

FILLING THE SEVENTH CIRCUIT VACANCIES

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INTRODUCTION

In January 2016, President Barack Obama nominated Donald Schott and Myra Selby for empty judicial positions on the United States Court of Appeals for the Seventh Circuit. Schott is a very talented

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practitioner, who has efficaciously served as a well-respected partner of a major law firm for greater than thirty years. For instance, Schott has professionally worked on numerous complicated federal suits and a plethora of complex actions, many of which efforts concluded with alternative dispute resolution. Selby is concomitantly an exceptional lawyer, who has compiled a distinguished record in the public and private sectors. For example, the compelling prospect was the first African American to secure partnership with a substantial Indianapolis law firm, and the highly competent pick eventually became the first African-American and female justice on the Indiana Supreme Court.

Accordingly, prodigious White House endeavors to confirm both of these superior nominees were unsurprising. However, 2016 was a presidential election year when considerable delay suffused most appointments, a predicament that replacing United States Supreme Court Justice Antonin Scalia peculiarly compounded. Because the nominees were accomplished, consensus designees—and the tribunal must have its entire judicial complement to quickly, inexpensively, and equitably resolve a significant docket—their nomination and confirmation processes merit scrutiny as instructive cautionary tales.

This Article analyzes the comprehensive records which the nominees assembled, judicial selection under President Obama, and the Seventh Circuit that encounters Wisconsin and Indiana vacancies, the former of which is the country's most protracted unoccupied seat. The Article ascertains that both choices are excellent centrists and the court desperately needs all of its members. Nevertheless, Republican senators failed to cooperate, particularly after they had captured an upper chamber majority—a situation which the presidential election year aggravated—so neither possibility secured confirmation. The Article then reviews multiple implications for the appellate court and the selection process, deriving lessons from these cautionary tales. Because the appeals court requires jurists serving in all eleven of the active judgeships that Congress has authorized for the Seventh Circuit, the last section proffers numerous suggestions that will help place superb jurists in these essential vacancies.

I. THE NOMINEES' QUALIFICATIONS

A. *Donald Schott*

Schott is clearly equipped to be an outstanding Seventh Circuit member. When nominating the aspirant, President Obama praised Schott's "exceptional dedication to the legal profession" and considered him a "diligent, judicious and esteemed addition[]" to the court of

appeals.¹ Schott has been a partner in the well-regarded Quarles & Brady law firm for three decades.² Schott possesses comprehensive litigation experience with federal appellate and trial courts and has represented manifold clients in disputes which relate to an expansive spectrum of legal practice, including corporate governance, securities actions, environmental controversies, and health care.³ During 2001, Schott secured prestigious American College of Trial Lawyers induction as a Fellow.⁴ He earned a unanimously well-qualified rating—the highest classification—from the American Bar Association (ABA) Standing Committee, which evaluates and ranks nominees.⁵

Schott is a dynamic nominee who merits appointment. He resembles a number of distinguished, consensus Obama picks and Myra Selby, the other talented, moderate person receiving nomination the same day, who can furnish multiple advantages. Courts of appeals need their whole contingents to rapidly, economically, and fairly treat cascading dockets.⁶ Increased substantive and procedural expertise over a wide range of fields improves comprehension and disposition of critical questions which tribunals address. Nonetheless, the consideration which Republicans had accorded most Obama nominees indicated that Schott might encounter problems securing confirmation in 2016, and this possibility correspondingly materialized.

B. Myra Selby

Selby is especially qualified to be a Seventh Circuit jurist. In 1988, the nominee earned partnership in the highly-respected Ice Miller law firm, becoming the first African-American partner of a leading Indianapolis firm.⁷ Over 1993 and 1994, under Governor Evan Bayh,

1. Press Release, White House Office of the Press Sec'y, President Obama Nominates Two to Serve on the United States Court of Appeals (Jan. 12, 2016) [hereinafter White House Press Release], <https://obamawhitehouse.archives.gov/the-press-office/2014/11/12/president-obama-nominates-two-serve-united-states-courts-appeals> [<https://perma.cc/6WTX-VM45>].

2. *Id.*

3. *Id.*

4. *Id.*

5. ABA STANDING COMM. ON FED. JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES: 114TH CONGRESS (2016), <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/WebRatingChart114.authcheckdam.pdf> [<https://perma.cc/Q3M4-FGZ3>].

6. 160 CONG. REC. S5,364 (daily ed. Sept. 8, 2014) (statement of Sen. Leahy); Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2239–40, 2254 (2013).

7. White House Press Release, *supra* note 1; Press Release, Sen. Joe Donnelly, Donnelly Announces President's Nomination of Myra Selby to Fill Vacancy on U.S. Court of Appeals for Seventh Circuit (Jan. 12, 2016) [hereinafter Donnelly

Selby was the Director of Health Care Policy for the state of Indiana.⁸ The following year, the nominee became the first African-American and female member to serve on the Indiana Supreme Court.⁹ Across Selby's tenure on the court, the jurist wrote more than 100 majority opinions, which encompassed numerous landmark determinations involving medical malpractice and tort law reform questions.¹⁰ During 1999, the nominee retired from the Supreme Court and practiced once more with her law firm.¹¹

That year, after Selby had finished her preeminent service on the Indiana Supreme Court, the justices promptly appointed her the Chair of the Court's Commission on Race and Gender Fairness, for which she has professionally served as a prominent member ever since.¹² During her productive work on the commission, Selby spearheaded initiatives that would enhance the accessibility of the Indiana Supreme Court to the public through broadening outreach and educational activities.¹³ Upon rejoining Ice Miller, Selby engaged in a wide-ranging practice, which emphasized corporate internal investigations, appellate practice, complex litigation, risk management, compliance counseling, as well as strategic and other legal advice predicated on clear appreciation of related business goals throughout diverse industry sectors.¹⁴

Indiana Democratic Senator Joe Donnelly powerfully endorsed Selby and reiterated the candidate's excellent qualifications on the same day that President Obama tendered her nomination; the Senator urged that the Senate Judiciary Committee promptly accord Selby a hearing when he was introducing Winfield Ong—the preeminent Southern District of Indiana nominee—at the May hearing in which the prospect

Press Release], <https://www.donnelly.senate.gov/newsroom/press/donnelly-announces-presidents-nomination-of-myra-selby-to-fill-vacancy-on-us-court-of-appeals-for-seventh-circuit> [https://perma.cc/NN3M-QRP8].

8. White House Press Release, *supra* note 1.

9. *Id.*; Donnelly Press Release, *supra* note 7.

10. Donnelly Press Release, *supra* note 7; White House Press Release, *supra* note 1.

11. White House Press Release, *supra* note 1.

12. *Id.*; Myra C. Selby, ICE MILLER LEGAL COUNS., <http://www.icemiller.com/people/myra-c-selby/> [https://perma.cc/VNV5-WTM4] (last visited Mar. 11, 2017).

13. Myra C. Selby, *supra* note 12.

14. *Id.*; White House Press Release, *supra* note 1.

and Schott proffered testimony while answering questions.¹⁵ Selby earned a qualified rating from the ABA evaluation committee.¹⁶

Selby is a dynamic person who ought to be confirmed. The nominee resembles Schott—the other prominent Seventh Circuit aspirant whom President Obama simultaneously recommended¹⁷—and both resemble talented, mainstream, diverse Obama appointees who provide copious benefits. Appellate courts aim to have their entire cohorts swiftly, inexpensively, and equitably review voluminous caseloads.¹⁸ Increased diversity vis-à-vis ethnicity, gender, and sexual orientation can improve understanding and resolution of critical questions, which tribunals decide.¹⁹ Minority judges also reduce biases that erode justice.²⁰ However, the treatment that the Grand Old Party (GOP) had afforded a multitude of candidates whom President Obama nominated indicated that Selby could experience difficulties realizing 2016 approval, while this prospect concomitantly arose.

15. Donnelly Press Release, *supra* note 7; *Nominations: Full Committee*, S. COMM. ON JUDICIARY (May 18, 2016), <https://www.judiciary.senate.gov/meetings/05/18/2016/nominations> [<https://perma.cc/ZC6U-8APX>].

16. ABA STANDING COMM. ON FED. JUDICIARY, *supra* note 5.

17. White House Press Release, *supra* note 1. Schott received a May hearing—the same day as Southern District of Indiana nominee Winfield Ong—and a June 13-7 committee vote with no discussion, but Schott awaited a floor vote after then until the Senate adjourned on January 3, 2017. *Nominations: Full Committee*, *supra* note 15; *Nominations: Full Committee*, S. COMM. ON JUDICIARY (June 16, 2016), <https://www.judiciary.senate.gov/meetings/06/21/2016/nominations> [<https://perma.cc/N5Q8-HS2S>]; *see* 162 CONG. REC. S7,181, 7,183 (daily ed. Jan. 3, 2017) (showing Senate adjournment sine die and returning to the president all fifty-one circuit and district court nominees, including Schott and Selby).

18. *See* Tobias, *supra* note 6, at 2240.

19. Tribunals resolve controversial matters concerning issues, such as civil rights, employment discrimination, and abortion. SALLY J. KENNEY, GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER 40-43 (2013); FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 18 (2003). *But see* Stephen J. Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504, 521 (2011) (finding that gender generally does not affect judicial decision making).

20. MICHELE JAWANDO & BILLY CORRIHER, CTR. FOR AM. PROGRESS, MONEY, MORE PROBLEMS: FLEETING VICTORIES FOR DIVERSITY ON THE BENCH (2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/10/26055523/judicialDiversity-reportB.pdf> [<https://perma.cc/D9GA-KLE7>]. Federal courts whose members resemble the United States improve public confidence in the judiciary. 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); Tobias, *supra* note 6, at 2249.

II. OBAMA ADMINISTRATION JUDICIAL SELECTION

A. *National Selection*

The judicial selection process worked rather efficaciously across President Obama's initial six years when Democrats possessed a majority in the Senate.²¹ The White House aggressively consulted home-state political officials—especially Republicans—soliciting, and usually naming, proposals of strong, mainstream, diverse nominees.²² These initiatives prompted collaboration, as legislators who represent states having vacancies enjoyed deference because they could impede the process through retaining “blue slips.”²³ Even with assiduous cultivation of the political actors, many senators did not cooperate, declining to forward able people.²⁴ Some members proposed none or very few.²⁵

The GOP coordinated about scheduling and conducting routine hearings, yet “held over” discussions and committee votes a week for all but one in sixty-plus excellent, moderate circuit aspirants.²⁶ Republicans slowly concurred on numerous picks' final debates and floor ballots, relegating superb centrists to languish for weeks until Democrats pursued cloture.²⁷ The GOP also sought plentiful roll call votes and debate time for impressive, mainstream candidates; many of the nominees readily won appointment, thereby consuming scarce floor hours.²⁸ Those procedures actually roiled confirmations, leaving some

21. Sheldon Goldman et al., *Obama's First Term Judiciary*, 97 JUDICATURE 7 (2013); Tobias, *supra* note 6, at 2239–50.

22. Tobias, *supra* note 6, at 2239–40; *see* Goldman et al., *supra* note 21, at 8–17.

23. Ryan Owens et al., *Ideology, Qualifications, and Covert Senate Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347, 369–70; Tobias, *supra* note 6, at 2242.

24. Tobias, *supra* note 6, at 2240, 2251; *see* 161 CONG. REC. S6,151 (daily ed. July 30, 2015) (statement of Sen. Schumer).

25. Goldman et al., *supra* note 21, at 17; *John Cornyn and Ted Cruz's Texas: A State of Judicial Emergency*, ALLIANCE FOR JUST., <http://www.afj.org/our-work/issues/judicial-selection/texas-epicenter-of-the-judicial-vacancy-crisis> [https://perma.cc/8HEK-28PE] (last updated Sept. 6, 2016).

26. *Executive Business Meeting*, S. COMM. ON JUDICIARY (Mar. 22, 2013), https://www.judiciary.senate.gov/meetings/rescheduled_-_executive-business-meeting-2013-03-22 [https://perma.cc/EE8F-EUD2]; *see* Tobias, *supra* note 6, at 2242–43.

27. Tobias, *supra* note 6, at 2243–46; Goldman et al., *supra* note 21, at 26–29.

28. Tobias, *supra* note 6, at 2244; *see* Juan Williams, Opinion, *The GOP's Judicial Logjam*, THE HILL (July 27, 2015, 6:00 AM), <http://thehill.com/opinion/juan-williams/249196-juan-williams-the-gops-judicial-logjam> [https://perma.cc/7AK7-FX49].

twenty appellate court openings for virtually a half decade following August 2009.²⁹

Over the 2012 presidential election year, these Republican strategies grew.³⁰ Delay prevailed, while chamber appellate court ballots halted after June.³¹ With President Obama's reelection, Democrats were cautiously optimistic about greater collaboration—which failed to materialize—and resistance soared the next year when he proffered three exceptional, moderate, diverse nominees for the D.C. Circuit, the second most important tribunal.³² The GOP would not agree to floor votes, while prolonged recalcitrance motivated Democrats to carefully explode the “nuclear option” that limited filibusters.³³

In 2015, after Republicans captured a Senate majority,³⁴ already negligible coordination diminished even further. The GOP leadership incessantly promised that it would again bring to the chamber “regular order,” the system which applied before Democrats ostensibly eroded the regime.³⁵ That January, Senator Mitch McConnell (R-Ky.), now the Majority Leader, proclaimed: “We need to return to regular order.”³⁶

29. For a list of the appellate court openings from 2009–2014, see generally *Archive of Judicial Vacancies*, U.S. CTS. [hereinafter *Judicial Vacancies*], <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> [https://perma.cc/9BZD-SUM2] (last visited Mar. 12, 2017).

