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SENATE

REPORT

of the

SENATE JUDICIARY COMMITTEE
MINORITY MEMBERS

REVIEW

of

REPUBLICAN EFFORTS TO STACK
FEDERAL COURTS

MAY 10, 2018

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Senator Patrick Leahy
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Table of Contents

Executive summary.....	4
Key findings.....	6
Republican obstruction helps President Trump remake federal courts	8
Confirming judges as quickly as possible, without thorough review	14
Rushing hearings without proper vetting.....	16
Attempts to discredit the American Bar Association.....	18
Lack of disclosure by nominees makes review harder	20
Republicans change committee standard for FBI background checks	24
Republicans change blue-slip tradition, cutting senators out of the process	25
Obama nominees blocked by Republican senators not returning blue slips.....	26
Outside and dark-money political groups play central role in selecting and confirming nominees	34
Rushing ideological nominees	38
Trump’s first 15 circuit court nominees: Controversial, confirmed at record pace.....	39
Obama’s first 15 circuit court nominees: Broadly supported, confirmed after long delays	40
Young nominees who will serve for decades	42
Failed nominees who lack basic qualifications.....	43
Nominees who would roll back civil rights, LGBT rights, and women’s rights	47
Trump nominees don’t reflect diversity of the communities they serve	52
Trump nominees	55

May 10, 2018

Dear Colleagues:

One of the Senate Judiciary Committee's most important responsibilities is to review and evaluate the president's nominees for lifetime appointments on federal courts to ensure they are qualified and within the mainstream of legal thinking.

The federal court system is comprised of 94 district courts, 13 courts of appeals, the Court of International Trade and the Supreme Court. The 874 judges who sit on these courts rule on hundreds of thousands of cases each year. They have the final say on important legal questions pertaining to health care, the environment, workers' rights, access to voting, campaign finance, and criminal law.

After decades of unyielding obstruction of judicial nominees, including during both of President Obama's terms—culminating in the unprecedented decision to block a Supreme Court nominee for a year—President Trump entered office with 112 judicial vacancies, compared to just 53 vacancies when President Obama entered office.

To fill these vacancies and change the nature of the federal judiciary for decades, President Trump and Senate Republicans have been rushing nominees through the Senate at a breakneck pace by changing the process for consideration and eliminating traditions that had been followed for over a century. The Judiciary Committee has approved nominees even when they lacked support of home-state Senators, did not have necessary legal experience, held views far outside the mainstream, or were rated unanimously "not qualified" by the American Bar Association.

The strategy of pushing right-wing ideological nominees onto the courts with minimal review resulted in 12 of President Trump's circuit court nominees being confirmed after just 328 days in office. This is the most nominees ever confirmed in a president's first year since the circuit court system was created in 1891.

In less than 16 months, President Trump will have secured confirmation for 21 circuit court nominees. By comparison, President Obama's 21st circuit court nominee was not confirmed until October 2011—33 months into his administration.

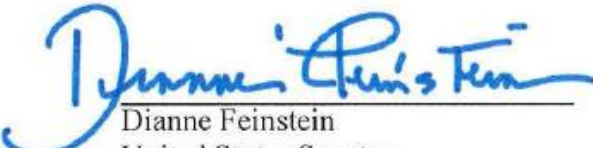
Despite their often ideological records, these circuit court nominees were confirmed by the Senate an average of just 20 days after being voted out of the committee. This is eight times faster than President Obama's nominees, who were confirmed an average of 167 days after being voted out by the committee.

At the committee's first 2018 markup, 17 judicial nominees were moved forward, including one nominee who was opposed by leaders of the Congressional Black Caucus because he spent his career defending North Carolina's restrictive voting law, which the Fourth Circuit struck down because the measures "targeted African Americans with almost surgical precision."

Democratic senators spoke in opposition to this nominee and several others who were approved by the committee that day. In contrast, Republican senators offered little in the way of defense before voting in lockstep to approve these nominees. The scene was emblematic of Republicans' rush to fill vacancies under President Trump as quickly as possible.

This report lays out, chapter and verse, how President Trump and Republicans are working to stack the federal judiciary, particularly circuit courts.

