even requested, that home state politicians tender many excellent, conservative and moderate, people of color, women, and LGBTQ aspirants.¹³⁰ Further, the White House has rarely sought proposals of candidates from sources—namely plentiful minority, female, and LGBTQ politicians, as well as numerous minority, women's, and LGBTQ interest, political, and bar

125. Candidate, nominee, Senate, and White House privacy needs may justify less than comprehensive transparency. *See generally* Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089, 1107 (2017); *see also* sources cited *supra* notes 21–28 (showing the approach of most GOP Presidents). *But see* Press Release, White House Office of the Press Sec'y, Keeping His Promise: President Trump's Transparent and Principled Process for Choosing a Supreme Court Nominee (July 9, 2018), <https://www.whitehouse.gov/briefings-statements/keeping-promise-president-trumps-transparent-consistent-principled-process-choosing-supreme-court-nominee/>.

126. *See supra* note 120 and accompanying text.

127. Carrie Johnson & Renee Klahr, *Trump Is Reshaping the Judiciary. A Breakdown by Race, Gender and Qualification*, NPR (Nov. 15, 2018, 5:00 AM), <https://www.npr.org/2018/11/15/667483587/trump-is-reshaping-the-judiciary-a-breakdown-by-race-gender-and-qualification> (explaining that President Trump failed to nominate any African Americans or Latino/as for appellate court positions).

128. *Id.* (comparing President Trump's federal judicial nominations, which have been 82% white with President Obama's federal judicial nominations, which were only 63% white).

129. *See* Carl Tobias, *President Donald Trump and Federal Bench Diversity*, 74 WASH. & LEE L. REV. ONLINE 400, 410–11, 414 (2017) (finding that President Trump's Administration has devoted minimal attention to recruiting strong minority candidates).

130. *Id.* at 411, 414.

groups—that know myriad strong, conservative and moderate, prospects.¹³¹

Another critical explanation is Trump’s deemphasis of diversity, particularly vis-à-vis the White House stress on appointing many ideological conservatives, especially those who have voiced opposition to diversity, participated in litigation, or worked on legislative, executive, policy, or legal initiatives that oppose or circumscribe diversity.¹³² The Trump Administration clearly emphasizes the nomination and confirmation of young, very conservative prospects in filling appellate court vacancies to the almost complete exclusion of numerous other important factors, including most relevantly enhancing bench diversity and filling emergency openings and district court vacancies, particularly in jurisdictions that Democratic senators represent.¹³³

Counsel reportedly applies litmus tests, which are meant to ensure that candidates possess views that resemble Trump’s on critical social policy questions that implicate diversity, such as voting rights, higher education affirmative action and Title IX enforcement, immigration, reproductive freedom, LGBTQ rights, marriage equality, and religious liberty.¹³⁴ Even if the Trump Administration does not in fact employ litmus tests, it rarely needs to use them, as many candidates whom Trump nominates and confirms actually hold the desired perspectives. This is manifested by their participation in litigation of, or developing federal or state legislative or executive branch policy on, issues that demonstrate opposition, and even hostility, to diversity.

For example, Fifth Circuit Judge Andrew Oldham, when serving in the Texas Attorney General’s Office, defended Texas voting restrictions and challenged in courts Obama’s actions to enhance the immigration system, which detrimentally affected persons of color,

131. *Id.* at 414.

132. *See* sources cited *supra* notes 80–87 (showing that when nominating judges for vacancies in the 9th Circuit, President Trump considered candidates with “strong conservative credentials”).

133. Tobias, *supra* note 129, at 410–12, 414–15.

134. *See, e.g.*, Jeremy Peters, *Trump’s New Judicial Litmus Test: Shrinking the Administrative State*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html> (explaining that President Trump has focused on ensuring the judges he nominates share his views in challenging the broad power of federal agencies); *see also* Mark Joseph Stern, *A Trump Judge! Ruled Against Trump! In the Acosta Case?! (It’s Sad That’s Surprising)*, SLATE (Nov. 16, 2018, 5:19 PM), <https://slate.com/news-and-politics/2018/11/donald-trump-jim-acosta-court-ruling-timothy-kelly.html> (observing that Trump promised to only nominate judges who embrace traditional conservative values, such as supporting the right to bear arms, religious liberty, and pro-life perspectives on reproductive freedom).

especially African Americans and Latino/as.¹³⁵ Fifth Circuit Judge Kyle Duncan, as Louisiana Solicitor General and a practitioner, defended Louisiana marriage equality proscriptions in court and pursued cases that limited LGBTQ individuals' efforts to adopt children, a legal initiative that harmed LGBTQ people.¹³⁶ Sixth Circuit appointee Eric Murphy, when Solicitor General, defended Ohio voting restrictions and gay marriage bans, which injured persons of color and LGBTQ individuals.¹³⁷ Ohio Sixth Circuit appointee Chad Readler, as U.S. Department of Justice Civil Division Acting Assistant Attorney General, defended many Trump legal initiatives, such as the travel ban, limitations on transgender people's military service, and use of educational facilities in accord with birth gender identity rather than present identity; these restrictions harmed diversity and people of color generally and transgender individuals specifically.¹³⁸ Peculiarly striking is that a third of Trump judicial nominees and confirmees have compiled anti-LGBTQ records,¹³⁹ and many others have analogously litigated in favor of,

135. See *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Apr. 25, 2018), <https://www.judiciary.senate.gov/meetings/04/25/2018/nominations>; see also Ariane de Vogue, *Board Takes Center Stage at Hearing for Trump's Judicial Nominees*, CNN (May 17, 2018, 5:59 PM), <https://www.cnn.com/2018/05/17/politics/judicial-nominees-senate-committee-brown-v-board-of-education/index.html>.

136. See *Nov. 29 Hearing*, *supra* note 99. See generally Zoe Tillman, *A Republican Senator Is Getting in the Way of One of Trump's Biggest Successes*, BUZZFEED NEWS (Nov. 30, 2017, 12:09 PM), <https://www.buzzfeednews.com/article/zoetillman/a-republican-senator-is-getting-in-the-way-of-one-of-trumps> (observing that Senator Kennedy was undecided about voting to confirm Duncan because he was unfamiliar with Duncan's background).

137. *Oct. 10 Hearing*, *supra* note 102; see also Sabrina Eaton, *U.S. Senate Considers Controversial Ohio Nominees for Federal Judgeships*, CLEVELAND.COM (Oct. 11, 2018), https://www.cleveland.com/metro/index.ssf/2018/10/us_senate_considers_ohio_nomin.html (explaining that the Democratic senator from Ohio opposed Murphy in part because he argued in cases supporting bans on gay marriage).