30. Tobias, *supra* note 6, at 2246.

31. Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L.J. 121, 127 (2015).

32. *Id.* at 141; see also Jeffrey Toobin, *The Obama Brief*, NEW YORKER, Oct. 27, 2014, at 24.

33. Tobias, *supra* note 31, at 128, 131. In 2013–2014, the 113th Senate confirmed more than 130 judges. See generally *Judicial Vacancies*, *supra* note 29 (years 2013–2014). Republicans compelled Democrats to pursue cloture on all nominees from November 2013 when Democrats detonated the nuclear option until 2015 when the GOP recaptured the Senate majority. 161 CONG. REC. S3,223 (daily ed. May 21, 2015) (statement of Sen. Leahy).

34. Jerry Markon et al., *Republicans Win Senate Control as Polls Show Dissatisfaction with Obama*, WASH. POST (Nov. 4, 2014), https://www.washingtonpost.com/politics/senate-control-at-stake-in-todays-midterm-elections/2014/11/04/e882353e-642c-11e4-bb14-4cfea1e742d5_story.html?utm_term=.cb8b956552dd [https://perma.cc/UYM5-ZEHS]; Jonathan Weisman & Ashley Parker, *G.O.P. Takes Senate*, N.Y. TIMES, Nov. 5, 2014, at A1.

35. 161 CONG. REC. S27–28 (daily ed. Jan. 7, 2015) (statement of Sen. McConnell).

36. *Id.* He repeated the mantra throughout the 114th Congress. 161 CONG. REC. S2,767 (daily ed. May 12, 2015) (statement of Sen. McConnell); see MITCH MCCONNELL, *THE LONG GAME 2* (2016). *But see* 161 CONG. REC. S2,949 (daily ed. May 18, 2015) (statement of Sen. Reid); 160 CONG. REC. S5,364 (daily ed. Sept. 8, 2014) (statement of Sen. Leahy) (discussing GOP refusal to process judicial nominees and the protracted length of pending nominations).

Senator Chuck Grassley (R-Iowa), the new Judiciary Chair, vowed that he would analogously evaluate submissions.³⁷ Despite multiple pledges, Republicans slowly tendered individuals for Obama to consider and nominate and slowly arranged hearings, committee ballots, chamber debates, and floor votes.³⁸ Upon 2015's conclusion, this meant that eight of nine appeals court vacancies lacking nominees—which the Administrative Office of the U.S. Courts (AO) identified as emergencies—plagued jurisdictions represented by GOP members.³⁹

One jurist secured circuit appointment over 2015. During November 2014, President Obama recommended Kara Fernandez Stoll—an experienced, mainstream counsel—and District Judge Felipe Restrepo—a distinguished, consensus jurist—as nominees to the Federal and Third Circuits.⁴⁰ Stoll's March 2015 hearing proceeded smoothly;

37. *Nominations: Full Committee*, S. COMM. ON JUDICIARY (Jan. 21, 2015), <https://www.judiciary.senate.gov/meetings/nominations-2015-01-21> [<https://perma.cc/PZ5C-BEPU>]; David Catanese, *Chuck Grassley's Gavel Year*, U.S. NEWS & WORLD REP. (Jan. 28, 2015, 12:01 AM), <https://www.usnews.com/news/articles/2015/01/28/chuck-grassleys-gavel-year> [<https://perma.cc/XX3F-EXMH>].

38. Carl Tobias, *Confirming Circuit Judges in a Presidential Election Year*, 84 GEO. WASH. L. REV. ARGUENDO 160, 166 (2016).

39. “Republican senators minimally cooperated, so Obama” decided to recommend no 2015 candidate. Carl Tobias, *Confirm Judge Koh for the Ninth Circuit*, 73 WASH. & LEE L. REV. ONLINE 449, 455 n.24 (2016), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1062&context=wlu-r-online> [<https://perma.cc/X4VE-QJQM>]. However, the President did nominate seven prospects throughout 2016, four of whom never received hearings because home-state senators refused to deliver blue slips for Third Circuit nominee Rebecca Ross Haywood, Sixth Circuit nominee Lisabeth Tabor Hughes, Eleventh Circuit nominee Abdul Kallon, nor Selby. *Toomey's Statement on the Nomination of Rebecca Haywood to the Third Circuit*, PAT TOOMEY (Mar. 16, 2016), <http://www.toomey.senate.gov/?p=news&id=1702> [<https://perma.cc/8T67-W8JG>]; Jonathan Tamari & Jeremy Roebuck, *Obama's Pick For Judgeship Here Draws Toomey's Ire*, PHILA. INQUIRER, http://www.philly.com/philly/news/politics/20160316_Obama_nominates_Pittsburgh_federal_prosecutor_for_Third_Circuit_vacancy.html [<https://perma.cc/T93Q-SXSC>] (last updated Mar. 15, 2016, 8:45 PM); Joseph Gerth, *McConnell Rejects Obama Choice of KY Judge*, COURIER-J., Mar. 18, 2016, at A5; Mary Troyan, *Obama Appoints Judge Abdul Kallon to 11th Circuit*, MONTGOMERY ADVERTISER, <http://www.montgomeryadvertiser.com/story/news/2016/02/11/obama-appoints-judge-abdul-kallon-11th-circuit/80253358/> [<https://perma.cc/JU8L-FAFC>] (last updated Feb. 12, 2016, 1:15 PM); *infra* note 62; *see infra* notes 131–132 and accompanying text. The Administrative Office is the federal courts' administrative arm, which premises designations of judicial emergencies on the prolonged length of openings and on conservative estimates of work and caseloads. *See generally Judicial Vacancies, supra* note 29.

40. Press Release, White House Office of the Press Sec'y, President Obama Nominates Two to Serve on the United States Courts of Appeals (Nov. 12, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/12/president-obama-nominates-two-serve-united-states-courts-appeals> [<https://perma.cc/47G5-P3VZ>].

the panel granted the nominee a late April ballot.⁴¹ In June, Senator McConnell suggested that circuit prospects' appointments would cease.⁴² Senator Harry Reid (D-Nev.), the Minority Leader, then excoriated Senator McConnell for abdication of his constitutional obligation by arranging no Senate ballot.⁴³ Senator Patrick Leahy (D-Vt.), the Ranking Member, correspondingly denounced the failure to approve a nominee in weeks, especially Stoll, which might have provoked her salient July 95-0 vote.⁴⁴

Restrepo's canvass was painfully slow. The astute centrist waited 200 days on a hearing because Senator Pat Toomey (R-Pa.) retained the blue slip until May 2015, as compared with Senator Bob Casey (D-Pa.), who delivered his in November 2014.⁴⁵ The June hearing progressed successfully; Senator Toomey proffered support and Restrepo efficaciously fielded questions propounded.⁴⁶ Restrepo was

41. *Hearing on Nominations Before the S. Judiciary Comm.*, 114th Cong. (Mar. 11, 2015) (statement of Sen. Chuck Grassley, Chairman, S. Comm. On Judiciary), <https://www.judiciary.senate.gov/imo/media/doc/03-11-15%20Grassley%20Statement.pdf> [<https://perma.cc/2S3L-LNUQ>]; *Results of Executive Business Meeting*, S. JUDICIARY COMM., 114TH CONG. (Apr. 23, 2015), <https://www.judiciary.senate.gov/imo/media/doc/Results%20of%20Executive%20Business%20Meeting%20-%20April%202015.pdf> [<https://perma.cc/ZVF4-ALDE>].

42. McConnell never elucidated precisely what he was saying related to appellate confirmations. Burgess Everett & Nick Gass, *McConnell Vows to Slow Judicial Nominees*, POLITICO, <http://www.politico.com/story/2015/06/mitch-mcconnell-judicial-nominations-118674> [<https://perma.cc/83YZ-TYB5>] (last updated June 5, 2015, 1:06 PM). *But see* Alexander Bolton, *McConnell Backs Away from Judicial Shutdown Talk*, THE HILL (June 6, 2015, 1:05 PM), <http://thehill.com/homenews/senate/244196-mcconnell-backs-away-from-judicial-shutdown-talk> [<https://perma.cc/9S5J-3SK9>] (McConnell denying the existence of a freeze on nominations and claiming the Senate would continue to process judges).

43. Reid urged that McConnell would "not even [approve] a consensus nominee [like] Kara Stoll," recounting the Kentucky senator's floor pleas to swiftly confirm Bush 2008 appellate court nominees. 161 CONG. REC. S3,849-50 (daily ed. June 8, 2015) (statement of Sen. Reid) [hereinafter Reid Statement].

44. 161 CONG. REC. S4,591 (daily ed. June 24, 2015); 161 CONG. REC. S4,678 (daily ed. July 7, 2015) (Stoll vote).

45. Jonathan Tamari, *A Judicial Nominee Waits; Toomey Gets Blamed*, PHILA. INQUIRER, http://www.philly.com/philly/news/local/20150508_A_judicial_nominee_waits_toomey_gets_blamed.html [<https://perma.cc/WU8G-TJ2W>] (last updated May 8, 2015, 1:08 AM). *But see* Pat Toomey, *I Am Not Delaying Judge L. Felipe Restrepo's 3rd Circuit Nomination*, PITTSBURGH POST-GAZETTE (May 13, 2015, 12:00 AM), <http://www.post-gazette.com/opinion/letters/2015/05/13/I-am-not-delaying-Judge-L-Felipe-Restrepo-s-3rd-Circuit-nomination/stories/201505130068> [<https://perma.cc/6H8K-DP5G>] (Toomey rejecting the assertion that he delayed Restrepo's nomination and claiming that the senator retained his blue slip because the Judiciary Committee background investigation was not yet complete).

46. *Nominations: Full Committee*, S. COMM. ON JUDICIARY (June 10, 2015), <https://www.judiciary.senate.gov/meetings/nominations-06-10-15> [<https://perma.cc/VCR6-2YXT>]. Republicans held over Restrepo until the subsequent

only confirmed on January 11, 2016.⁴⁷ Senate approval of merely two circuit nominees was practically unprecedented: over 2007–2008, the Democratic Senate majority helped confirm ten George W. Bush appeals court picks and, in 1988, six appellate choices whom President Ronald Reagan had mustered *and* Supreme Court Justice Anthony Kennedy.⁴⁸

In short, the national appointments process during President Obama’s tenure was characterized by much partisanship, stalling, and obstruction. These phenomena were especially prevalent when the Senate scrutinized nominees for appellate vacancies. Circuits include multiple jurisdictions and are courts of last resort for ninety-nine percent of appeals—which encompass questions concerning matters that involve abortion, constitutional law, and separation of powers.

B. *The Wisconsin Vacancy*

One especially troubling vacancy was a Seventh Circuit Wisconsin position, and endeavors to fill it are symptomatic of the “confirmation wars,” as the empty judgeship has become the longest current appellate vacancy.⁴⁹ On July 14, 2010, President Obama nominated University of Wisconsin Law School Professor Victoria Nourse, declaring that “[t]hroughout her career[,] Victoria Nourse has shown a commitment to justice”⁵⁰ The Judiciary panel failed to arrange a hearing

meeting, but the committee unanimously approved the nominee on a voice vote without dissent. *Executive Business Meeting*, S. COMM. ON JUDICIARY (June 25, 2015), <https://www.judiciary.senate.gov/meetings/executive-business-meeting-06-25-15> [<https://perma.cc/HEE8-KG6H>]; *Executive Business Meeting*, S. COMM. ON JUDICIARY (July 9, 2015), <https://www.judiciary.senate.gov/meetings/executive-business-meeting-07-09-15> [<https://perma.cc/PUX4-JJAK>]; see Carl Tobias, *Confirming Judge Restrepo to the Third Circuit*, 88 TEMPLE L. REV. ONLINE 37, 45–46 (2017), <http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2369&context=law-faculty-publications> [<https://perma.cc/EL9K-AEZE>].

47. No defensible reason supported Restrepo’s prolonged confirmation for an emergency vacancy. 162 CONG. REC. S21 (daily ed. Jan. 11, 2016); *supra* text accompanying notes 40, 44 (contrasting Stoll’s expeditious approval).

48. See generally *Judicial Vacancies*, *supra* note 29 (years 1988 and 2007–2008); Christopher Kang, *Republican Obstruction of Courts Could Be the Worst Record Since the 1800s*, HUFFINGTON POST (Apr. 20, 2016, 3:31 PM), http://www.huffingtonpost.com/christopher-kang/republican-obstruction-of_b_9741446.html [<https://perma.cc/6DQY-5YJ3>] (suggesting that 2016 could witness the fewest appellate confirmations since 1897–1898 when Congress had authorized merely 25 circuit judgeships for the appeals courts rather than the present 179).