Sincerely,



Dianne Feinstein
United States Senator



Patrick Leahy
United States Senator


Richard J. Durbin
United States Senator


Sheldon Whitehouse
United States Senator


Amy Klobuchar
United States Senator


Christopher A. Coons
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Richard Blumenthal
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Mazie Hirono
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Cory A. Booker
United States Senator


Kamala D. Harris
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Executive summary

President Trump and Senate Republicans have prioritized filling the nation's federal courts, particularly circuit courts, with ideological judges intent on weakening civil rights, women's rights, workers' rights, and the ability of everyday Americans to hold corporations accountable.

As Senate Majority Leader Mitch McConnell (R-Ky.) noted in the February 9, 2018, issue of *Time*:

“So when Donald Trump won, a week after the election I called Don McGahn, who I heard was going to be the White House counsel. And I said Don, we've got an opportunity here to have a huge long-term impact on the country, if we can get more efficient.

“**[A]t the end of the year we confirmed a record number of circuit court judges since the circuit court system was established in 1891.** And the reason we were able to do that is that we expedited that process, both at the White House and at the committee, and when they came out of committee I called them up. **I feel that the impact that this administration could have on the courts is the most long-lasting impact we could have.**”¹

The Supreme Court decides fewer than 100 cases each year.² In contrast, nearly 59,000 cases³ were filed in courts of appeals, and nearly 368,000 cases⁴ were filed in district courts. The reality is that lower courts are the place of final justice for the vast majority of Americans.

There has been a strategy to allow Republican presidents to have a disproportionate effect on federal courts. The effects of this strategy will affect the country for generations, and it is especially dangerous in the context of the Trump administration.

President Trump has demonstrated a lack of respect for the rule of law. He has attacked judges who have ruled against him, stated he expects loyalty from those in law enforcement, demanded investigations into the media and political opponents, and repeatedly declared he has litmus tests for judicial nominees, pledging that they would be “pro-life” and “pro-gun.”⁵

¹ Berenson, Tessa. “Mitch McConnell Speaks About Donald Trump Judicial Strategy.” *Time*. February 8, 2018. Accessed February 08, 2018. <http://time.com/5138247/mitch-mcconnell-judicial-strategy/>.

² “The Justices’ Caseload.” Supreme Court of the United States. Accessed May 04, 2018. <https://www.supremecourt.gov/about/justicecaseload.aspx>.

³ “Federal Judicial Caseload Statistics 2017.” United States Courts. <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017>

⁴ Id. from March 2016 to March 2017.

⁵ Blake, Aaron. “The final Trump-Clinton debate transcript, annotated.” *Washington Post*. October 19, 2016. https://www.washingtonpost.com/news/the-fix/wp/2016/10/19/the-final-trump-clinton-debate-transcript-annotated/?utm_term=.9fbf33bef1a1

President Trump’s signature policies—banning travel from Muslim-majority countries, restricting women’s access to contraception, limiting communities’ ability to combat pollution, allowing coal-fired power plants to discharge toxic wastewater, expanding the use of harmful pesticides, and reversing the Obama administration’s net neutrality rules—are all subject to ongoing litigation.

Senate Republicans have undermined the vetting process by placing two circuit court nominees on hearings, ignored “not qualified” ABA ratings, neglected to follow up when nominees failed to disclose information required by the committee questionnaire, changed the committee’s standard for clearing confidential background investigations, undermined the 100-year-old blue-slip tradition, and rushed nominees to the floor.

Republicans should have felt an urgency to defend the integrity of our courts. Instead, Senate majority leadership undermined the vetting process that ensures qualified, impartial judicial nominees, in order to advance the president’s picks, too many of whom have proven to be unprepared and unqualified.

This report analyzes the degradation of the judicial nominations process, the lack of diversity among President Trump’s nominees, and this administration’s commitment to nominate ideological, often-unqualified candidates.