138. See source cited *supra* note 57. When queried regarding these perspectives in panel questionnaires, hearings or members' written questions for the record, many of the nominees and their Republican supporters have argued that the nominees were zealously representing their clients and appreciated the difference between advocating as lawyers and being neutral arbiters as federal judges. See, e.g., *Oct. 24 Hearing*, *supra* note 102 (Ninth Circuit appointee Eric Miller); *Oct. 10 Hearing*, *supra* note 101 (Sixth Circuit appointees Eric Murphy and Chad Readler); *April 15 Hearing*, *supra* note 135 (Fifth Circuit appointee Andrew Oldham); *Nov. 29 Hearing*, *supra* note 99 (statement of Senator Chuck Grassley, Chairman, S. Comm. on the Judiciary) (Fifth Circuit appointee Kyle Duncan).

139. See *Stacking the Courts: The Fight Against Trump's Extremist Nominees*, LAMBDA LEGAL (Jan. 31, 2019), <https://www.lambdalegal.org/judicial-nominees> (explaining that one in three of Trump's judicial nominees have "deep histories of anti-LGBTQ advocacy."); see also Kenneth Jost, *Trump's Judges Pose Danger to LGBT Rights*, JOST ON JUSTICE (Feb. 11, 2018), <http://www.jostonjustice.com>

worked on, or endorsed positions, that embody Trump's views in fields pertinent to diversity.¹⁴⁰

Trump executive branch departments and agencies, such as the Department of Education ("DOE"), the Department of Defense ("DOD"), the Department of Homeland Security ("DHS"), and the DOJ, correspondingly assume positions in litigation and formulate legal policies, which oppose, confine, or erode ethnic, gender, or sexual orientation diversity regarding numerous matters.¹⁴¹ These include: (1) higher education affirmative action and sexual assault allegations, manifested with a brief that DOJ filed in the Harvard affirmative action case as well as DOE's agreement with the Texas Tech University Medical School to eschew use of race in admissions and the department's proposed Title IX policy guidance on sexual assault allegations; (2) immigration, as seen in the travel ban, zero tolerance policy, asylum procedures, sanctuary city practices, and similar limitations; and (3) reproductive freedom and voting rights.¹⁴²

/2018/02/trumps-judges-pose-danger-to-lgbt-rights.html (observing that at least sixteen of Trump's judicial nominations have anti-LGBTQ records).

140. These include voting rights, affirmative action, Title IX enforcement, immigration, LGBTQ rights, marriage equality, reproductive freedom, and religious liberty. See source cited *supra* note 57.

141. See, e.g., OFFICE OF THE DEPUTY SEC'Y, DIRECTIVE-TYPE MEMORANDUM 19-004, MILITARY SERVICE BY TRANSGENDER PERSONS AND PERSONS WITH GENDER DYSPHORIA (Mar. 12, 2019); *Trump's Record of Action Against Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUALITY (last visited Mar. 26, 2019), <https://transequality.org/the-discrimination-administration> (providing that the Department of Justice instituted a policy of housing transgender people in prisons that match their sex assigned at birth); Dave Philipps, *New Rule for Transgender Troops: Stick to Your Birth Sex, or Leave*, N.Y. TIMES (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/us/transgender-troops-ban.html> (observing that the policy will take effect April 19, 2019).

142. See *San Francisco v. Trump*, 897 F.3d 1225, 1231–33 (9th Cir. 2018); Order Granting Temporary Restraining Order, *East Bay Sanctuary Covenant v. Trump*, 2018 WL 6053140 (C.D. Cal. Nov. 19, 2018) (No. 18-cv-06810); *Trump v. East Bay Sanctuary Covenant*, 139 S. Ct. 782 (2018) (denying stay); Order to Show Cause re Preliminary Injunction, *East Bay Sanctuary Covenant v. Trump*, 2018 WL 6053140 (C.D. Cal. Nov. 19, 2018) (No. 18-cv-06810); Order Granting Plaintiffs' Motion for Classwide Preliminary Injunction, *Ms. L. v. U.S. Immigration and Customs Enf't*, 310 F. Supp. 3d 1133, 1136 (C.D. Cal. 2018) (No. 18cv0428); *Ms. L. v. U.S. Immigration and Customs Enf't*, 2019 WL 1099789 (2019) (expanding the definition of a certified class to families separated before the preliminary injunction); Memorandum and Order on Cross-Motions for Summary Judgment, *Students for Fair Admissions, Inc. v. Harvard Corp.*, 2018 WL 4688308 (D. Mass., Sept. 28, 2018) (No. 14-cv-14179-ADB); Unredacted Version of United States' Statement of Interest in Opposition to Defendant's Motion for Summary Judgment, *Students for Fair Admissions, Inc. v. Harvard Corp.*, 2018 WL 4688308 (D. Mass. Sept. 28, 2018) (No. 1:14-cv-1476-ADB); Erica L. Green, *Sex Assault Rules Under DeVos Bolster Defendants' Rights and Ease College Liability*, N.Y. TIMES (Nov. 16, 2018), <https://www.nytimes.com/2018/11/16/us/politics/betsy-devos-title-ix.html>; Anemona Hartocollis, *Does Harvard Admissions Discriminate? The Lawsuit on Affirmative Action, Explained*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/us/harvard->

Trump generally opposes expansion of rights for, and has initiated actions that seem to favor discrimination against, LGBTQ people through legal arguments proffered in suits or policies effectuated across numerous fields. Examples include: (1) marriage equality, shown by DOJ's filing an amicus brief that supported the petitioner in *Masterpiece Cakeshop*,¹⁴³ but not doing so in *Pidgeon v. Turner*,¹⁴⁴ and related litigation; (2) workplace discrimination, seen by DOJ filing a brief that argued that gender identity is not protected under "sex" in Title VII; and (3) many other important areas, witnessed by similar DOJ filings.¹⁴⁵

The Trump Administration has been particularly focused on narrowing the rights of transgender people in higher education and secondary schools, the military, and employment, as reflected in numerous legal positions that DOJ assumed during much litigation and in numbers of policy initiatives, which DOE, DOD and DHS undertook.¹⁴⁶ More specifically, Trump and DOD instituted efforts to prevent, or at least restrict, military service by transgender persons.¹⁴⁷ The White House, DOE, and DOJ simultaneously

affirmative-action-asian-americans.html; Anemona Hartocollis, *Civil Rights Agreement Settles Case at Texas Tech*, N.Y. TIMES, Apr. 10, 2019, at A12; Laura Meckler, *Betsy DeVos Releases Sexual Assault Rules She Hails as Balancing Rights of Victims, Accused*, WASH. POST (Nov. 16, 2018), https://www.washingtonpost.com/local/education/betsy-devos-releases-sexual-assault-rules-she-hails-as-balancing-rights-of-victims-accused/2018/11/16/4aa136d4-e962-11e8-a939-9469f1166f9d_story.html.

143. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

144. *Turner v. Pidgeon*, 538 W.3d 73 (Tex. 2017), *cert denied*, 138 S. Ct. 505 (2017).

145. See OFFICE OF THE DEPUTY SEC'Y, *supra* note 141; Joan Biskupic, *Trump Justice Department Reversing Obama-Era Positions on Discrimination*, CNN (Feb. 4, 2019, 6:05 AM), <https://www.cnn.com/2019/02/04/politics/trump-justice-department-race/index.html>; Adam Liptak, *Supreme Court Revives Transgender Ban for Military Service*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/us/politics/transgender-ban-military-supreme-court.html>. Compare Brief for United States as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2017) (No. 16-111) (showing that the United States wrote an amicus curiae brief advocating that a shop owner had the First Amendment right to refuse to make a cake for a same-sex marriage), with *Pidgeon v. Turner*, 538 S.W.3d 73 (Tex. 2017), *cert. denied*, 138 S. Ct. 505 (2017); Brief for the Federal Respondent in Opposition, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp't Opportunity Comm'n*, 884 F.3d 560 (6th Cir. 2018), *petition for cert. filed*, (No. 18-107).

146. See, e.g., OFFICE OF THE DEPUTY SEC'Y, *supra* note 141; NAT'L CTR. FOR TRANSGENDER EQUALITY, *supra* note 141 (observing that on March 23, 2018, the Trump Administration announced a plan to implement a ban on transgender military service members); Philipps, *supra* note 141 (observing that the policy will take effect April 19, 2019).

147. *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 175 (D.D.C. 2017), *vacated by Doe 2 v. Shanahan*, No. 18-5257, 2019 WL 102309 (D.C. Cir. Jan. 4, 2019); *Stone v. Trump*, 280 F. Supp. 3d 747, 747 (D. Md. 2017); see Helene Cooper, *Transgender People Will Be Allowed to Enlist in the Military as a Court Case Advances*, N.Y.

attempted to reverse Obama's policy of invoking current gender identity, rather than birth, when addressing transgender students in education.¹⁴⁸

Trump correspondingly appears to target immigrants generally and those of color and Muslims specifically. Examples are the zero-tolerance policy, which separated children from their parents at the United States-Mexico border, and the directive that asylum seekers pursue relief only at ports of entry, which injured South American migrants.¹⁴⁹ Other trenchant illustrations are the travel ban, which disproportionately affects Muslim immigrants, and efforts to prevent a migrant teenager from securing an abortion, which harms immigrants and women's reproductive freedom.¹⁵⁰

V. IMPLICATIONS

Trump's neglect of ethnic minority, female, and LGBTQ prospects when recruiting, analyzing, nominating, and confirming jurists has many detrimental effects. The federal courts are a salient

TIMES (Dec. 11, 2017), <https://www.nytimes.com/2017/12/11/us/politics/transgender-military-pentagon.html> (observing that President Trump declared in a tweet that the armed forces could not afford the "tremendous cost" associated with transgender service members).

148. U.S. Dep't of Justice & U.S. Dep't of Educ., Dear Colleague Letter on Transgender Students (May. 13, 2016) <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>; see Libby Bulinski, "Transgender Need Not Apply," 102 MINN. L. REV. BLOG: DE NOVO (Nov. 12, 2017), <http://www.minnesotalawreview.org/2017/11/transgender-need-not-apply> (explaining that the Department of Justice memorandum revoked protections for transgender individuals in the workplace); Sari Horwitz & Spencer S. Hsu, *Sessions Ends Workplace Protections for Transgender People Under Civil Rights Act*, WASH. POST (Oct. 5, 2017), https://www.washingtonpost.com/local/public-safety/trump-administration-asks-court-to-toss-out-challenge-to-military-transgender-ban/2017/10/05/3819aec4-a9d5-11e7-92d1-58c702d2d975_story.html (showing that the Justice Department argued that Title VII does not protect transgender citizens from workplace discrimination).

149. See Order Granting Plaintiffs' Motion for Classwide Preliminary Injunction, *supra* note 142; Miriam Jordan, *Federal Judge Blocks Trump's New Rule Targeting Asylum Seekers*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/20/us/judge-denies-trump-asylum-policy.html>; Miriam Jordan & Manny Fernandez, *Judge Rejects Long Detentions of Migrant Families*, N.Y. TIMES (July 10, 2018), <https://www.nytimes.com/2018/07/09/us/migrants-family-separation-reunification.html>.

150. See generally *Hawaii v. Trump*, 138 S. Ct. 2392 (2018) (showing that President Trump has made statements urging complete exclusion of Muslims from entering the United States); *Hargan v. Garza*, 874 F.3d 735 (D.C. Cir. 2017) (en banc) (per curiam) (Millett, J., concurring), *vacated by* *Azar v. Garza*, 138 S. Ct. 1790 (2018); Tessa Stuart, *Here's What's at Stake in the Fight Over Trump's New Judges*, ROLLING STONE (Nov. 28, 2018, 3:04 PM), <https://www.rollingstone.com/politics/politics-news/trump-judicial-appointments-759956/> (explaining that many of President Trump's judicial nominees are threats to women's reproductive rights).

locus for justice in which persons of color—mostly African Americans, Latino/as, and Native Americans, and immigrants or members of certain religious groups, namely Muslims—can be overrepresented in the criminal justice system, while ethnic minorities, women, and LGBTQ people experience insubstantial representation on the bench. His negligible attention to diversity's expansion constitutes a lost opportunity for increasing the quality of justice that litigants deserve and courts must supply.