49. Carl Tobias, *Confirm Schott for 7th Circuit Court*, MILWAUKEE J. SENTINEL (Dec. 8, 2016, 4:55 PM), <http://www.jsonline.com/story/opinion/2016/12/08/tobias-confirm-schott-th-circuit-court/95161594/> [<https://perma.cc/2THC-UN4P>].

50. *Press Release – President Obama Names Victoria F. Nourse to U.S. Court of Appeals*, AM. PRESIDENCY PROJECT (July 14, 2010),

during 2010, while the “Senate returned pending judicial nominations, including Nourse’s, to Obama at the end of [the] year.”⁵¹

President Obama actually mustered Nourse’s re-nomination on January 5, 2011, the same day that Senator Ron Johnson (R-Wis.), who defeated Democrat Russ Feingold the preceding November, was sworn into office.⁵² The White House purportedly failed to consult Senator Johnson, who refused to deliver his blue slip because of this perceived slight and because Nourse putatively lacked many substantive ties to the Wisconsin legal community.⁵³ The Judiciary panel honored the blue slip tradition by eschewing a hearing; thus, in January 2012, Nourse asked that the President remove her from Senate consideration.⁵⁴

After Nourse withdrew, Senator Johnson decided to revamp the system—that made proposals for Wisconsin federal court nominees—by disbanding the longstanding, efficacious Wisconsin selection panel and

<http://www.presidency.ucsb.edu/ws/index.php?pid=122189> [https://perma.cc/8UY2-WUEZ]. Nourse was one of four candidates whom Democratic Senators Russ Feingold and Herb Kohl recommended to President Obama. Bruce Vielmetti, *7th Circuit Nominee Worth \$19.8 Million*, MILWAUKEE J. SENTINEL (Aug. 19, 2010), <http://archive.jsonline.com/blogs/news/101031424.html> [https://perma.cc/5ELT-7CY4].

51. Ed Whelan, *The Blue-Slip Privilege and Seventh Circuit Nominee Victoria Nourse*, NAT’L REV. (July 25, 2011, 3:15 PM), <http://www.nationalreview.com/bench-memos/272670/blue-slip-privilege-and-seventh-circuit-nominee-victoria-nourse-ed-whelan> [https://perma.cc/6VPZ-GKKL] (asserting that Senator Johnson’s blue slip retention was a conventional, accepted use of the policy); see 156 CONG. REC. 23,566 (Dec. 22, 2010). *But see* Letter from Bruce Ackerman et al., to Sens. Patrick Leahy & Chuck Grassley on Victoria Nourse (July 14, 2011) [hereinafter Letter] (arguing that Senator Johnson’s retention of Nourse’s blue slip was procedurally flawed and effectively a “one-person filibuster”).

52. *Nominations Submitted to the Senate*, 138 PUB. PAPERS 1, 781–82 app. b (Jan. 5, 2011); Whelan, *supra* note 51.

53. Craig Gilbert, *Ron Johnson ‘Filibuster’ of Nourse Nomination to Federal Bench Draws Fire*, MILWAUKEE J. SENTINEL (July 18, 2011), <http://archive.jsonline.com/blogs/news/125741928.html?page=1&viewAll=1> [https://perma.cc/992V-NZE3]; Ron Johnson, Opinion, *Cooperation Only Goes So Far with Sen. Tammy Baldwin*, MILWAUKEE J. SENTINEL (Mar. 11, 2016), <http://archive.jsonline.com/news/opinion/cooperation-only-goes-so-far-with-sen-tammy-baldwin-b99685832z1-371825211.html> [https://perma.cc/NB83-XWGR]. *But see* Letter, *supra* note 51 (suggesting that the White House did consult with Senator Johnson).

54. For honoring the blue slip tradition by eschewing a hearing, see Whelan, *supra* note 51. *See also supra* note 24. *But see* Letter, *supra* note 51 (arguing that Senator Johnson’s retention of Nourse’s blue slip was procedurally flawed and effectively a “one-person filibuster”). For Nourse’s request that President Obama remove her from Senate consideration, see Jennifer Bendery, *Get in Line SCOTUS. This Court Has Been Waiting 2,296 Days For a Judge.*, HUFFINGTON POST (Apr. 21, 2016, 3:32 PM), http://www.huffingtonpost.com/entry/ron-johnson-circuit-court-vacancy_us_5717c796e4b0479c59d6bcef [https://perma.cc/3VJ8-LJMK]; Bruce Vielmetti, *Nourse Asks Obama to Withdraw Her Nomination to Federal Appeals Court*, MILWAUKEE J. SENTINEL (Jan. 19, 2012), <http://archive.jsonline.com/blogs/news/137702938.html> [https://perma.cc/23JB-M4MB].

by cooperating with Senator Tammy Baldwin (D-Wis.) to institute another entity.⁵⁵ Forming that panel consumed a year, although Senator Johnson then required that the commission only act on the unfilled Seventh Circuit post *after* President Obama had finished nominations for two Wisconsin district openings; this effort consumed one more year, so the panel ultimately solicited applications in July 2014, while evaluating and interviewing eight finalists that November.⁵⁶ However, the panel was unable to reach consensus on four selections and duly informed Senators Johnson and Baldwin of that resolution during January 2015. Once the commission process stalled, Senator Baldwin attempted to collaborate with Senator Johnson on addressing the impasse.⁵⁷ Because they could not agree, Senator Baldwin sent the White House the names of the eight finalists, which infuriated Senator Johnson.⁵⁸ He characterized Senator Baldwin's move as "partisan," considered each finalist "tainted," and urged that the selection process recommence.⁵⁹ The stalemate continued until President Obama picked Schott in early January 2016.⁶⁰

55. Senators of the party which controlled the presidency had more power. Annie L. Owens, "All Politics Is Local": *The Politics of Merit-Based Federal Judicial Selection in Wisconsin*, 88 MARQ. L. REV. 1031, 1044 (2005); Bendery, *supra* note 54; Michael Grunwald, *Did Obama Win the Judicial Wars?*, POLITICO (Aug. 8, 2016, 5:25 AM), <http://www.politico.com/story/2016/08/obama-courts-judicial-legacy-226741> [https://perma.cc/Y73L-YJMK]; Johnson, *supra* note 53.

56. For Senator Johnson's machinations which consumed two years, see Bendery, *supra* note 54. *See also* Press Release, Sen. Ron Johnson, Wisconsin Senators Announce Agreement on Wisconsin Judicial Commission to Move Federal Nominations Forward (Apr. 17, 2013), <https://www.ronjohnson.senate.gov/public/index.cfm/2013/4/wisconsin-senators-announce-agreement-on-wisconsin-judicial-commission-to-move-federal-nominations-forward> [https://perma.cc/54HZ-ZN2N]. For panel solicitation and interviews, see Bendery, *supra* note 54; *Nominating Commission Seeks Applicants for Judicial Vacancy on the Seventh Circuit Court of Appeals*, ST. BAR WIS. (July 25, 2014), <http://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=11704> [https://perma.cc/ZG5P-3QCM].

57. Craig Gilbert, *Tammy Baldwin, Ron Johnson Spar Over Judicial Candidates*, MILWAUKEE J. SENTINEL (May 8, 2015), <http://archive.jsonline.com/news/statepolitics/tammy-baldwin-ron-johnson-spar-over-judicial-candidates-b99496806z1-303145491.html> [https://perma.cc/2GQS-LR3Q].

58. Patrick Marley, *Ron Johnson Says Russ Feingold is 'Addicted' to Politics*, MILWAUKEE J. SENTINEL (May 16, 2015), <http://archive.jsonline.com/news/statepolitics/ron-johnson-russ-feingold-is-addicted-to-politics-b99501623z1-304010451.html> [https://perma.cc/W3N8-6MEG].

59. Bendery, *supra* note 54. Senator Johnson remarked that he agreed to send the White House the two candidates who had secured five commission votes. *Id.*

60. Craig Gilbert, *Obama Nominates Madison Lawyer for 7th Circuit Vacancy*, MILWAUKEE J. SENTINEL (Jan. 12, 2016), <http://archive.jsonline.com/news/statepolitics/obama-nominates-madison-lawyer-for-7th-circuit-vacancy-b99650722z1-365064531.html> [https://perma.cc/RX2M-GKHH].

C. The Indiana Vacancy

During March 2014, it became public that Seventh Circuit Judge John Tinder would retire promptly upon his sixty-fifth birthday, which professionally granted Senator Donnelly, his Republican counterpart Senator Dan Coats, and the White House considerable time for nominating and confirming a worthy successor, although the President only nominated Selby early in January 2016.⁶¹

On the same day that the White House nominated Selby, Senator Coats released a press statement in which he directly “reiterated his call for the establishment of an Indiana Federal Nominating Commission to make recommendations on this and other judicial vacancies affecting the Hoosier state.”⁶² The press release contended that the Senator had first suggested adopting a judicial selection panel during May 2015.⁶³ Senator Coats asserted that Indianans would be served most effectively with a “nomination process that is taken completely out of politics,” arguing that considerable time remained to fashion equitable procedures across the 114th Congress and claiming that the initiative that he envisioned ought to address the Selby nomination.⁶⁴ Senator Coats distinctly maintained that these selection commissions had a lengthy pedigree in the state, praising the 1980 creation by Indiana Republican Senators Richard Lugar and Dan Quayle of the “Indiana Merit Commission on Federal Judicial Appointments.”⁶⁵ Senator Coats

61. David Lat & Staci Zaretsky, *Rejection Letter of the Day: You Can't Clerk for Me Because...I'm Quitting!*, ABOVE THE LAW (Mar. 3, 2014, 6:31 PM), <http://abovethelaw.com/2014/03/rejection-letter-of-the-day-you-cant-clerk-for-me-because-im-quitting/> [https://perma.cc/U9HY-CL3R]; Dave Stafford, *Judge Tinder's Retirement Plans Leaked*, IND. LAW. (Mar. 12, 2014), <http://www.theindianalawyer.com/judge-tinders-retirement-plans-leaked/PARAMS/article/33639> [https://perma.cc/R34H-9CH5]; see generally *Judicial Vacancies*, supra note 29 (for the 2017 year). See also Carl W. Tobias, *Confirm Myra Selby for the Seventh Circuit*, 92 IND. L.J. ONLINE 27, 28–30 (2016).

62. Dan Coats, *Coats Responds to President's Nominations for Indiana Judicial Vacancies*, VOTE SMART (Jan. 12, 2016), https://votesmart.org/public-statement/1052149/coats-responds-to-presidents-nominations-for-indiana-judicial-vacancies#.WLdf_hiZNE4 [https://perma.cc/EZM2-EAQZ]; Maureen Groppe, *Obama Nominates Indiana Lawyers to Federal Bench*, INDYSTAR (Jan. 12, 2016, 8:09 PM), <http://www.indystar.com/story/news/politics/2016/01/12/obama-nominates-indiana-lawyers-federal-bench/78710858/> [https://perma.cc/9AJE-V7TZ]. Ironically, Coats did not insist that Southern District of Indiana nominee Winfield Ong be subjected to a commission process, even though he and Selby were nominated the same day. Coats, supra. In fairness, Ong was nominated to a district court vacancy, which many senators consider less important, and the vacancy was a judicial emergency, which required considerably more expeditious nomination and confirmation. See supra note 15 and accompanying text.

63. Coats, supra note 62.

64. *Id.*

65. *Id.*

admonished that the entity “recruited, interviewed, investigated and made final” proposals on choices for federal selections across two decades.⁶⁶ Following Selby’s January 12 nomination, Senator Coats steadfastly defended this position and rejected delivery of his blue slip that the Judiciary Committee mandates before the nominee’s hearing can proceed, so that the Senator essentially imposed a one-member veto upon Selby’s candidacy.⁶⁷

D. 2016 Selection

2016 was a presidential election year. During these years, appointments customarily stall and halt, factors which were intensified by the GOP’s refusal to process United States Court of Appeals for the District of Columbia Circuit Chief Judge Merrick Garland, Obama’s High Court aspirant.⁶⁸ These phenomena may have confounded all circuit appointments. Nevertheless, conventions have allowed prominent, moderate court of appeals nominees to realize votes following May.⁶⁹ The Senate helped confirm eleven Bush *père* 1992 nominees (six after June); two whom President Bill Clinton marshaled in January 1996 with eight for 2000 (one past June); and five whom President George H. W. Bush drafted over 2004 with four more coming in 2008 (none following June either year).⁷⁰ All save the last were the very precedents Senators McConnell and Arlen Specter (Pa.)

66. *Id.*

67. Marilyn Odendahl, *Indiana’s Judicial Nominees Headed Toward Disappointment*, IND. LAW. (Dec. 28, 2016), <http://www.theindianalawyer.com/indianas-judicial-nominees-headed-toward-disappointment/PARAMS/article/42372> [https://perma.cc/83BP-3AXJ] [hereinafter Odendahl, *Disappointment*]; Marilyn Odendahl, *Time Running Out to Get Indiana Judicial Nominees Confirmed*, IND. LAW. (July 14, 2016), <http://www.theindianalawyer.com/time-running-out-to-get-indiana-judicial-nominees-confirmed/PARAMS/article/40891> [https://perma.cc/BZY6-BNPM]; see Owens et al., *supra* note 23; Tobias, *supra* note 6, at 2242–43.