Key findings

- 1. Senate Republicans' obstruction of President Obama's judicial nominees provided President Trump an opportunity to dramatically remake federal courts:** Sustained efforts by Senate Republicans to block President Obama's judicial nominees were intended to hold seats open for a Republican president. This obstruction allowed Senate Republicans to hand President Trump 112 vacancies on day one of his term, including the Supreme Court seat they held open for nearly a year, as well as 17 circuit court and 86 district court vacancies. These vacancies represented 12 percent of the federal judiciary. In contrast, President Obama entered office with just 53 vacancies, or 6 percent of the federal judiciary.
- 2. To confirm President Trump's often ideological and even unqualified nominees as quickly as possible, Senate Republicans have undermined the Senate's advice and consent role:** To further the long-standing goal of remaking the federal judiciary, Republican leadership has eroded the Senate's ability to vet judicial nominees and ensure they are qualified and within the mainstream. One of the ways this has been done is diminishing senators' ability to use the blue-slip tradition to guard against extreme nominees.
- 3. Having demanded that their blue slips be honored and used the blue slip to block 18 Obama nominees, Senate Republicans eliminated the guarantee that blue slips would be honored for Democrats:** When Senate Republicans were in the majority (2015-2016), they blocked nine Obama nominees from receiving hearings because they did not have positive blue slips from both home-state senators. With a Republican president, Senate Republicans have reversed their position and allowed three nominees to move forward without both blue slips.
- 4. Senate Republicans have pushed two circuit court nominees on hearings, making it more difficult to vet and question them:** In 2017, the committee held four hearings with two circuit court nominees on the same panel—more than all eight years of the Obama administration—and each time over the objection of Democratic senators.
- 5. President Trump and Senate Republicans have undermined the independent, nonpartisan role of the American Bar Association (ABA) in ensuring judicial nominees are qualified:** The Trump administration eliminated the ABA's role in evaluating judicial nominees prior to their nominations.

More than one year into the Trump administration, five nominees have received hearings without ABA evaluations. Two others were rated unanimously “not qualified.” Of those, one dropped out and the other became the first nominee ever rated “not qualified” based on concerns of bias to be confirmed.

- 6. President Trump and Senate Republicans are reshaping the nation's circuit courts at breakneck speed:** President Trump's first 15 circuit court nominees took an average of 131 days to be confirmed. In contrast, President Obama's first 15 circuit court

nominees took an average of 254 days to be confirmed—more than twice as long.

On average, President Trump's first 15 circuit court nominees waited just 20 days from approval by the Judiciary Committee to confirmation on the floor. On average, President Obama's first 15 circuit court nominees waited 167 days from approval by the Judiciary Committee to confirmation on the floor—eight times longer than President Trump's nominees.

- 7. President Trump's circuit court nominees have been far more controversial than President Obama's circuit court nominees:** President Trump's first 15 circuit court nominees were confirmed largely along party lines, reflecting nominees' ideological records and lack of consultation with Democratic senators on nominees from their states to ensure mainstream choices.

Eleven of President Trump's first 15 circuit court nominees have been confirmed with fewer than 60 votes. President Obama's first 15 circuit court nominees were confirmed with overwhelming bipartisan votes. Three were confirmed unanimously (by voice vote) and seven did not receive a single vote in opposition.

- 8. President Trump's circuit court nominees have been young, with more than half in their 40s, allowing them to serve for more than a generation:** Nine of President Trump's first 15 confirmed circuit court judges, or 60 percent, are in their 40s. By comparison, only one of President Obama's first 15 confirmed nominees was in their 40s.
- 9. Outside and dark-money political groups, including the Federalist Society, the Judicial Crisis Network, and the Heritage Foundation, have been central to the effort to fill vacancies as quickly as possible. They have used their power and resources to influence the selection of nominees and pressure Republicans to rush nominations through the Senate.**
- 10. President Trump's nominees reflect a lack of diversity, with far fewer women and people of color than President Obama's nominees:**

- 8 percent of President Trump's U.S attorney nominees are women.
- 25 percent of President Trump's district court nominees are women.
- 19 percent of President Trump's circuit court nominees are women.
- 8 percent of President Trump's U.S. attorney nominees are people of color.
- 8 percent of President Trump's district court nominees are people of color.
- 11 percent of President Trump's circuit court nominees are women.

Republican obstruction helps President Trump remake federal courts

Decades of sustained efforts by Senate Republicans to block Democratic presidents' judicial nominees succeeded in holding seats open for Republican presidents.