Improved diversity furnishes the crucial benefits reviewed previously: this enhances decision-making with constructive, different views, eliminates or reduces prejudices, which can deprive litigants of fairness, and increases confidence that federal jurists will equitably treat parties.¹⁵¹ Appointing plentiful talented, conservative and moderate persons of color, women, and LGBTQ people would help fill the 133 vacancies and constrict the rampant politicization, divisiveness, and nonstop paybacks that plague the modern federal branches of government and the appointments process. Seating these candidates in the empty posts might show that Republicans and Democrats can meaningfully collaborate to fill the myriad vacancies for the good of the courts, the presidency, the Senate, and the nation. The country has substantial numbers of excellent, conservative and moderate, ethnic minorities, women, and LGBTQ people from whom to choose, so these candidates would rather easily secure appointment.¹⁵²

Certain justifications for not promoting diversity, which could have enjoyed a modicum of plausibility much earlier, lack any persuasiveness now. For instance, the superb, conservative persons of color, women, and LGBTQ aspirants—namely Trump's nine confirmees and his fourteen other nominees, including Bumatay, Smith, Ruiz, and Rowland—dramatically repudiate the condescending suppositions that confirming capable minority, female, and LGBTQ nominees will erode merit in the judiciary because the pool of qualified candidates is small or lacks enough conservatives.¹⁵³

151. See sources cited *supra* notes 27–30.

152. Circuit Judges Elizabeth Branch and St. Eve and District Judges Gren Scholer, Rodriguez, Claria Horn Boom and Annemarie Carney Axon easily won confirmation on strong roll call votes and District Judges Otake and Moorero as well as nine white female District Judges easily won approval on voice votes. Circuit Judges Ho, Nalbandian, Amy Barrett, Joan Larsen, Allison Eid, and Britt Grant experienced greater difficulty, and the Senate confirmed Thapar, Allison Jones Rushing, and Neomi Rao with no Democratic senators' votes. *Archive of Judicial Vacancies (2017–2019)*, *supra* note 93.

153. Trump confirmed many other well qualified, conservative women, such as Seventh Circuit Judge Barrett and Sixth Circuit Judge Larsen. 163 CONG. REC. S6944 (daily ed. Nov. 1, 2017) (confirming Judge Larsen); 163 CONG. REC. S6908 (daily ed. Oct. 31, 2017) (confirming Judge Barrett); Press Release, White House Office of the Press Sec'y, Nine Nominations Sent to the Senate Today (May 8, 2017), <https://www.whitehouse.gov/presidential-actions/nine-nominations-sent-senate-today-2/>.

The people of color and women whom Trump has confirmed and the LGBTQ individuals tapped so far demonstrate that he has readily available many choices, who at once can furnish substantial merit and conservative perspectives. Trump need only capitalize on that potential.

In 2016, Trump campaigned and won partly because the candidate pledged to confirm ideologically conservative judges who shared his or Republican positions on social policy and culture war issues, especially diversity. Trump honored this promise by appointing two Supreme Court Justices, thirty-seven circuit jurists, and many district judges who satisfied this description.¹⁵⁴ Trump incessantly touts his record-breaking circuit approvals and even urged that 2018 voters elect Republican senators, so that he might continue appointing even more analogous jurists,¹⁵⁵ a strategy that arguably proved effective because the GOP slightly enhanced its majority.

He enjoyed considerable success. For example, the Gorsuch and Kavanaugh appointments have made the Supreme Court more ideologically conservative while apparently solidifying a five-Justice conservative majority on certain issues essential to diversity, such as affirmative action, voting rights, reproductive freedom, and LGBTQ individuals' rights.¹⁵⁶

The Trump appointees to the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have also seemingly made those appeals courts more conservative, but he has only modified the Third Circuit's composition from a majority of judges whom Democratic Presidents confirmed to a majority whom Republican chief executives appointed.¹⁵⁷ Nevertheless, some

154. Ronna McDaniel, *Donald Trump Has Secured the Future of the American Courts*, THE HILL (Apr. 7, 2019), <https://thehill.com/opinion/judiciary/437750-donald-trump-has-secured-the-future-of-our-american-courts>.

155. *See Trump Urges Republicans to Mobilize for 2018 Midterm Elections*, CNBC (May 11, 2018, 12:41 AM), <https://www.cnbc.com/2018/05/11/trump-urges-republicans-to-mobilize-for-2018-midterm-elections.html> (explaining that Trump urged voters at a rally in Indiana to vote for the Republican Senate candidate so that the Democrats would not stymie his agenda, especially regarding the appointment of conservative judges).

156. Zach Ford, *Supreme Court Poised to Drastically Reverse LGBTQ Equality*, THINK PROGRESS (Nov. 27, 2018, 9:54 AM), <https://thinkprogress.org/the-six-lgbtq-cases-awaiting-consideration-from-the-supreme-court/>; Kendall, *supra* note 116; *see Confirmed Judges, Confirmed Fears: The Devastating Harm Already Done by Confirmed Trump Federal Judges*, PEOPLE FOR AM. WAY (Oct. 2018), <http://www.pfaw.org/report/confirmed-judges-confirmed-fears-the-devastating-harm-already-done-by-confirmed-trump-federal-judges/> (providing examples of Gorsuch's opinions in which he has voted with the other conservative Justices on crucial issues, such as voting rights and reproductive rights). *But see* Wolf, *supra* note 6. It is early in the tenure of Trump appointees to posit firm conclusions.

157. *See* Jonathan Tamari, *Christie Ally and 'Bridgewater' Attorney Confirmed to Third Circuit Over Objections*, PHILA. INQUIRER, Mar. 12, 2019. The Eleventh

confirmees have already issued opinions that support Trump's views and oppose or restrict diversity, even though most have served only brief periods. For example, Fifth Circuit Judge Ho lamented the "moral tragedy" of abortion in the "fetal remains" case and Seventh Circuit Judge Amy Coney Barrett allowed corporations to racially segregate employees in their workplaces.¹⁵⁸

Trump also vilified many federal jurists, especially those who serve in the Ninth Circuit, and criticized their opinions ruling that his initiatives that touch diversity are legally deficient. For example, Trump denigrated Western District of Washington Judge James Robart, who resolved the initial travel ban case, as a "so-called judge"¹⁵⁹ and Northern District of California Judge Jon Tigar, who decided the first challenge to Trump's modified rules for asylum seekers, as an Obama judge, while then-candidate Trump argued that Southern District of California Judge Gonsalvo Curiel would not rule

Circuit is 6-6, but the court has no current vacancies. Kendall, *supra* note 116; Jasmine C. Lee, *Trump Could 'Flip' the Supreme Court. His Impact on the Lower Courts Is Less Clear*, N.Y. TIMES (Sept. 4, 2018), <https://www.nytimes.com/interactive/2018/09/04/us/politics/trump-federal-judge-appointments.html>; Wolf, *supra* note 82 (observing, however, that the Third and Eleventh Circuit Courts of Appeals were close to shifting to a majority of judges nominated by Republican Presidents). Whether the appointing President is a Republican or Democrat is a crude measure, and most Trump confirmees have replaced GOP Presidents' appointees, but Trump's appointees are considerably younger than the judges whom they are replacing. Russell Wheeler, *Trump Has Reshaped the Judiciary But Not as Much as You Might Think*, BROOKINGS (Aug. 27, 2018), <https://www.brookings.edu/blog/fixgov/2018/08/27/trump-has-reshaped-the-judiciary-but-not-as-much-as-you-might-think/>.