68. Russell Wheeler, *The “Thurmond Rule” and Other Advice and Consent Myths*, BROOKINGS (May 25, 2016), <https://www.brookings.edu/blog/fixgov/2016/05/25/the-thurmond-rule-and-other-advice-and-consent-myths/> [https://perma.cc/66DD-EG59]; Michael D. Shear et al., *Obama Pick Engages Supreme Court Battle*, N.Y. TIMES, Mar. 17, 2016, at A1.

69. See *supra* note 68. Republican obstruction of Chief Judge Merrick Garland slowed Senate consideration of Schott. 162 CONG. REC. S1,527 (daily ed. Mar. 16, 2016); S. COMM. ON JUDICIARY, EXECUTIVE BUSINESS MEETING (Mar. 17, 2016) (statement of Sen. Chuck Grassley); S. COMM. ON JUDICIARY, EXECUTIVE BUSINESS MEETING (Mar. 17, 2016) (statement of Sen. Patrick Leahy); S. COMM. ON JUDICIARY, EXECUTIVE BUSINESS MEETING (May 19, 2016) (statement of Sen. Chuck Grassley); S. COMM. ON JUDICIARY, EXECUTIVE BUSINESS MEETING (May 19, 2016) (statement of Sen. Patrick Leahy).

70. See generally *Judicial Vacancies*, *supra* note 29 (for the years 1992, 1996, 2000, 2004, and 2008).

invoked when strenuously urging rapid consideration of Bush 2008 nominees.⁷¹ Across President Bush's final (a presidential election) year, the Democratic majority confirmed four nominees.⁷² In fact, Fourth Circuit Judge Steven Agee's March candidacy, with approval nine weeks later, was particularly relevant.⁷³ Five Obama 2012 choices enjoyed appointment before June 13.⁷⁴

In short, confirming one appeals court judge in 2015 and another on January 11, 2016 contrasts with Democrats' approving ten in the comparable juncture of Bush's presidency. The statistics portended ominously for 2016, while Republicans did not substantially accelerate the pace in President Obama's final year to match confirmations secured during 2007–2008, particularly by finishing review of Schott or Selby and the other candidates proposed during that year.

III. REASONS FOR, IMPLICATIONS OF, AND LESSONS FROM PROBLEMATIC SELECTION

The explanations for the problematic state of judicial selections are complex,⁷⁵ yet observers attribute the “confirmation wars” to D.C. Circuit Judge Robert Bork's 1987 attempted Court appointment.⁷⁶ They detect that the regime has collapsed—as manifested through corrosive politicization, systemic paybacks, and stunning divisiveness in which each party constantly ratchets up the stakes—amply demonstrated by persistent GOP rejection of the 2016 Supreme Court nominee's assessment.⁷⁷

71. 154 CONG. REC. S6,894–98 (daily ed. July 17, 2008) (statements of Sens. Arlen Specter and Mitch McConnell); *see* Reid Statement, *supra* note 43.

72. Six more Bush circuit nominees captured approval during 2007. U.S. CTS., JUDICIAL CONFIRMATIONS – 110TH CONG. (2009).

73. Press Release, White House Office of the Press Sec'y, Nominations and Withdrawals Sent to the Senate (Mar. 13, 2008), <https://georgewbush-whitehouse.archives.gov/news/releases/2008/03/20080313-11.html> [<https://perma.cc/6WGS-6LGK>]; U.S. CTS., *supra* note 72.

74. No more votes ensued; Republicans required that five accomplished, consensus nominees wait until 2013 for confirmation. *See generally* *Judicial Vacancies*, *supra* note 29 (for the years 2012 and 2013).

75. Professors and lawmakers debate whether judicial selection has always been complex. Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice: Federal Judicial Selection, 1789, 1861*, 100 IOWA L. REV. 551 (2014); Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL'Y 1035 (2009).

76. ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989); MARK GITENSTEIN, *MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT* (1992).

77. The latest battles in the confirmation wars commenced with allegations that Democrats delayed Bush's last two years and the GOP retaliated with

The consequences are grim. The drastically limited confirmation activity since 2015 means the judiciary has nineteen circuit and forty-eight emergency openings.⁷⁸ The bench could only face the rather “few” vacancies *after* Democrats mustered the nuclear option that restricted lower court filibusters.⁷⁹ However, chamber inaction since January 2015 remarkably multiplied openings and emergencies, which President Donald Trump and the 115th Senate will confront across this year.⁸⁰ This could mean that the Seventh Circuit will have more than the current two vacancies, if other judges retire or assume senior status.

Delayed approvals have numerous critical adverse impacts.⁸¹ They make nominees leave vibrant careers on hold and can prevent many fine aspirants from envisioning court service, particularly attorneys with clients, like Schott and Selby.⁸² Interminable reviews deprive circuit tribunals of necessary judicial resources and myriad litigants of justice.⁸³ These detrimental effects also undermine public respect for

unprecedented delay in Obama’s time. Democrats then exploded the nuclear option which enabled the Senate to promptly confirm many judges, especially in 2014’s lame duck session. The GOP next drastically slowed all nominees and recently ignited the nuclear option for Supreme Court nominees. *See supra* Part II; *see also* Matt Flegenheimer, *Republicans Gut Filibuster Rule to Lift Gorsuch*, N.Y. TIMES, Apr. 7, 2017, at A1.

78. The latter dramatically rose from twelve in January 2015 to forty-eight. *See generally Judicial Vacancies, supra* note 29 (for the year 2017 and for emergencies); *see* Whelan, *supra* note 51; Eric Lipton & Jeremy W. Peters, *Conservatives Press Overhaul in the Judiciary*, N.Y. TIMES, Mar. 19, 2017, at A1; Joe Palazzolo, *Obama’s Successor Will Likely Fill Dozens of Judicial Vacancies*, WALL ST. J. (Mar. 18, 2016, 6:32 PM), <https://www.wsj.com/articles/obamas-successor-will-likely-fill-dozens-of-judicial-vacancies-1458340351> [<https://perma.cc/EXA4-HPZY>].

79. Carl Hulse, *Exiting Reid Offers Advice on Filibusters*, N.Y. TIMES, Sept. 1, 2016, at A16; *see supra* notes 32–33.

80. *See generally Judicial Vacancies, supra* note 29 (for the year 2017). Chief Judge Diane Wood has remarked that additional vacancies could plague Seventh Circuit case management. Pamela Manson, *Vacancies on Bench Cause Concern*, CHI. DAILY L. BULL. (May 3, 2016), <http://www.chicagolawbulletin.com/Archives/2016/05/03/Supreme-Court-vacancies-5-3-16.aspx> [<https://perma.cc/Z5QJ-CP8X>].

81. Tobias, *supra* note 6, at 2253; *see* 160 CONG. REC. S5,364 (daily ed. Sept. 8, 2014) (statement of Sen. Leahy).

82. *See* Andrew Cohen, *In Pennsylvania, the Human Costs of Judicial Confirmation Delays*, ATLANTIC (Sept. 10, 2012), <https://www.theatlantic.com/politics/archive/2012/09/in-pennsylvania-the-human-costs-of-judicial-confirmation-delays/261862/> [<https://perma.cc/UE9Z-J7FV>]; Palazzolo, *supra* note 78.

83. JOHN ROBERTS, 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2010), <https://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf> [<https://perma.cc/R9Y9Z-QXL5>]; Tobias, *supra* note 6, at 2253; Jennifer Bendery, *Federal Judges Are Burned Out, Overworked and Wondering Where Congress Is*, HUFFINGTON POST, http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_us_55d77721e4b0a40aa3aaf14b [<https://perma.cc/84RW-F9P9>] (last updated Oct. 1, 2015).

the selection process and the government.⁸⁴ Few courts of appeals confront difficulties so grave as the Seventh Circuit, which receives numerous appeals that can demand protracted time.⁸⁵ More specifically, the prolonged Wisconsin and Indiana openings limit the states' representation on the court by active circuit judges, intensify problems which the other appellate court jurists encounter, and clearly delay appeals.⁸⁶

The nomination and confirmation processes for Schott and Selby impart valuable lessons. Their experiences demonstrate the importance of assiduous consultation with home-state politicians. President Obama systematically engaged in aggressive consultation and cultivation of all Republican and Democratic members—but particularly GOP senators—throughout his first seven years by refusing to nominate without home-state political figures' support for nominees, partly due to the blue slip policy.⁸⁷ Extremely limited cooperation from Republican in-state officials and minuscule prospects for successfully vouching nominees through the confirmation process might suggest why the Obama White House chose to eschew nominating any circuit possibility in 2015, and why administration frustration with GOP senators may have prompted President Obama to nominate Schott without comparatively powerful support from Senator Johnson and Selby with minimal assurance that Senator Coats would favor the designee.

Thus, had President Obama proffered the nominees earlier, they might have won confirmation, although Republicans clearly deserve greater responsibility because all individual circuit nominees merit expeditious review. For instance, Schott could have been able to navigate the confirmation process in time for an up or down vote. Their concomitantly may have been sufficient time for effectuating the

84. Tobias, *supra* note 6, at 2253.

85. JUDICIAL BUS. OF THE U.S. CTS., U.S. COURTS OF APPEALS—MEDIAN TIMING INTERVALS IN MONTHS FOR CASES TERMINATED ON THE MERITS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2016, tbl. B-4 (2017).

86. It may also deprive the circuit of a tie-breaker on numerous critical issues, including voter ID laws, on which the en banc court was evenly divided. Patrick Marley & Jason Stein, *Judge Strikes Down Wisconsin Voter ID, Early Voting Laws*, MILWAUKEE J. SENTINEL, <http://www.jsonline.com/story/news/politics/2016/07/30/judge-strikes-down-wisconsin-voter-id-early-voting-laws/87803408/> [<https://perma.cc/EH3H-Y3DA>] (last updated Aug. 1, 2016, 11:24 AM); see Grunwald, *supra* note 55; Rick Hasen, *Was the 7th Circuit's Voter ID En Banc Order a 4-4 Compromise a la #SCOTUS?*, ELECTION LAW BLOG (Aug. 28, 2016, 7:22 AM), <https://electionlawblog.org/?p=85939%5D> [<https://perma.cc/AS2G-CXZG>].

87. Jeffrey Toobin, *Blue-Slip Battle: The Senate Obstructionists' Secret Weapon*, NEW YORKER (Nov. 26, 2013), <http://www.newyorker.com/news/daily-comment/blue-slip-battle-the-senate-obstructionists-secret-weapon> [<https://perma.cc/KE4M-SDVY>].

commission that Senator Coats mandated and for it to operate and propose Selby and, thus, receive the Senator's blue slip and conclude the appointments process. However, this is speculative, given GOP dogged recalcitrance and determination to await the 2016 election results, pertinent phenomena witnessed in Judge Garland's unprecedented treatment.

The fates of each 2016 nominee, but mainly the Seventh Circuit pair, show that choosing appellate nominees in a presidential election year may be fraught with complications and even derail impeccably qualified nominees. The "Thurmond Rule," which is merely a custom—not a requirement that directly binds members, namely a Senate rule—maintains that confirmations are delayed and halted, notably for most circuit nominees, across presidential election years, mainly because the party lacking White House control hopes to secure election and out of respect for new presidents and senators.⁸⁸ However, the failure to confirm more than one court of appeals judge and either Seventh Circuit nominee in 2016 was a mistake.

Therefore, lessons derived from this canvass reveal the pressing need for expeditious Senate action, which failed to occur in 2016 and which must happen this year. First, lawmakers had a constitutional duty to advise and consent on White House circuit nominees. Major precedent, namely respecting Bush's 2007–2008 appointments, correspondingly should have applied.⁸⁹ The unfilled High Court post would have minimally delayed Schott or Selby. GOP refusal to analyze the president's Supreme Court nominee meant that there was plentiful time for assiduously considering both Seventh Circuit nominees and, even had the party relented on Garland, the chamber might have easily approved Schott and Selby last year, as it processed Kennedy and six circuit prospects during 1988.⁹⁰ The Seventh Circuit nominees also would have provided many valuable contributions and resembled numbers of selections felicitously canvassed and confirmed across

88. Carl Tobias, *Transforming the Thurmond Rule in 2016*, 66 EMORY L.J. 2001 (2016); Wheeler, *supra* note 68.

89. See *supra* notes 48, 70–73. Some earlier precedent was more compelling. Senators confirmed considerably more judges and approved them much later in time. See *supra* notes 69–70 and accompanying text.