During the Clinton administration, Republicans blocked the consideration of nominees for years. For example, Richard Paez, a federal district court judge, waited four years after his nomination to be confirmed to the Ninth Circuit.⁶ Marsha Berzon, who had clerked for Justice William Brennan and argued a number of cases before the Supreme Court, waited two years after her nomination to be confirmed to the Ninth Circuit.⁷

Republican obstruction ramped up in the final two years of the Clinton presidency, when more than 60 circuit and district court nominees were blocked in the Judiciary Committee or denied floor consideration.⁸

These efforts only increased during the Obama administration as relentless obstruction resulted in the lowest percentage of district and circuit court nominees approved among two-term presidents since 1945.⁹

After seven years of obstructing lower-court nominees, Senate Republicans' efforts culminated in the unprecedented decision to block a Supreme Court nominee for nearly a year.

D.C. Circuit Chief Judge Merrick Garland was well qualified and supported by both Democrats and Republicans. However, Republican leaders refused to even consider his nomination in order to deny President Obama the opportunity to fill the vacancy created by the death of Justice Antonin Scalia.

Judge Garland was never given a hearing or consideration on the floor, and most Republican senators refused to give him the courtesy of an introductory visit.¹⁰

⁶ Lewis, Neil A. "After Long Delays, Senate Confirms 2 Judicial Nominees." *New York Times*. March 09, 2000. Accessed February 01, 2018. <http://www.nytimes.com/2000/03/10/us/after-long-delays-senate-confirms-2-judicial-nominees.html>.

⁷ Id.

⁸ Chaddock, Gail. "Judicial nominee logjam? Change the rules." *Christian Science Monitor*. May 12, 2003. <https://www.csmonitor.com/2003/0512/p02s01-uspo.html>.

⁹ McMillion, Barry J. "U.S. Circuit and District Court Nominations: Comparative Statistics of Two-Term Presidencies Since 1945." Congressional Research Service. April 24, 2017. Accessed December 18, 2017. <https://fas.org/sgp/crs/misc/IN10694.pdf>

¹⁰ Washington Post Staff. "Where do Senate Republicans stand on Supreme Court nominee Merrick Garland?" *Washington Post*. April 8, 2016. Accessed December 29, 2017. <https://www.washingtonpost.com/graphics/politics/scotus-senate-gop-garland/>.

The result was that Senate Republicans handed President Trump 112 vacancies on the first day of his presidency,¹¹ including the Supreme Court seat they had held open, as well as 17 circuit court and 86 district court vacancies.¹² This represented nearly 13 percent of the federal judiciary. In contrast, President Obama entered office with just 53 vacancies, or just 6 percent.¹³