158. See *Whole Women's Health v. Smith*, 896 F.3d 362, 376 (5th Cir. 2018) (Ho, J., concurring); *Equal Emp't Opportunity Comm'n v. AutoZone, Inc.*, 875 F.3d 860, 860 (2017) (denying rehearing en banc to a case in which the Seventh Circuit ruled in favor of a company that intentionally segregated its employees on the basis of race); Mark Joseph Stern, *Trump-Appointed Judge Bemoans the "Moral Tragedy" of Abortion, Accuses Lower Court of Anti-Christian Bias*, SLATE (July 16, 2018), <https://slate.com/news-and-politics/2018/07/judge-james-ho-attacks-abortion-rights-while-accusing-a-lower-court-of-anti-christian-bias.html>; see also *Confirmed Judges, Confirmed Fears*, *supra* note 153 (providing many other examples of Trump appointees' opinions); Alison Frankel, *Trump Appellate Judges Are Paving the Way to Challenge Precedent*, REUTERS (Oct. 3, 2018), <https://www.reuters.com/article/us-otc-courtingchange/trump-appellate-judges-are-paving-the-way-to-challenge-precedent-idUSKCN1MD2RD>. Many caveats attend these ideas. It is very early in Trump's tenure and the jurists' service to proffer firm conclusions. Much also depends on the specific law, facts, and issues that cases raise. For instance, was the Justices' travel ban ruling about national security, immigration, or presidential power?

159. David Cole, *'So Called' Judges Trump Trump*, WASH. POST (Feb. 10, 2017), https://www.washingtonpost.com/opinions/so-called-judges-trump-trump/2017/02/10/573fd1c8-ef42-11e6-b4ff-ac2cf509efe5_story.html.

fairly in the Trump University litigation because Curiel was a “Mexican” judge.¹⁶⁰

These phenomena apparently came to a head when Judge Tigar preliminarily enjoined the directive, which required that asylum seekers pursue relief at ports of entry.¹⁶¹ Trump castigated the jurist as an “Obama judge” and wrongly criticized plaintiffs for litigating in the Ninth Circuit, which he asserted invariably stops or delays his executive actions.¹⁶² In response to an Associated Press query, Chief Justice John Roberts replied: “We do not have Trump or Obama judges. [We do have extraordinary] dedicated judges doing equal right to [litigants]. That independent judiciary is something for which we should all be thankful.”¹⁶³ Trump retorted that Chief Justice Roberts was mistaken because the federal courts have many Obama judges who rule against the executive, particularly on national security issues about which the jurists know little and that this jeopardizes Americans’ safety, while he described the Ninth Circuit as a “total disaster [which] is out of control [and] is reversed more than any circuit,” intimating that Congress must seriously consider dividing the appellate court.¹⁶⁴

Many of these efforts have deleterious impacts. The actions can make federal judges and courts appear more partisan and politicized and, thus, resemble the legislative and executive branches. The initiatives may also undermine judicial independence, separation of powers, checks and balances, the rule of law and democracy, make the judiciary appear beholden to, or captured by, one party or another government branch, as well as continue, and even accelerate, the selection process’ counterproductive decline. The dynamics identified could undercut public respect for the judiciary, the President, the Senate, and the selection process.

In sum, despite the multiple, clear advantages of increasing minority representation, the rather nascent Trump presidency has devoted minuscule resources to expanding diversity. However,

160. See Jia Tolentino, *Trump and the Truth: The “Mexican” Judge*, NEW YORKER (Sept. 20, 2016), <https://www.newyorker.com/news/news-desk/trump-and-the-truth-the-mexican-judge>.

161. See *supra* notes 143, 148.

162. See *supra* notes 143, 148; see also Maria Sacchetti & Sarah Kinoshian, *Trump Lashes Out After Judge Rules That Migrants Who Cross Border Illegally Can Seek Asylum*, WASH. POST (Nov. 21, 2018), <https://www.latimes.com/nation/politics/la-na-pol-trump-asylum-20181121-story.html>; Mark Sherman & Jill Colvin, *Trump Demands ‘Some Common Sense’ from Judges*, ASSOCIATED PRESS (Nov. 23, 2018), <https://www.apnews.com/c06ed53489254491bc1fb619c505d33e>.

163. Adam Liptak, *Roberts Rebukes Trump for Swipe at ‘Obama Judge,’* N.Y. TIMES, Nov. 22, 2018, at A1; Sherman & Colvin, *supra* note 159.

164. Sherman & Colvin, *supra* note 159; see Ross Douthat, *The Two-Emperor Problem*, N.Y. TIMES, Nov. 25, 2018, at SR7; Bob Egelko, *Trump Attack May Reopen Debate on Splitting Ninth Circuit in SF*, S.F. GATE (Feb. 18, 2017, 7:19 PM), <https://www.sfgate.com/nation/article/Trump-attack-may-reopen-debate-on-splitting-Ninth-10943304.php>.

considerable time remains in this Administration to implement endeavors that will increase the persons of color, women, and LGBTQ federal jurists. Thus, Part VI of this Article provides recommendations for significantly enhancing the number of ethnic minority, female, and LGBTQ court members.

VI. SUGGESTIONS FOR THE FUTURE

Trump now must implement multifarious special constructs that have functioned well previously and promise to increase judicial diversity. One valuable, dependable procedure would be elevating to the appeals courts numerous accomplished, conservative and moderate, ethnic minority, female, and LGBTQ district court appointees whom Presidents George W. Bush and Obama nominated and confirmed.¹⁶⁵ That measure is time honored and efficacious, as the candidates have assembled accessible, comprehensive records and can proffer much relevant experience derived from years of trial court service, and importantly the Senate has already thoroughly evaluated and confirmed them once.¹⁶⁶ Examples include the following: Judges Thapar, Diane Humetewa, who could become the first Native American court of appeals jurist; Pamela Chen and Alison Nathan, either one, if appointed, would be the initial lesbian appointed to any court of appeals; and Paul Oetken, who might become the first gay judge to serve on the Second Circuit.¹⁶⁷

A related and helpful source for circuit nominees is the pool of Justices who are serving on state supreme courts. This measure is venerable and effective, as the prospects have compiled similarly available, full records and may furnish expertise because much of their work resembles that of federal appellate jurists. Presidents George W. Bush and Obama carefully applied this mechanism,¹⁶⁸

165. Unfortunately President Bush appointed no LGBTQ judges. *See supra* note 61 and accompanying text.

166. Elisha Savchak et al., *Taking It to the Next Level: The Elevation of District Judges to the U.S. Courts of Appeals*, 50 AM. J. POL. SCI. 478, 478 (2006); Tobias, *supra* note 68, at 2248.