90. Mike DeBonis, *A Hundred Days Later, White House Isn't Giving Up on Replacing Antonin Scalia*, WASH. POST (May 25, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/05/25/a-hundred-days-later-white-house-isnt-giving-up-on-replacing-antonin-scalia/?utm_term=.b5c8921ab2f5 [https://perma.cc/Y9FF-2KRC]; see Nolan D. McCaskill, *Grassley Hints at Supreme Court Confirmation Hearing in Lame Duck*, POLITICO (Aug. 30, 2016, 12:02 PM), <http://www.politico.com/story/2016/08/senate-merrick-garland-confirmation-grassley-227543> [https://perma.cc/A8JV-WX4J]; *supra* note 48.

presidential election years.⁹¹ Finally, the Seventh Circuit desperately requires that all its positions be filled.⁹²

IV. SUGGESTIONS FOR THE CONFIRMATION PROCESS

A. *What Did Occur and Should Have Happened*

Court selection and election year politics should not have undermined consideration, as partisan infighting over the High Court vacancy attested. Schott and Selby have compiled ample, distinguished careers as practitioners, especially before federal courts, and both nominees had assembled comprehensive, accessible records, which can often accelerate the evaluation.⁹³ The panel carefully investigated Schott by actively cooperating with the FBI and the Justice Department, yet the committee minimally assessed Selby because Senator Coats never returned his blue slip.⁹⁴

1. SCHOTT

Senator Baldwin promptly delivered her blue slip after President Obama proposed Schott, but Senator Johnson initially retained his.⁹⁵ This encouraged many former presidents of the Wisconsin Bar to swiftly write Senator Johnson, urging that he expeditiously insure the nominee's processing because delay "hurts the judicial system and the people" of Wisconsin, while Senator Johnson ultimately relented by forwarding the blue slip in March 2016.⁹⁶ The Senator correctly returned the slip, but earlier action could have instigated a faster

91. For the nominees' contributions, see *supra* notes 1–5, 7–16 and accompanying text. See also *supra* notes 69–73 and accompanying text (for similar nominees who captured appointment across presidential election years).

92. See *supra* notes 80, 85 and accompanying text; see also *infra* note 138 and accompanying text.

93. See *supra* notes 1–5, 7–16 and accompanying text.

94. See *supra* notes 21–22, 39 and accompanying text; see also *infra* notes 129–141 and accompanying text.

95. Bendery, *supra* note 54.

96. Letter from Past Presidents, St. Bar of Wis., to Sen. Chuck Grassley, Chairman, Comm. on the Judiciary, on Confirmation of Donald Schott (Jan. 30, 2016), <https://www.baldwin.senate.gov/imo/media/doc/1.30.16%20WI%20State%20Bar.pdf> [<https://perma.cc/XLZ9-XSTA>]; see Letter from Wis. Law Professors to Sen. Ron Johnson on Return of Donald Schott's Blue Slip (Feb. 23, 2016) [hereinafter Letter from Wisconsin Law Professors], <http://www.afj.org/wp-content/uploads/2016/02/Law-Prof-Ltr-Schott.pdf> [<https://perma.cc/U65M-L3YH>]; Bendery, *supra* note 54; Johnson, *supra* note 53; Patrick Marley, *Senate Panel Advances Schott for Federal Appeals Court*, MILWAUKEE J. SENTINEL (June 16, 2016), <http://archive.jsonline.com/news/statepolitics/judge17-b99745812z1-383284571.html> [<https://perma.cc/U4F7-HUHF>].

hearing, as the panel would not move until both of the senators had proffered blue slips.

Senator Grassley ought to have efficiently calendared a panel hearing; because the nominee is very accomplished, the Seventh Circuit must have every post filled and the Chair needed to reciprocate for Democrats' assertively confirming ten appellate jurists in 2007–2008.⁹⁷ Senator Grassley finally conducted Schott's hearing on May 18, one-third year after Schott received nomination.⁹⁸ Senator Baldwin carefully introduced Schott, lauded his wealth of practice experience, and stressed the pressing urgency to fill the vacancy.⁹⁹

Members then robustly questioned Schott—who provided convincing answers—which demonstrated why the competent, moderate nominee warranted rapid approval. Senator David Vitter (R-La.) queried Schott regarding litigation over a deadline miscalculation in a case on which the prospect worked.¹⁰⁰ The nominee cautiously replied that his firm won the lawsuit that was dismissed and, therefore, was vindicated—but Schott regretted what had occurred as the “worst day” of his career.¹⁰¹ Senator Vitter concomitantly pressed Schott on the filing of an amicus brief in a case about Wisconsin's same-sex domestic partnership laws on behalf of the Wisconsin LGBT Chamber of Commerce.¹⁰² The nominee responded that Quarles & Brady has an active pro bono policy, and he offered to supervise associates who volunteered to handle the matter.¹⁰³ Senator Vitter correspondingly asked that Schott describe the source for the “right of same-sex

97. See generally *Judicial Vacancies*, *supra* note 29 (for the years 2007 and 2008). President Obama proposed five appellate court nominees after the White House had nominated Schott and Selby. *Id.* (for the year 2016); see also *supra* note 39 and accompanying text.

98. Tobias, *supra* note 49.

99. *Nominations: Full Committee*, *supra* note 15. Senator Baldwin emphasized his strong, comprehensive record and the Seventh Circuit's powerful need. Senator Johnson could not attend because he was chairing another hearing. Craig Gilbert, *Appellate Nominee Gets Hearing, Confirmation Still in Doubt*, MILWAUKEE J. SENTINEL (May 18, 2016), <http://archive.jsonline.com/news/statepolitics/appellate-nominee-gets-hearing-confirmation-still-in-doubt-b99728101z1-379973221.html> [<https://perma.cc/W8RT-NGJF>]; see Jennifer Bendery, *Ron Johnson Ditches His Own Judicial Nominee After Ignoring Court Vacancy for 2,323 Days*, HUFFINGTON POST, http://www.huffingtonpost.com/entry/ron-johnson-judicial-nominee_us_573c90b5e4b0ace7b8e8935c [<https://perma.cc/XZ2U-QA7N>] (last updated January 9, 2017).

100. *Nominations: Full Committee*, *supra* note 15. Senator Grassley assigned Senator Vitter to chair the hearing, and he apparently lodged queries on Grassley's behalf. *Id.*

101. *Id.*

102. *Id.*; see *Appling v. Walker*, 853 N.W.2d 888 (Wis. 2014).

103. *Nominations: Full Committee*, *supra* note 15.

marriage.”¹⁰⁴ The nominee observed that he had not reviewed the case precedent in detail but that marriage equality was the law of the land after the United States Supreme Court resolved the question in *Obergefell v. Hodges*.¹⁰⁵ Senator Thom Tillis (R-N.C.) questioned Schott about the proper role that societal pressure or citizen opinion should play in judicial decision-making, to which the nominee replied that they must not and the Constitution controls.¹⁰⁶ Senators Richard Durbin (D-Ill.) and Amy Klobuchar (D-Minn.) asked uncontroversial questions, which Schott clearly answered.¹⁰⁷ The members who participated appeared satisfied.¹⁰⁸

A few senators next posited written queries—most of which elaborated on issues that senators raised in the panel hearing—to which Schott offered timely, complete, and careful responses that displayed a powerful grasp of complex, technical legal questions.¹⁰⁹ For example, Senators Grassley and Jeff Flake (R-Ariz.) inquired about statutory construction and the use of legislative history.¹¹⁰ Schott replied that he would first evaluate the law’s words and assume that its plain meaning clearly expresses the statutory purpose while restrictively deploying legislative history.¹¹¹ Senator Tillis asked “[w]hen, if ever, is it appropriate for a federal court to rule that a statute is unconstitutional?”¹¹² The nominee answered that challengers must afford a pellucid showing that Congress exceeded its constitutional bounds, and courts should effectively attempt to construe a particular

104. *Nominations: Full Committee*, *supra* note 15; SENATOR CHUCK GRASSLEY: QUESTIONS FOR THE RECORD 5 (2016) [hereinafter QFR OF SEN. GRASSLEY] (providing Senator Grassley’s questions and Schott’s careful responses based on binding precedent to Senator Vitter’s questions after review of that precedent). Senator Vitter also asked what ACLU work Schott had undertaken; he replied only the *Appling* matter. *Nominations: Full Committee*, *supra* note 15.

105. 135 S. Ct. 2584 (2015).

106. *Nominations: Full Committee*, *supra* note 15. Senator Tillis concomitantly asked questions regarding precedent, and Schott replied that there was great value in following precedent and providing certainty, while reversals should be rare and undertaken by the en banc court. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* (announcing that the record would remain open for one week for written queries). The questions and answers often are not critical, but the panel’s 13-7 vote without discussion elevates their value as a way to decipher the no votes. *See Marley*, *supra* note 96.

110. QFR OF SEN. GRASSLEY, *supra* note 105, at 5 (question number one); U.S. SEN. COMM. ON JUDICIARY, WRITTEN QUESTIONS OF SENATOR JEFF FLAKE 1 (2016) [hereinafter QFR OF SEN. FLAKE] (question number one, addressed to Schott).

111. QFR OF SEN. GRASSLEY, *supra* note 105, at 6 (Schott’s answer to number five); QFR OF SEN. FLAKE, *supra* note 110, at 1 (Schott’s answer to number one).

112. SENATE JUDICIARY COMM., QUESTIONS FOR THE RECORD: SENATOR THOM TILLIS 1 (2016) [hereinafter QFR OF SEN. TILLIS] (question three).

law in ways that essentially avoid a finding of unconstitutionality, should this interpretation comport with the legislation's plain meaning.¹¹³

Schott also furnished numerous comprehensive, measured answers to comparatively "political" queries. For instance, Senator Tillis sought to elicit a definition of "judicial activism," pondering whether the concept is ever appropriate.¹¹⁴ The nominee remarked that some observers "believe it usually refers to circumstances in which a judge makes decisions based on [personal] views, and . . . [u]sing that definition, judicial activism is never appropriate."¹¹⁵ Senator Tillis concomitantly wondered if Schott regarded the Constitution as a "living document" to which he provided the brief response "no."¹¹⁶

Senator Grassley arranged a June committee discussion and vote on Schott, but the panel's GOP senators held over the ballot until the following meeting without supplying any justification, as had been the Republican practice in President Obama's entire tenure.¹¹⁷ Because of the difficulty in securing and retaining a quorum, the committee permitted no discussion about Schott's candidacy and only voted.¹¹⁸ The panel approved Schott 13-7, while GOP members cast the negative ballots, although four Republicans, including the Chair, voted yes.¹¹⁹

Senator Baldwin then issued a statement which encouraged Senator Johnson to join her in calling on the Majority Leader to promptly arrange a final ballot before the full Senate, so the nominee would have rapid approval because the "people of Wisconsin and the entire Seventh Circuit deserve a fully functioning court."¹²⁰ Senator Johnson published a statement observing that he had returned the blue slip during March,

113. *Id.* at 1–3 (citations omitted) (focusing on Schott's responses). Many other questions involved technical legal issues. His responses were uncontroversial and mainly cited existing binding legal precedent in areas, such as sincerely held religious beliefs, the Second Amendment and the death penalty. *Id.* at 2–3 (citations omitted) (responses to questions five, six, and nine).

114. *Id.* at 1 (question two).

115. *Id.* (Schott's response to question two).

116. *Id.* (question one and Schott's response).

117. *Executive Business Meeting*, S. COMM. ON JUDICIARY (June 9, 2016), <https://www.judiciary.senate.gov/meetings/06/09/2016/executive-business-meeting> [<https://perma.cc/2MMN-M6GQ>]; see *supra* note 26 and accompanying text.

118. *Executive Business Meeting*, *supra* note 17.

119. *Id.*; Marley, *supra* note 96.

120. Marley, *supra* note 96; see Press Release, Sen. Tammy Baldwin, U.S. Senator Tammy Baldwin Calls on Majority Leader McConnell to Schedule Floor Vote on Longest Standing Federal Circuit Court Vacancy (June 20, 2016), <https://www.baldwin.senate.gov/press-releases/calls-on-mcconnell-to-schedule-schott-vote> [<https://perma.cc/E4VG-6FQ9>].

yet failed to join Senator Baldwin's request for a floor vote.¹²¹ This inaction and his generic unwillingness to cooperate or evince powerful support for the very qualified, moderate nominee were unfortunate, as home-state politicians can directly influence appointments. Senator Baldwin continued to push for a Senate vote by writing the Majority Leader a June 20 letter, which asked him to convene a ballot for the nominee, and presenting a July 12 floor speech that urged Senator McConnell and her colleagues to provide Schott a vote.¹²² However, the leader ignored both pleas, and no member directly addressed Senator Baldwin's call.¹²³

Quite a few reasons demonstrate why Schott needed a rapid final debate and ballot. Senator McConnell necessarily should have effectuated the regular order which he consistently lauds and should have honored the distinctly relevant 2008 precedent.¹²⁴ Senator Johnson could and should have prevailed on the Majority Leader, because Schott is a highly competent, mainstream prospect, and Wisconsin clearly deserves greater active judge representation that has been lacking for seven protracted years on the court, which needs an entire cohort.¹²⁵ Because Senator McConnell, nonetheless, eschewed arranging Schott's Senate debate and vote, his supporters should have assiduously pursued cloture, but they did not.¹²⁶ Accomplished centrists have traditionally secured final ballots; thus, senators who appreciate custom should have quickly agreed on nominee cloture.¹²⁷ Had Schott

121. Patrick Marley & Bill Glauber, *Feingold, Johnson Trade Barbs*, MILWAUKEE J. SENTINEL, <http://www.jsonline.com/story/news/politics/2016/08/31/group-calls-out-johnson-high-court/89650938/> [<https://perma.cc/U8UT-K7YZ>] (last updated Aug. 31, 2016, 11:17 PM); *see supra* note 96 and accompanying text.