167. *Seay, Frank Howell, supra* note 67; *see supra* notes 27, 74–75, 77. There are many others, such as Central District of California Judge Philip Gutierrez and Northern District of California Judge Lucy Koh. Tobias, *supra* note 77, at 715–18. Bush confirmed Thapar and Gutierrez; Obama appointed the others. Indeed, Trump has already elevated one of his own district appointees, Marvin Quattlebaum, to the Fourth Circuit, and Trump may elevate many others in the future. 164 CONG. REC. S5704 (daily ed. Aug. 16, 2018) (confirming Judge Quattlebaum).

168. For example, President Bush elevated Ohio Supreme Court Justice Deborah Cook to the Sixth Circuit and Wisconsin Supreme Court Justice Diane Sykes to the Seventh Circuit. 150 CONG. REC. S7399 (daily ed. June 24, 2004) (confirming Judge Sykes); 149 CONG. REC. S5742 (daily ed. May 5, 2003) (confirming Judge Cook). For instance, President Obama elevated Virginia Supreme Court Justice Barbara Milano Keenan to the Fourth Circuit and Alaska Supreme Court Justice Morgan Christen to the Ninth Circuit. 157 CONG. REC.

while Trump has capitalized on it to elevate Michigan Supreme Court Justice Joan Larsen to the Sixth Circuit, Colorado Supreme Court Justice Allison Eid to the Tenth Circuit, and Georgia Supreme Court Justice Britt Grant to the Eleventh Circuit.¹⁶⁹

A somewhat analogous concept would be renominating certain of the twenty able, consensus, conservative and moderate Obama district nominees who earned panel hearings and reports without dissent but lacked 2016 chamber votes.¹⁷⁰ This construct would decidedly expedite confirmations, as nominees who are renamed must only secure panel and final ballots.¹⁷¹ Trump has wisely renominated fifteen Obama designees, including Karen Gren Scholer and Milton Younge, most of whom, encompassing Gren Scholer, rather felicitously achieved confirmation.¹⁷²

S8691 (daily ed. Dec. 15, 2011) (confirming Judge Christen); 156 CONG. REC. S7971 (daily ed. Mar. 2, 2010) (confirming Judge Keenan).

169. See 164 CONG. REC. S5525 (daily ed. July 31, 2018) (confirming Judge Grant); 163 CONG. REC. S6982 (daily ed. Nov. 2, 2017) (confirming Judge Eid); 163 CONG. REC. S6944 (daily ed. Nov. 1, 2017) (confirming Judge Larsen).

170. The Republican Senate leadership refused to provide these nominees chamber votes across 2015 and 2016. Savage, *supra* note 80; Tobias, *supra* note 85, at 11, 18.

171. Tobias, *supra* note 85, at 18–19. Senator Grassley continued the venerable tradition of not requiring another hearing for many nominees who had a hearing in the previous Congress. Because any of the 15 Obama nominees whom Trump renamed, who was not confirmed in 2018, required and received renomination and did not have a hearing in the 115th Congress and the panel will have several new members, Senator Graham may deem it advisable to convene additional hearings in 2019.

172. See *supra* note 120 (Scholer confirmation). He can tap five more Obama nominees in addition to the fifteen, who received prior panel hearings and approvals, such as Inga Bernstein and Florence Pan. *Executive Business Meeting to Consider Pending Legislation and Nominations Before the S. Comm. on the Judiciary*, 114th Cong. (Sept. 15, 2016), <https://www.judiciary.senate.gov/meetings/09/08/2016/executive-business-meeting-09-15-16> (Pan panel approval); *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 114th Cong. (July 13, 2016), <https://www.judiciary.senate.gov/meetings/07/13/2016/nominations> (Pan hearing); *Executive Business Meeting to Consider Pending Legislation and Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (May 19, 2016), <https://www.judiciary.senate.gov/meetings/05/19/2016/executive-business-meeting> (Bernstein panel approval); *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 114th Cong. (Apr. 20, 2016), <https://www.judiciary.senate.gov/meetings/04/20/2016/nominations> (Bernstein hearing). Their nominations expired on January 3, 2017, when the 114th Congress ended. 162 CONG. REC. S7183–84 (daily ed. Jan. 3, 2017). There are twenty-eight more Obama nominees like the twenty, such as Diane Gujarati and Abid Qureshi, who lacked panel approval but had ABA ratings, FBI checks and perhaps panel reviews, so they can be confirmed rather swiftly. Thirteenth Wave, *supra* note 93 (Trump renomination of Gujarati); Press Release, White House Office of the Press Sec'y, President Obama Nominates Diane Gujarati to Serve on the United States District Court for the Eastern District of New York (Sept. 13, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/09/13/president-obama-nominates-diane-gujarati-serve-united-states-district>; Press Release, White House Office of the Press Sec'y, President

The Administration must also carefully evaluate adopting, stressing, reviewing, or improving several efficacious practices that Trump deemphasized or jettisoned. Most crucial is enhancing diversity on the federal bench, which contemporary Democratic Presidents have stressed but modern Republican chief executives have ignored or downplayed. Trump must assign increasing ethnic minority, female, and LGBTQ judicial representation much greater priority as well as communicate to all involved with selection and the American citizenry that he believes that improving diversity has substantial importance. The White House Counsel should systematically convey the message that diversity's rigorous supplementation has compelling priority that resembles appointing conservative jurists. This should also be communicated through the actions of White House Counsel Office employees; the DOJ, which investigates candidates and prepares nominees for hearings; the Judiciary Committee, which evaluates nominees and stages hearings, discussions and votes; and home state politicians, who propose multiple outstanding candidates for each vacancy and introduce nominees to Senate colleagues.

The White House Counsel should broadly prescribe suggestions to accentuate ethnic minority, female, and LGBTQ diversity on the federal bench. For instance, Counsel Office employees and others working on selection ought to encompass minorities while committing sufficient resources to efficaciously discharge responsibility for improving diverse representation. All participating in the nomination process must avidly recruit, examine, and suggest numerous able, conservative and mainstream, people of color, women, and LGBTQ candidates, particularly by contacting individuals, lawmakers, as well as ethnic minority, women's, and LGBTQ political, interest and bar entities, especially the Federalist Society and the Heritage Foundation, which are familiar with designees. The Counsel should convince every home state lawmaker to seek out, pursue, and suggest excellent, conservative and moderate persons of color, women, and LGBTQ aspirants. One constructive technique that many officials deploy is bipartisan selection panels because they are familiar with numerous prospects who could be exceptional judges.¹⁷³ Counsel then must evaluate, interview, and propose these submissions, asking the President to seriously evaluate nominating them. Trump might lead by example with the aspirants' consequent nomination.

Obama Nominates Abid Riaz Qureshi to Serve on the United States District Court for the District of Columbia (Sept. 6, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/09/06/president-obama-nominates-abid-riaz-qureshi-serve-united-states-district>; see Tobias, *supra* note 85, at 21–22.

173. See, e.g., Tobias, *supra* note 68, at 2256; Tobias, *supra* note 75, at 176–77; *supra* notes 88, 109 and accompanying text.

Another critical procedure that Trump disregards or deemphasizes is meticulously consulting home state senators, and this emphasis on the interaction between Presidents and the home state senators is a major reason for the blue slip custom.¹⁷⁴ Assiduous consultation promotes felicitous nominations and confirmations, particularly of talented, conservative and moderate, ethnic minority, female, and LGBTQ possibilities. A helpful illustration was the nomination of two well qualified, conservative or centrist ethnic minority Texas district court nominees, Asian American Karen Gren Scholer and Latino Fernando Rodriguez, whom the bipartisan Texas Judicial Evaluation Commission strongly recommended, Texas Republican Senators Cornyn and Cruz powerfully supported, and the Senate smoothly confirmed.¹⁷⁵ Equally compelling was the nomination of two accomplished, conservative Illinois Seventh Circuit choices, Amy St. Eve and Michael Scudder, whom an Illinois bipartisan panel avidly proposed, Democratic Senators Dick Durbin and Tammy Duckworth strenuously favored, and the chamber easily approved as witnessed by the nominees' swiftly-arranged uncontroversial committee hearing, discussion and report, and expeditious, smooth chamber debate and ballot.¹⁷⁶ In short, much

174. See *supra* notes 87–88, 101 and accompanying text.

175. These phenomena were evinced by the nominees' rather expeditious, noncontroversial panel reviews and chamber debates and votes. See *supra* note 120 (both nominations and confirmations); *Executive Business Meeting to Consider Pending Legislation and Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Oct. 26, 2017), <https://www.judiciary.senate.gov/meetings/10/23/2017/executive-business-meeting> (Scholer panel approval); *Executive Business Meeting to Consider Pending Legislation and Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Jan. 11, 2018), <https://www.judiciary.senate.gov/meetings/01/11/2018/executive-business-meeting> (Rodriguez panel approval); *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Nov. 29, 2017), <https://www.judiciary.senate.gov/meetings/11/29/2017/nominations> (Rodriguez hearing); Todd Ruger, *Senate Republicans Steamroll Judicial Process*, ROLL CALL (Jan. 18, 2018, 11:33 AM), <https://www.rollcall.com/news/policy/the-senates-consent-machine>. See generally Tobias, *supra* note 75.

176. See *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Apr. 19, 2018), <https://www.judiciary.senate.gov/meetings/committee-executive-business-meeting> (St. Eve and Scudder panel approvals); 164 CONG. REC. S2655 (daily ed. May 14, 2018) (St. Eve & Scudder confirmations); *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Mar. 21, 2018), <https://www.judiciary.senate.gov/meetings/03/21/2018/nominations> (White House Counsel McGahn carefully consulted senators and Chair Grassley quickly set hearing) (statements of Senators Dick Durbin and Chuck Grassley); *supra* note 108. Similar cooperation attended Mark Bennett's selection for a Hawaii Ninth Circuit vacancy. For Bennett's rather similar noncontroversial panel and chamber treatment, see *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Apr. 11, 2018), <https://www.judiciary.senate.gov/meetings/04/11/2018/nominations-1>; *Executive Business Meeting to Consider Pending Legislation and Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (May 10, 2018), <https://www.judiciary.senate.gov/meetings/05/10/2018/executive->

solicitous consultation will not invariably afford each party its preferred nominees, yet consultation will facilitate many nominations and carefully address controversies like the disputes in Oregon and Wisconsin that can ultimately undercut the process and trust between the parties.¹⁷⁷

Trump should also reexamine his erroneous choice to disregard ABA nominee evaluations and ratings because Democratic and Republican Presidents since Eisenhower, except George W. Bush and Trump, relied on the ABA's deep experience, mammoth network of expert assessors, and full, informative reports.¹⁷⁸ Dependence on ABA analyses and rankings in candidates' *pre-nomination* analyses might reduce the embarrassment that can be imposed on Trump designees whom the ABA rates not qualified.¹⁷⁹ Ultimate confirmation of most nominees with this ranking indicates that ABA input can helpfully alert selection participants to putative concerns about nominees.¹⁸⁰

Trump as well should reconsider the decision to emphasize filling appellate vacancies with conservative nominees in states that GOP senators represent to the nearly complete exclusion of related important factors, especially diversity. For instance, the Administration should institute a system that focuses on *all* circuit and district courts. A constructive approach could be prioritizing nominations by first selecting nominees who decrease the eighty-four emergency vacancies.¹⁸¹ The White House should emphasize the 125 district openings and the numerous tribunals with large judicial complements and vacancy percentages, which encompass districts in

business-meeting; 164 CONG. REC. S4858 (daily ed. July 10, 2018) (Bennett confirmation).

177. See *supra* notes 88, 101, 109–110 and accompanying text. Similar disputes arose in Ohio, Washington, and New Jersey. See *Oct. 10 Hearing, supra* note 101; *Oct. 24 Hearing, supra* note 101; *Nov. 13 Hearing, supra* note 102; see also Kaplan, *supra* note 12.

178. See *supra* note 90 and accompanying text. *But see supra* note 91.

179. See *supra* note 91. The President can decline to nominate or the aspirant may withdraw privately.

180. See *supra* note 91 and accompanying text. When the ABA rated Charles Goodwin and Holly Teeter not qualified, the chief judge of the district court to which each was named voiced support. *Executive Business Meeting to Consider Pending Legislation and Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Jan. 18, 2018), <https://www.judiciary.senate.gov/meetings/01/18/2018/executive-business-meeting> (Teeter); *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Dec. 13, 2017), <https://www.judiciary.senate.gov/meetings/12/13/2017/nominations> (Goodwin); 164 CONG. REC. S5590 (daily ed. Aug. 1, 2018) (Teeter confirmation); 164 CONG. REC. S5981 (daily ed. Aug. 28, 2018) (Goodwin confirmation).