122. Letter from Sen. Tammy Baldwin, U.S. Senate, to Sen. Mitch McConnell, U.S. Senate, on Floor Vote for Donald Schott (June 20, 2016); 162 CONG. REC. S4,975–76 (daily ed. July 12, 2016) (statement of Sen. Baldwin); *see* Press Release, *supra* note 120.

123. 162 CONG. REC. at S4,976.

124. *See supra* notes 36, 70–73 and accompanying text (McConnell's urging that GOP was following regular order and requesting approval of Bush appellate court nominees, four of whom the Senate Democratic majority helped confirm).

125. It remained unclear whether Senator Johnson had actually urged that Senator McConnell schedule a confirmation vote. Marley & Glauber, *supra* note 121.

126. *See supra* note 27 and accompanying text. For comparatively recent Republican denials of Democrats' unanimous consent requests, *see* 162 CONG. REC. S2,654–55 (daily ed. May 10, 2016); *id.* at S4,870 (daily ed. July 7, 2016); *id.* at S5,045–47 (daily ed. July 13, 2016). Most Republican senators opposed considering any 2016 Supreme Court nominee; few GOP members apparently opposed Schott or Selby. Ted Cruz, *The Scalia Seat: Let the People Speak*, WALL ST. J. (Mar. 6, 2016, 6:35 PM), <https://www.wsj.com/articles/the-scalia-seat-let-the-people-speak-1457307358> [<https://perma.cc/D3GJ-XZW8>].

127. *See supra* text accompanying notes 69–74.

reached the floor, Senator McConnell ought to have promptly staged a dignified and respectful debate—which rigorously considered numerous pertinent questions—and the Senate should have rapidly voted.

2. SELBY

The need for presidential, senatorial, and nominee privacy acutely complicates attempts to detect exactly what happened and should have occurred in Selby's nomination and confirmation processes. Suggestions about Selby warrant comparatively abbreviated consideration, as Senator Coats ended Selby's review by not delivering the blue slip and much observed respecting Schott pertains to Selby. Nonetheless, certain analysis is merited because the exceptional nominee's cautionary tale improves understanding and could enhance future initiatives, especially to fill the Seventh Circuit vacancies.

President Obama and Senator Donnelly seemingly attempted to cooperate with Senator Coats when pursuing a selection for the Indiana vacancy. However, the White House and Senator Donnelly may have been frustrated by the lack of cooperation received after years of devoting effort to consulting and collaborating on nominations and confirmations. Moreover, it appears that Senator Coats only decided to urge adoption of a commission late in the process when somewhat limited time remained for nomination and confirmation. Once Senator Coats insisted on the panel's establishment and made return of his blue slip contingent on that action, this dramatically constricted the available options.

In retrospect, the White House and Senator Donnelly might have done more to either create a nomination selection panel or attempt to cajole, and work together with, Senator Coats on a mutually agreeable resolution of the standoff. For instance, perhaps a truncated commission endeavor could have been adopted before Selby's nomination or possibly simultaneously with her confirmation process. In any event, once Senator Coats refused to deliver his blue slip, the result was preordained, as Senator Grassley would supply no hearing to any nominee who lacked a pair of blue slips.

Thus, the Chair declined to initiate a hearing,¹²⁸ even though Selby is quite accomplished, the Seventh Circuit must have all court positions filled, and Senator Grassley should have reciprocated Democrats'

128. Odendahl, *Disappointment*, *supra* note 67; Marilyn Odendahl, *Law Professor Calls for Selby to be Confirmed to the 7th Circuit*, IND. LAW. (Oct. 7, 2016); <http://www.theindianalawyer.com/law-professor-calls-for-selby-to-be-confirmed-to-7th-circuit/PARAMS/article/41681> [<https://perma.cc/8VMP-NR82>].

collegial approval of many jurists over 2007–2008.¹²⁹ When the Chair resisted a nominee hearing, Senator Donnelly might have, but did not, institute another effort to prevail on the Chair, as the Indiana senator had collegially requested at the May hearing.¹³⁰ Senator Donnelly also probably should have considered attempts that would have persuaded Senator Coats to reconsider possible blue slip delivery by proposing that he analyze the conduct of additional Republican colleagues who delivered blue slips for Obama appellate nominees.

An informative example is Senator John Hoeven (R-N.D.), who convened a meeting with Jennifer Klemetsrud Puhl—Obama’s well qualified, mainstream Eighth Circuit nominee, and considered acceptable her responses to many queries—and supported Puhl when introducing her at a summer committee hearing and when the panel reported her.¹³¹ Senator Johnson correspondingly appeared to depend on

129. President Obama proposed five 2016 circuit nominees after he had nominated Schott and Selby. *See generally Judicial Vacancies*, *supra* note 29 (for the year 2016); *see supra* note 39. Schott and Ninth Circuit nominee District Judge Lucy Haeran Koh would have filled judicial emergencies. Judge Koh received a July hearing and September panel approval. *Nominations: Full Committee*, S. COMM. ON JUDICIARY (July 13, 2016), <https://www.judiciary.senate.gov/meetings/07/13/2016/nominations> [<https://perma.cc/925F-RY4D>]; *Executive Business Meeting*, S. COMM. ON JUDICIARY (Sept. 17, 2016), <https://www.judiciary.senate.gov/meetings/09/08/2016/executive-business-meeting-09-15-16> [<https://perma.cc/GN6Z-26P9>]. Eighth Circuit nominee Jennifer Klemetsrud Puhl enjoyed a summer hearing and panel vote. *Nominations: Full Committee*, S. COMM. ON JUDICIARY (June 21, 2016) [hereinafter June 21 Hearing], <https://www.judiciary.senate.gov/meetings/06/21/2016/nominations> [<https://perma.cc/8HY4-XNW8>]; *Executive Business Meeting*, S. COMM. ON JUDICIARY (July 14, 2016), <https://www.judiciary.senate.gov/meetings/07/04/2016/executive-business-meeting> [<https://perma.cc/3XDR-JT3L>]. Regular order suggested that Schott have a final vote before the other two nominees because the Senate had considered him first.

130. *See supra* note 15 and accompanying text. Senator Dianne Feinstein could have instituted similar action on behalf of Judge Koh, because the senator had supported controversial Bush nominees and could have requested that Republican members reciprocate. Bob Egelko, *Feinstein Draws Fire Over Vote for Judge*, S.F. GATE (Aug. 4, 2007, 4:00 AM), <http://www.sfgate.com/politics/article/Feinstein-draws-fire-over-vote-for-judge-2549435.php> [<https://perma.cc/W5HT-NPRG>]; Sheryl Gay Stolberg, *Avoiding Clash, Senate Sends Judicial Nomination to Floor*, N.Y. TIMES, May 26, 2006, at A18.

131. June 21 Hearing, *supra* note 128; Press Release, Sen. John Hoeven, Hoeven: U.S. Senate, Judiciary Committee Recommends Jennifer Puhl for Seat on 8th U.S. Circuit Court of Appeals (July 14, 2016), <https://www.hoeven.senate.gov/news/news-releases/hoeven-judiciary-committee-recommends-jennifer-puhl-for-seat-on-8th-us-circuit-court-of-appeals> [<https://perma.cc/W9ER-A4WK>]; Patrick Springer, *Senate Hearing Friendly for Appointment to Replace Fargo-based Appeals Judge*, DICKINSON PRESS (June 21, 2016, 2:52 PM), <http://www.thedickinsonpress.com/news/north-dakota/4059230-senate-hearing-friendly-appointment-replace-fargo-based-appeals-judge> [<https://perma.cc/4DJU-MN32>]; Patrick Springer, *Puhl, Federal Appeals Court Nominee from ND, Slated for Senate Hearing*, INFORUM (June 17, 2016, 4:01 PM),

the merit commission's proposal of Schott when affording his blue slip.¹³²

Senator Coats also might have canvassed other applicable precedent, which showed that few remaining GOP senators deployed selection commissions for appellate courts, even in Obama's presidency when Republicans opposed many of his nominees, seemingly because the groups demanded much time and effort to create and operate.¹³³ When Senator Coats did not relent and proffer his blue slip, Senator Donnelly probably should have contemplated instituting a panel analogous to that which Senator Coats suggested, but this would have markedly delayed the possibility of expeditious nomination and chamber assessment.¹³⁴

Had Senator Coats tendered the blue slip and Senator Grassley arranged a hearing, the panel should have promptly convened a session which permitted senators to rigorously question Selby, who would have proffered direct, thorough answers.¹³⁵ Because the submission in fact was an experienced, mainstream pick—who resolved few controversial questions when serving as a State Supreme Court Justice, but had decided numerous complex issues with measured practices—the session would probably have resembled the dynamic witnessed for Judge Restrepo's hearing: few GOP senators were present, lodging comparatively mundane queries that he felicitously answered.¹³⁶ Senators could then have posed written questions, to which Selby would have responded in a prompt, thorough, and careful fashion.¹³⁷

<http://www.inforum.com/news/4057075-puhl-federal-appeals-court-nominee-nd-slated-senate-hearing> [<https://perma.cc/GN7L-WH5M>].

132. Johnson, *supra* note 53; see Letter from Wis. Law Professors, *supra* note 96. The commission process has seemingly enjoyed mixed success since Senator Johnson and Senator Baldwin employed that process. See *supra* notes 55–59 and accompanying text. However, the panel had been very successful the previous three decades. See Tobias, *supra* note 6, at 2256; *supra* note 55 and accompanying text.

133. For example, Texas Republican Senators John Cornyn and Ted Cruz deployed an evaluation commission for lower court vacancies, but the two Texas Fifth Circuits vacancies have lacked nominees across nearly four and one half and three years. See generally *Judicial Vacancies*, *supra* note 29 (for the year 2017); see *John Cornyn and Ted Cruz's Texas: A State of Judicial Emergency*, *supra* note 25.

134. See Tobias, *supra* note 21. The time required to assemble the selection panel and for the entity to solicit applications, evaluate and review candidates, and tender senators' recommendations could have essentially delayed Senate review until the lame duck session began or the Senate adjourned. This should have been a last resort, because a panel was unnecessary and would have imposed substantial delay.

135. *Nominations: Full Committee*, *supra* note 46.

136. Senator Tillis chaired the hearing at Senator Grassley's request, while Tillis asked most of the questions. *Id.*; *supra* Part I.B. (Selby's deft resolution of disputes).

137. *Nominations: Full Committee*, *supra* note 46 (Senator Tillis announcing that the record would remain open a week for written questions).

Senator Grassley would next have conducted a panel discussion and ballot a few weeks later. Many nominees whom President Obama elevated from state high courts—illustrated by Ninth Circuit Judges Morgan Christen and Andrew Hurwitz—easily won committee approval, because the selections had assembled comprehensive, available records as capable, mainstream jurists.¹³⁸ After the senators debated the nominee’s qualifications, they would have voted.

Multiple ideas which resemble the concepts that favored Schott’s positive or negative ballot explain why the Majority Leader should have quickly orchestrated dignified and respectful debate, which robustly probed many applicable questions, while the chamber ought to have immediately voted. For example, Senator McConnell should have followed the regular order which he persistently lauds and respected directly relevant 2008 precedent.¹³⁹ Had the GOP not furnished Selby’s debate and vote, the nominee’s supporters should have avidly pursued cloture,¹⁴⁰ as capable, mainstream aspirants have conventionally received Senate ballots.¹⁴¹

B. What Should Happen in the Future

1. GENERAL IDEAS

a. The Nomination Process

President Trump’s highest priority has been establishing a new government. Insofar as he has enjoyed much time for the selection process over the near term, it has mainly been dedicated to filling the

138. Press Release, White House Office of the Press Sec’y, President Obama Nominates Judge Morgan Christen to the United States Court of Appeals (May 18, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/05/18/president-obama-nominates-justice-morgan-christen-united-states-court-ap> [<https://perma.cc/G6JN-BWUB>]; Press Release, White House Office of the Press Sec’y, President Obama Nominates Judge Andrew Hurwitz to Serve on the United States Court of Appeals (Nov. 2, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/02/president-obama-nominates-justice-andrew-david-hurwitz-serve-united-stat> [<https://perma.cc/G5E5-7ZAQ>]; 157 CONG. REC. S8,625 (daily ed. Dec. 15, 2011) (Christen confirmation); 158 CONG. REC. S4,108 (daily ed. June 12, 2012) (Hurwitz confirmation).

139. See *supra* text accompanying notes 36, 70–73 (urging that the Senate follow regular order and that it confirm Bush appellate nominees, four of whom the Democratic majority helped approve).

140. See Goldman et al., *supra* note 27. Virtually all GOP senators opposed processing any 2016 Supreme Court nominee; few apparently opposed Selby. See *supra* note 126.