181. See *supra* notes 92–94. This recommendation also treats districts' compelling need to fill many openings and the lack of nominees from states that Democrats represent.

California, Illinois, New Jersey, and New York.¹⁸² Those states' magnitude ensures a substantial pool of well qualified, conservative and moderate, ethnic minority, female, and LGBTQ candidates.¹⁸³ Trump should institute this measure by according home state politicians more responsibility for recruiting, discovering, and proffering strong candidates whom he names.¹⁸⁴

After Trump taps strong ethnic minority, female, and LGBTQ picks, the White House, the DOJ, and each party's senators should promptly collaborate by providing thorough, fair confirmation processes. For example, Trump might ask that every senator powerfully support nominees, that DOJ carefully prepare selections for the confirmation regime, and that the panel schedule prompt, rigorous, and equitable hearings, discussions, and ballots. Once nominees capture approval, the Senate must swiftly, robustly, and fairly debate and vote.

The evaluation above shows that the confirmation wars that preceded Trump's inauguration have persisted during his presidency. However, certain phenomena suggest that Republicans and Democrats must seriously assess ideas that can permanently improve the dismal process because the few appointments that the GOP permitted throughout Obama's last half term partially explain the dramatically reduced interparty collaboration so early in Trump's presidency.¹⁸⁵ This Administration's deletion, modification, or deemphasis of many procedures that had operated rather efficaciously accelerates the measures' steady decline, while the factors scrutinized exacerbate the apparently dwindling prospects for remedying the concerns.¹⁸⁶

However, there is one promising approach that could at once improve the present selection regime and enhance bench diversity. Trump and senators can adopt a bipartisan judiciary that would enable the party not possessing White House control to recommend a

182. See *Archive of Judicial Vacancies* (2019), *supra* note 93 (showing 125 district openings).

183. See *supra* notes 92–94. Texas, Florida, and Pennsylvania have many vacancies, but only the latter has a Democratic senator. See *supra* note 42 (sending five Florida district nominees). States, like Nebraska and Idaho, with few active judges, deserve emphasis, as one vacancy can be crippling. 28 U.S.C. § 133 (2012).

184. Trump has apparently deferred significantly to many home state politicians, especially on district vacancies. See *supra* notes 74–76 and accompanying text.

185. Tobias, *supra* note 125, at 1107; see John Gramlich, *Federal Judicial Picks Have Become More Contentious, and Trump's Are No Exception*, PEW RES. CTR. (Mar. 7, 2018), <http://www.pewresearch.org/fact-tank/2018/03/07/federal-judicial-picks-have-become-more-contentious-and-trumps-are-no-exception/>.

186. For many longer-term ideas that could treat the confirmation wars, 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 68, at 2255–65.

percentage of aspirants.¹⁸⁷ Senators who represent various states have adopted relatively similar concepts. New York apparently instituted the first system that permitted the senator whose party lacked the executive to recommend one in a few district aspirants.¹⁸⁸ The two New York nominee packages, comprising three Second Circuit, and nine district picks, suggest that Trump and the senators used a similar process whereby he and the senators chose some nominees.¹⁸⁹

Congress should combine the bipartisan judiciary with a law authorizing sixty-five seats. This would operationalize 2019 Judicial Conference suggestions for Congress, which the courts' policymaking arm bases on conservative projections of case and workloads that will afford courts necessary resources.¹⁹⁰ Conjoining a bipartisan judiciary and sixty-five posts could enhance judicial diversity and supply other benefits. These concepts would give both parties incentives to cooperate, create a relatively diverse judiciary, and provide courts with critical resources. The constructs would increase diversity by enabling Democrats to propose some nominees and might halt or slow the process' downward slide. Effectuation will require care, although bipartisan courts may be fashioned to satisfy the Constitution.¹⁹¹

187. Michael Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 688 (2003); Carl Tobias, *Fixing the Federal Judicial Selection Process*, 65 EMORY L.J. ONLINE 2051, 2051 (2016), http://law.emory.edu/elj/_documents/volumes/65/online/tobias.pdf (more fully explaining a bipartisan judiciary).

188. The measure worked well from the 1970s through the 1990s. It was first one in four and more recently one in three under Senators Alfonse D'Amato (R) and Daniel Patrick Moynihan (D). 143 CONG. REC. S2538 (daily ed. Mar. 19, 1987) (statement of Senator Biden); see Stephan Klein, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 249 (1999).

189. The packages included two Obama district nominees, Gary Brown and Diane Gujarati, whom Trump renamed and two Bush district appointees, Richard Sullivan and Joseph Bianco, as Second Circuit nominees. See *supra* note 120; Eighteenth Wave, *supra* note 93. However, few senators apply a bipartisan judiciary to circuits, as the vacancies are rare, the courts include several states, and perceptions that appointing these judges is political, complex and critical suggest that the idea may be ineffective. Differing rules, such as districts that have bipartisan courts, would apply within states and would be issues for negotiation among the senators and Trump. For discussion of more specifics related to the bipartisan judiciary concept, see Tobias, *supra* note 187, at 2057–58.

190. Judicial Conference of the United States, 2019 Judicial Conference Judgeship Recommendations (Mar. 2019), https://www.uscourts.gov/sites/default/files/2019_judicial_conference_judgeship_recommendations_0.pdf. Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the U.S.*, U.S. CTS., 16–17 (Mar. 14, 2017), https://www.uscourts.gov/sites/default/files/2017-03_0.pdf; see Federal Judgeship Act of 2013, S.1385, 113th Cong. (2013) (most recent comprehensive judgeships bill).

191. The Constitution permits these ideas on which the President and Congress can agree. The concepts may further politicize selection but could

VII. CONCLUSION

President Trump has compiled a poor record of nominating and confirming accomplished, conservative and centrist, ethnic minority, female, and LGBTQ candidates. Because the appointment of diverse candidates would enhance the justice that courts deliver and parties merit, the chief executive and the Senate must institute changes by meticulously applying certain reforms and numerous mechanism that have proved effective in the past.

improve it, the confirmation wars must end and litigant needs should be paramount. The ideas seem complex, but most problems can be easily solved. Congress has faced worse issues, namely how to resolve large, increasingly complex dockets with few resources, by approving many slots, but the last thorough law passed in 1990. Federal Judgeship Act of 1990, Pub. L. No. 101-650, §§ 201-206, 104 Stat. 5089-5104. The ideas above address most issues that a bipartisan judiciary raises.