141. See *supra* notes 69–73 and accompanying text; see also *supra* notes 126–127 and accompanying text.

Supreme Court vacancy.¹⁴² President Trump has negligible experience with judicial appointments, in contrast to his most recent predecessors. President Bush had approved state court jurists when he was the Governor of Texas, and President Obama had worked on confirmation processes when he served as a United States senator.¹⁴³ President Trump made comments about the type of Supreme Court nominees whom he planned to afford during the campaign, but the statements might have been presidential election year rhetoric, directed at Justice Scalia's unfilled position or restricted to High Court appointments.¹⁴⁴

Because creating a government and nominating and confirming a justice have consumed substantial time, the White House may want to deploy a finely-calibrated analysis which can precisely identify and set essential priorities regarding lower court selection. For instance, the Administrative Office classifies vacancies as judicial emergencies premised on (1) their length, specifically the Wisconsin circuit opening that is the most protracted nationally, and (2) conservative estimates of work and caseloads, which designations might serve as instructive proxies for vacant slots that warrant priority.¹⁴⁵ The president also

142. Press Release, White House Office of the Press Sec'y, President Donald J. Trump Nominates Judge Neil Gorsuch to the United States Supreme Court (Jan. 31, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/31/president-donald-j-trump-nominates-judge-neil-gorsuch-united-states> [https://perma.cc/YB6R-VP68]; see Adam Liptak, *Trump's Supreme Court List: Ivy League Is Out, the Heartland Is In*, N.Y. TIMES, Nov. 15, 2016, at A21; Alan Rappaport & Charlie Savage, *Trump Offers a List of Possible Supreme Court Nominees Who Reflect His Principles*, N.Y. TIMES, May 19, 2016, at A16.

143. *E.g.*, Carl Tobias, *Filling the Texas Federal Court Vacancies*, 95 TEX. L. REV. (forthcoming 2017) (manuscript at n.25) (on file with author); Gregory Korte, *With The Tables Turned, Obama Now 'Regrets' His 2006 Alito Filibuster*, USA TODAY (Feb. 17, 2016, 3:43 PM), <http://www.usatoday.com/story/news/politics/2016/02/17/obama-now-regrets-his-2006-alito-filibuster-white-house-says/80514152/> [https://perma.cc/WYH4-DC36].

144. Josh Gerstein, *A Closer Look at Trump's Potential Supreme Court Nominees*, POLITICO (Jan. 3, 2017, 6:38 AM), <http://www.politico.com/story/2017/01/trumps-supreme-court-nominees-233115> [https://perma.cc/TG28-X4FU]; see Adam Liptak, *Trump, Set on Unwavering Conservatives, Pledges Fast Action on Supreme Court*, N.Y. TIMES, Jan. 12, 2017, at A22; see also *supra* note 142. *But see* Press Release, White House Office of the Press Sec'y, *Doing What He Said He Would: President Trump's Transparent, Principled and Consistent Process for Choosing a Supreme Court Nominee*, <https://www.whitehouse.gov/the-press-office/2017/01/31/doing-what-he-said-he-would-president-trumps-transparent-principled-and> [https://perma.cc/LTV9-LHM5] (Jan. 31, 2017) (asserting that President Trump had kept his campaign promise to nominate from the list of twenty-one candidates he earlier released by instituting a transparent, principled and conservative nomination process).

145. *Judicial Emergency Definition*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition> [https://perma.cc/9MM7-TS7N] (last visited Mar 13, 2017).

needs to keep in mind that re-nominating and confirming a small number of qualified, moderate Obama nominees—particularly Schott and Selby—would definitely preserve scarce resources that must be devoted to restarting the nomination process, cultivate Democrats, and more swiftly fill prolonged, empty Seventh Circuit posts.¹⁴⁶

The Heritage Foundation and the Federalist Society purportedly helped President Trump compile the “short list” of twenty-one aspirants from whom he pledged to select when proposing a Supreme Court nominee, and those organizations will probably continue advising the White House respecting lower court initiatives, especially about circuit vacancies.¹⁴⁷ Modern administrations carefully secure assistance, cogent ideas, and prospects’ names from multiple conventional sources—notably particular lawyers, the ABA, and concomitant state and local bar entities.¹⁴⁸ White Houses correspondingly derive perceptive insights from officials who had judicial selection responsibilities under prior administrations. Moreover, some earlier White Houses pursued distinctive input from less customary sources, namely ethnic minority, female, lesbian, gay, bisexual, and transgender individuals and groups.¹⁴⁹ President Trump could and should approach these sources and committees, and he also ought to ask centrist and liberal organizations for constructive recommendations.

President Trump also can accord special consideration to measures which have been efficacious in numerous earlier administrations. One trenchant illustration would be elevating current or previous federal and state court members, notably plenty of federal district jurists and state high court justices.¹⁵⁰ This practice is valuable, because the Senate has already canvassed and confirmed the federal judges who easily assemble comprehensive, accessible records. That prior consideration also directly facilitates multifaceted constituents of Senate

146. Tobias, *supra* note 49; *see supra* Part I.

147. Eric Lipton & Jeremy Peters, *Conservatives Press Overhaul in the Judiciary*, N.Y. TIMES, Mar. 19, 2017, at A1; *see supra* notes 142, 144 and accompanying text; *see also* Jason DeParle, *Debating the Subtle Sway of the Federalist Society*, N.Y. TIMES (Aug. 1, 2005), http://www.nytimes.com/2005/08/01/politics/politicsspecial1/debating-the-subtle-sway-of-the-federalist.html?_r=0 [<https://perma.cc/DY5K-RKKW>]; Jeffrey Toobin, *The Supreme Court After Scalia*, NEW YORKER (Oct. 3, 2016), <http://www.newyorker.com/magazine/2016/10/03/in-the-balance> [<https://perma.cc/NY89-5A3D>].

148. Goldman et al., *supra* note 21, at 28–29; Tobias, *supra* note 6, at 2239–40.

149. Tobias, *supra* note 6, at 2239–40.

150. Elisha C. Savchak et al., *Taking it to the Next Level: The Elevation of District Court Judges to the U.S. Courts of Appeals*, 50 AM. J. POL. SCI. 478 (2006); Tobias, *supra* note 6, at 2243–46 (providing examples of Judges David Hamilton and Gerard Lynch whom Obama elevated from district courts).

investigations, namely: ABA assessment commission evaluations and ratings; FBI background inquiries; Judiciary panel scrutiny, hearings, discussions, and committee votes; and rigorous chamber debates and ballots.¹⁵¹ The robust work of plentiful state supreme court justices—pertinently Selby and present Seventh Circuit Judge Diane Sykes whom President Bush actually elevated from the Wisconsin Supreme Court—resembles that of federal appellate court jurists.¹⁵² Other potential sources for prospects are counsel, notably Schott, who regularly appear before federal circuit and district courts.¹⁵³

Most Republican and Democratic contemporary presidential administrations have situated lead responsibility for circuit nominations and confirmations in the White House Counsel Office with assistance—especially when preparing individual nominees for smoothly confronting the appointments process—supplied by the Justice Department Office of Legal Policy.¹⁵⁴ The president must assign selection considerable priority and sufficient resources to promote speedy nomination and confirmation. For instance, these endeavors may propel swift ABA and FBI checks, White House nomination initiatives, and Judiciary Committee and chamber processing.

Modern administrations necessarily consult meticulously with numerous Republican and Democratic home-state officers, cautiously pursuing recommendations of several accomplished, mainstream candidates whom lawmakers prioritize for each open seat.¹⁵⁵ Aggressive consultation will be peculiarly useful when jurisdictions have split delegations, as currently pertains to Wisconsin and Indiana.

Numbers of senators concomitantly rely on merit selection panels to search for applicants, evaluate them, interview choices, and propose submissions for lawmakers, who correspondingly proffer suggestions to

151. Tobias, *supra* note 6, at 2243–46.

152. Press Release, White House Office of the Press Sec’y, President Bush Nominates Justice Diane Sykes to the United States Court of Appeals (Nov. 14, 2003) (available on LexisNexis); 150 CONG. REC. S7,399 (daily ed. June 24, 2004) (Judge Sykes Seventh Circuit confirmation); Owens, *supra* note 55, at 1033, 1046–50; *see also supra* note 138 and accompanying text (providing Ninth Circuit judges whom President Obama elevated from state Supreme Courts); *supra* note 147 (Sykes on short list of prospects whom President Trump considered for Supreme Court).

153. *See supra* notes 1–6 and accompanying text. Other possibilities could be state intermediate appellate and trial court judges and counsel, although federal court experience would have enhanced applicability to Seventh Circuit service.

154. Goldman et al., *supra* note 21, at 14–16; Tobias, *supra* note 6, at 2239.

155. Some White Houses have assumed the lead because certain presidents, senators, and other observers deem appellate selection more important, as circuit opinions govern multiple states and are “essentially courts of last resort for ninety-nine percent of filings and decide complex questions regarding issues including terrorism and constitutional interpretation.” Tobias, *supra* note 6, at 2240–41.

the president.¹⁵⁶ The specific Wisconsin entity operated productively for three decades, yet it has been less effective recently;¹⁵⁷ Senator Coats did assert that the Indiana commission had proved very efficacious.¹⁵⁸

The White House must accord solicitude to senators who represent home states—namely the pair of Democrats from Wisconsin and Indiana—because they can arrest Senate consideration of prospects through retaining blue slips. The jurisdictions’ Democratic and GOP senators should work effectively together while being receptive to White House overtures. The senators ought to collaborate in good faith and strive to promptly designate a few excellent, moderate candidates about whom they concur and, if the senators reach no concord, delineate priorities for the White House and comprehensively explain the rankings.

The administration should carefully and promptly scrutinize those materials, pose lingering questions to the senators, diligently reconcile differences that remain, and attempt to choose a nominee who proves satisfactory for President Trump and both senators. The White House ought to maximize clarity and transparency consistent with privacy needs of all concerned and seek the best resolution. The senators must concomitantly be flexible and clear and directly pursue the finest solution.

The president ought to inform home-state elected officials regarding the person under consideration for nomination, so that the senators might denominate anyone whom they could oppose and why. The recommendation of several candidates rather than one and careful, active open communications will provide the White House and senators considerable flexibility and putatively decrease surprise. If the politicians keep objecting to a submission whom President Trump proposes, they must attempt to cogently explain why and resolve critical disagreements, so that all can identify a preferred approach. Continued opposition and blue slip retention may promote embarrassment, delay, and the necessity to start the process over, which could result from differences and consume scarce resources.

b. The Senate Confirmation Process

When the president and both senators concur about a fine, mainstream nominee, they ought to diligently cooperate with each other and the senators’ colleagues to insure a swift, thorough, and fair

156. SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 289 (1997); Owens, *supra* note 55, at 1033; Tobias, *supra* note 6, at 2240, 2256.

157. Tobias, *supra* note 6, at 2256.

158. *Supra* notes 55–59, 62–67 and accompanying text.

confirmation process. The staff personnel for Republicans and Democrats on the Judiciary Committee and for the Majority Leader should conduct prompt, full, and equitable investigations by helping expedite ABA and FBI consideration, and the nominee ought to coordinate with these individuals and entities by, for instance, efficiently, comprehensively, and straightforwardly completing the panel questionnaire.¹⁵⁹ Home-state senators must retain blue slips when they conclusively find that a nominee is unacceptable after exhausting initiatives to have the president alter the nomination's course. The touchstone ought to be merit, defined as consummate intelligence, ethics, diligence, independence, and balanced judicial temperament. The prospect should have, but officials need to verify that the choice actually possesses, (1) views within the "mainstream" of Supreme Court jurisprudence, defined as not too politically conservative or liberal, (2) significant respect for High Court precedent and many state and federal legislative and executive branch concerns, and (3) no prejudgments about the essential considerations to be addressed.

Once the senators deliver blue slips for a person who satisfies those criteria, the panel must swiftly arrange a hearing. When the nominee is highly competent, moderate, and not controversial—and the ABA, FBI, and committee analyses have been comprehensive and fair while producing uncontroversial conclusions—few members attend the session, which normally proceeds smoothly, particular phenomena dramatically exemplified by Judge Restrepo.¹⁶⁰ If these ABA, FBI, and committee actions yield, or legislators discover controversial matters, the hearing should promote full, rigorous, and equitable questioning. The session's chair usually informs senators that they have seven days for proffering written questions to nominees—which must be direct, robust, and fair—while the nominee ought to speedily, completely, and clearly answer.

A few weeks later, the committee holds an executive business meeting in which the panel ought to comprehensively and equitably

159. Some of President Trump's executive branch nominees have experienced difficulties completing their questionnaires or ethics reports in a timely manner. Ylan Q. Mui & Ed O'Keefe, *Treasury Nominee Initially Omitted More Than \$100 Million from Disclosures, Democratic Memo Says*, WASH. POST (Jan. 19, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/01/19/treasury-nominee-initially-omitted-more-than-100-million-from-disclosures-democratic-memo-shows/?utm_term=.3a38beda27ff [https://perma.cc/K2C7-YFR5]; Alan Rappeport, *Issues of Riches, Trip up Picks, but Few, if Any, May Be Denied*, N.Y. TIMES, Jan. 20, 2017, at A1; see Elizabeth Warren, *Trump's Nominees Are Putting Us All At Risk by Ignoring Ethics Laws*, WASH. POST (Jan. 19, 2017), https://www.washingtonpost.com/posteverything/wp/2017/01/19/the-gop-is-putting-the-country-in-danger-by-ignoring-ethical-rules-for-appointees/?utm_term=.32f61b72c63f [https://perma.cc/5CGR-7QFY].

160. See *supra* note 46 and accompanying text.

discuss questions relevant to the nominee and vote. If the candidate prevails, but the minority filibusters, the nominee's advocates should pursue cloture, which excellent, mainstream aspirants normally win.¹⁶¹ Once the individual comes to the floor, the Majority Leader needs to expeditiously arrange a chamber debate, if warranted, and a ballot. The Majority Leader ought to encourage complete, rigorous discussion, which respects the nominee and the process. Following that debate, senators quickly vote.

In the beginning, Democrats will confront, and must expressly treat, a conundrum: whether to retaliate for the unprecedented GOP denial of any consideration to Judge Garland's nomination, the rejection of Schott's final ballot, and the *de minimis* canvass provided Selby. The party needs to resist this temptation at least initially, especially if the court of appeals designees constitute moderate nominees, as matching Republican obstruction will continue and propel the counterproductive downward spiraling appointments process. Full collaboration with President Trump and numerous GOP senators could also promote confirmation, and the Seventh Circuit requires every jurist to furnish justice.

Democrats must comprehensively and fairly query nominees in panel hearings, submit probing questions for the record, and completely explore qualifications across committee and floor discussions. If they muster severe concerns about recommendations' capability, ethics or temperament, or detect that nominees retain perspectives outside the mainstream of American jurisprudence, Democrats should frankly ventilate criticisms; be receptive to direct, persuasive GOP arguments while substantively treating the concepts; and be prepared to cast votes against candidates, if not satisfied.

2. SPECIFIC VACANCIES

a. Wisconsin Vacancy

President Trump should avidly consult the Wisconsin senators, who ought to actively cooperate with the Executive and one another by providing very competent, moderate aspirants for White House consideration. The senators possess ample incentives for coordination, especially in showing their ability to felicitously resolve delicate, complex problems, like filling the nation's most extended appellate court vacancy. Senator Johnson also captured reelection last year after a protracted, contentious fight, and Senator Baldwin will probably

161. Goldman et al., *supra* note 21, at 27-28.

confront a difficult 2018 reelection battle in a state which President Trump won.¹⁶²

During the outset, Senator Johnson ought to promptly and seriously consider proposing that the administration renominate Schott for numerous reasons. He was a prominent, mainstream nominee, who marshaled a 13-7 bipartisan Judiciary Committee vote.¹⁶³ The proposal would also conserve scarce resources by not having to again commence the designation process. Swiftly filling the open post is essential for Seventh Circuit litigants, the appeals court's jurists, and Wisconsin's active circuit judge representation. This proposition might appear to conflict with the notion that Senators Johnson and Baldwin should proffer several picks because it could maximize flexibility. However, when the Wisconsin Democratic and Republican senators concur on a potential designee, President Trump should accord their recommendation considerable deference as the officials have coordinated on the vacancy for years and possess superior knowledge about well qualified individuals—especially those who can best represent Wisconsin—and could halt or delay processing through blue slip retention.

If Senator Johnson differs with this promising approach or President Trump wants submissions comprising multiple people, Senators Johnson and Baldwin should carefully attempt to galvanize consensus on a few names or cautiously revitalize and deploy the merit selection commission. A panel should help effectively solicit, investigate, evaluate, and interview excellent possible nominees, yet a panel is resource intensive to operate and the senators' prior use of a similar committee lacked efficacy.¹⁶⁴ However, in February, they agreed to reactivate the commission, which provided application information on March 15 with applications due on April 29, and this is a promising start.¹⁶⁵

162. *E.g.*, Julie Bosman, *Johnson Retains a Critical Seat*, N.Y. TIMES, Nov. 9, 2016, at P11; Daniel Bice, *Group Touting Clarke Attacks Baldwin's Sexuality*, MILWAUKEE J. SENTINEL (Jan. 31, 2017), <http://www.jsonline.com/story/news/investigations/daniel-bice/2017/01/31/bice-group-touting-clarke-attacks-baldwins-sexuality/97265566/> [<https://perma.cc/YG3E-SZR6>].

163. Marley, *supra* note 96.

164. *See supra* notes 56–59 and accompanying text. *But see supra* notes 55, 62–67 and accompanying text.

165. Press Release, Sen. Tammy Baldwin, Wisconsin Senators Renew Agreement on Wisconsin Judicial Commission and Call for Applications for U.S. Attorney Vacancies (Feb. 13, 2017), <https://www.baldwin.senate.gov/press-releases/wisconsin-federal-nominating-commission> [<https://perma.cc/6286-XY8W>]; *Federal Nominating Commission*, ST. BAR WIS., <http://www.wisbar.org/aboutus/governmentrelations/Pages/Federal-Nominating-Commission.aspx> [<https://perma.cc/46MX-JC4T>] (last visited Mar. 23, 2017).

Once Senators Johnson and Baldwin concur, or in fact agree to disagree, they must present several prioritized suggestions with comprehensive explanations of the potential nominee rankings to the administration, which in turn must carefully and expeditiously canvass those notions while tendering a person who satisfies President Trump and both senators. The president should inform the officers about the prospect being considered, which enables the senators to identify any choice whom they may oppose and explain precisely why. If Senator Johnson or Senator Baldwin continues objecting to the White House pick after frank discussions, each should keep negotiating with the administration to carefully reach a preferred solution.¹⁶⁶

When President Trump and the senators concur on a prominent, moderate nominee, all three should cooperate with one another and the senators' colleagues to assure a speedy, comprehensive, and fair confirmation process. There is little more specifically pertaining to Wisconsin that can be effectively stated until the president selects the nominee, but the general ideas prescribed earlier should apply.¹⁶⁷ For instance, the White House, Senator Johnson, and Senator Baldwin ought to work closely with additional colleagues and staff for the Judiciary panel and Senator McConnell on the nominee's timely, full, and equitable investigation. They concomitantly should promote much rigorous, fair evaluation in committee hearings and complete, robust, dignified, and equitable scrutiny of crucial, relevant questions in the panel discussion and corresponding floor debate. The nominee also ought to efficaciously cooperate with panel staff and Senate leadership, which facilitates their actions, while comprehensively and clearly responding to queries posited by senators during the hearing and in writing.

b. Indiana Vacancy

President Trump must vigorously consult Senator Donnelly and the new GOP Senator Todd Young (Ind.), while both senators should collaborate with the White House and each other to quickly proffer fine, mainstream individuals for President Trump's consideration.¹⁶⁸ At

166. These measures provide flexibility while restricting embarrassment, cost and delay by obviating the need to restart, if President Trump differs with a single choice tendered. *See supra* Part I.

167. *See supra* Part IV.B.1.b.

168. The Indiana and the Wisconsin senators ironically have rather similar incentives to cooperate. Senator Young, like Senator Johnson, won 2016 election and will probably want to show that he can efficaciously work with Senator Donnelly to fill the Indiana vacancy. Chelsea Schneider & Mark Alesia, *Todd Young Wins Pivotal U.S. Senate Race*, INDYSTAR, <http://www.indystar.com/story/news/politics/2016/11/08/elections-results-2016-indiana-us-senate-race-winner/93240768/> [<https://perma.cc/5NA2-MCCM>] (last updated Nov. 9,

the beginning, Senator Young needs to cautiously examine suggesting re-nomination of President Obama's designee Selby for numerous persuasive reasons analogous to why Schott clearly deserves prompt re-nomination. She is a dynamic, moderate pick, and the candidate's re-nomination would save limited time and energy while the court's prolonged vacancy imposes detrimental effects on circuit litigants, jurists, and Indiana's active judge representation.¹⁶⁹

Should Senator Young differ with this concept or President Trump request a few proposed nominees, the home-state senators might attempt to concur on a small number of aspirants or consider the panel approach for which Senator Coats argued.¹⁷⁰ However, establishing the commission and having the group solicit, investigate, evaluate, interview, and proffer several exceptional, consensus possibilities would actually devour considerable additional time. Better routes may be creating some form of truncated panel system or having the senators work together directly on submitting possibilities.¹⁷¹ In February, Senator Young posted an announcement on his website stating that persons interested in the Seventh Circuit vacancy could submit applications by March 13 after which he would consider them and make recommendations to President Trump.¹⁷² The lawmaker should coordinate efforts with Senator Donnelly, as that would facilitate prompt confirmation, because it should promote bipartisan support for the nominee and because Senator Donnelly could retain his blue slip and prevent Senate consideration of the nominee. It now appears that

2016, 12:36 AM). Senator Donnelly, like Senator Baldwin, first captured election in 2012 and will probably confront a difficult 2018 reelection fight because President Trump won Indiana and Vice President Mike Pence is the former Governor of Indiana; therefore, Senator Donnelly will wish to appear cooperative with Senator Young. Maureen Groppe, *Susan Brooks Won't Challenge Joe Donnelly for U.S. Senate Seat*, INDYSTAR (Jan. 31, 2017, 6:14 PM), <http://www.indystar.com/story/news/politics/behind-closed-doors/2017/01/31/brooks-wont-challenge-donnelly-us-senate-seat/97282986/> [<https://perma.cc/D7LD-FXJN>]; see *supra* note 162 and accompanying text.

169. If Senators Young and Donnelly concur on proposing Selby's re-nomination, President Trump should defer to this agreement for reasons similar to those espoused above for deferring to the Wisconsin senators regarding Schott. See *supra* notes 163–164 and accompanying text.

170. See *supra* notes 62–67 and accompanying text.

171. See *supra* note 164 and accompanying text.

172. APPLICATION FOR PROSPECTIVE JUDICIAL NOMINEES FOR THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (2017), <https://www.young.senate.gov/sites/default/files/Application%20for%207th%20Circuit%20Judicial%20Nominee%20Final.pdf> [<https://perma.cc/V2RH-42PX>]; see Ryan Martin, *As Trump Boots U.S. Attorneys, Indiana Senator Looks for Applicants*, INDYSTAR (Mar. 13, 2017, 5:44 PM), <http://www.indystar.com/story/news/crime/2017/03/13/trump-boots-us-attorneys-indiana-senator-looks-applicants/99121958/> [<https://perma.cc/H589-BQDD>].

Senator Young has discussed the process with Senator Donnelly and they have “agreed to continue their cooperative relationship,” while Senator Young told Senator Donnelly that “he would have the opportunity to review the selections before they were sent to the White House” and Senator Young would not convene a vetting committee.¹⁷³

In any event, the senators need to recommend multiple impressive, centrist people for the White House, fully explain their suggestions and dutifully rank the persons whom the legislators do support with clear reasons for these priorities. The administration should carefully and promptly survey this input while expediently choosing a putative nominee who is mutually satisfactory. That ought to provide everyone some flexibility and considerable ability to profitably negotiate in reaching a salutary conclusion.¹⁷⁴

Once the president and the senators concur about a talented, mainstream pick, the officials need to coordinate with each other and chamber members to ensure the nominee a speedy, full, and equitable confirmation process. There seems little more particular to Indiana which deserves analysis before the president selects the nominee, but the general ideas treated earlier and propositions specific to Wisconsin can apply.¹⁷⁵ Most important will be quick, comprehensive, respectful, dignified, and rigorous panel evaluations and committee and Senate debates regarding nominee qualifications.

CONCLUSION

In January 2016, President Barack Obama recommended Donald Schott for the protracted Wisconsin Seventh Circuit open position and Myra Selby for this court’s Indiana vacant post. Because the nominees were accomplished, moderate candidates and the circuit requires all of its jurists, the Senate should not have allowed the presidential election year or GOP obstruction to frustrate the individuals’ confirmation. President Trump, Senator Johnson, and Senator Young must seriously consider the possible nomination of each selection again. The nominees comprise well-qualified, mainstream aspirants. Their nominations would conserve resources and diligently filling the vacancies is essential to Seventh Circuit parties, court members, and both states’ active circuit judge representation. If President Trump or the GOP senators

173. Marilyn Odendahl, *Young Wants to Fill Indiana Seats on Federal Courts Quickly*, IND. LAW. (Mar. 15, 2017), <http://www.theindianalawyer.com/young-wants-to-fill-indiana-seats-on-federal-courts-quickly/PARAMS/article/43102> [<https://perma.cc/Q7T5-5VLL>].

174. This process would reduce embarrassment, expense, and delay by limiting the necessity to start the process again, should President Trump disagree with a sole candidate proffered. *See supra* note 165.

175. *See supra* Parts IV.B.1.b., 2.a

directly oppose re-nomination, those legislators and the White House must cooperate to deftly propose aspirants who can satisfy Republicans and Democrats while collaborating to expeditiously appoint these candidates. In the end, President Trump and the Senate need to coordinate on approving preeminent, moderate jurists for the Seventh Circuit.