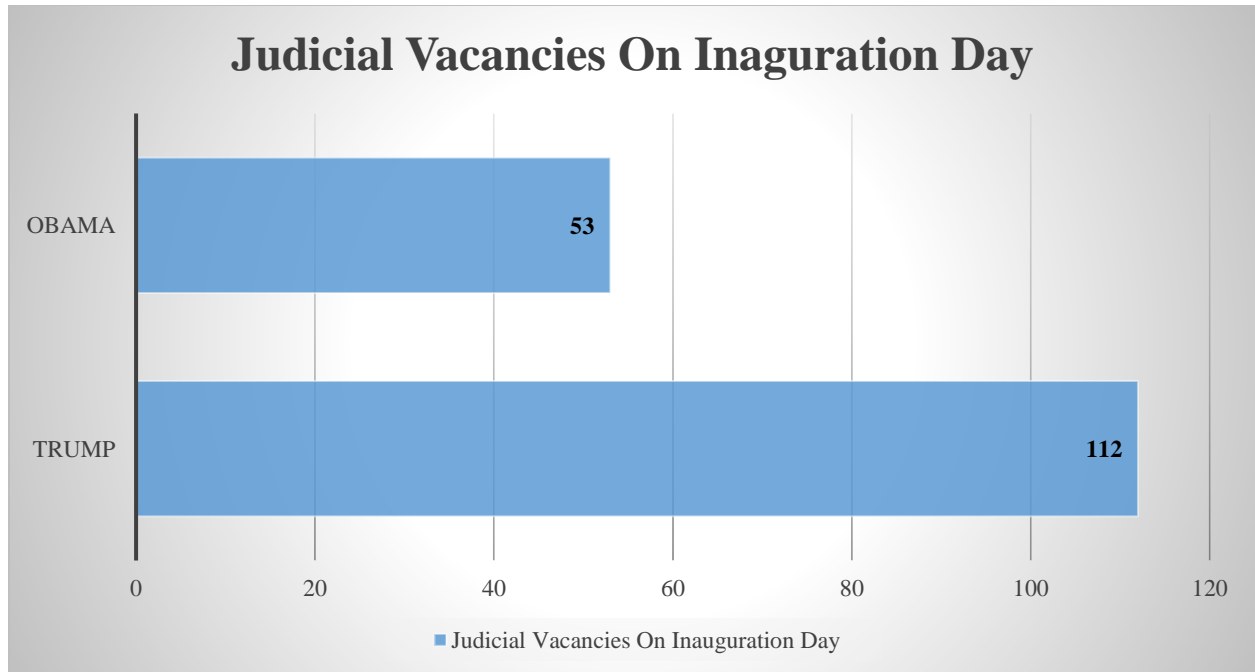


Figure 1
Source: U.S. Courts

Obstruction of Obama nominees

In the first five years of the Obama administration, Republican senators filibustered 36 judicial nominees,¹⁴ as many as had been filibustered in the previous 42 years (1967-2009).¹⁵

¹¹ "Vacancy Summary for January 2017." United States Courts. Accessed December 28, 2017. <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/01/summary>

¹² Id.

¹³ "Vacancy Summary for January 2009." United States Courts. Accessed December 11, 2017. <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2009/01/summary/pdf>.

¹⁴ Beth, Richard S., and Elizabeth Rybicki. "Nominations with Cloture Motions: 2009 to the present." Congressional Research Service. November 21, 2013. Accessed December 28, 2017. <https://www.documentcloud.org/documents/838702-crs-filibuster-report.html>.

¹⁵ Beth, Richard S. "Cloture Attempts on Nominations: Data and Historical Development." Congressional Research Service. June 26, 2013. <https://www.senate.gov/CRSPubs/83d4b792-d34b-4215-be6d-4a3c4e976d2b.pdf>.

Most of these nominees were eventually confirmed with strong bipartisan support. For example, Republicans filibustered Barbara Keenan,¹⁶ nominated to the Fourth Circuit, and Adalberto Jordan,¹⁷ nominated to the Eleventh Circuit. Keenan was confirmed 99-0,¹⁸ and Jordan was confirmed 94-5.¹⁹

As a result of filibusters, President Obama's judicial nominees were forced to wait much longer for confirmation.

During the first five years of the Obama administration, district court nominees waited an average of 104 days after being approved by the Judiciary Committee to be confirmed, three times as long as President George W. Bush's district court nominees, who waited an average of 35 days at the same point in his administration.

During President Obama's first term, the average circuit court nominee waited more than seven times as long for a vote than the average Bush nominee during his two terms. According to the Congressional Research Service (CRS), 60 percent of President Bush's first-term circuit court nominees were confirmed within 30 days on the Senate floor.²⁰ In contrast, 80 percent of President Obama's first-term circuit court nominees waited more than 90 days.²¹

¹⁶ "Roll Call Vote 111th Congress - 2nd Session." U.S. Senate: U.S. Senate Roll Call Votes 111th Congress - 2nd Session. March 3, 2010. Accessed December 29, 2017. https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00029.

¹⁷ "Roll Call Vote 112th Congress - 2nd Session." U.S. Senate: U.S. Senate Roll Call Votes 112th Congress - 2nd Session. February 13, 2012. Accessed December 29, 2017. https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=2&vote=00018.

¹⁸ "Roll Call Vote 111th Congress - 2nd Session." U.S. Senate: U.S. Senate Roll Call Votes 111th Congress - 2nd Session. March 3, 2010. Accessed December 29, 2017. https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00030.

¹⁹ "Roll Call Vote 112th Congress - 2nd Session." U.S. Senate: U.S. Senate Roll Call Votes 112th Congress - 2nd Session. February 15, 2012. Accessed December 29, 2017. https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=2&vote=00019.

²⁰ McMillion, Barry J. "Nominations to U.S. Circuit and District Courts by President Obama During the 111th and 112th Congresses." Congressional Research Service. June 1, 2012. <https://fas.org/sgp/crs/misc/R42556.pdf>.

²¹ *Id.*

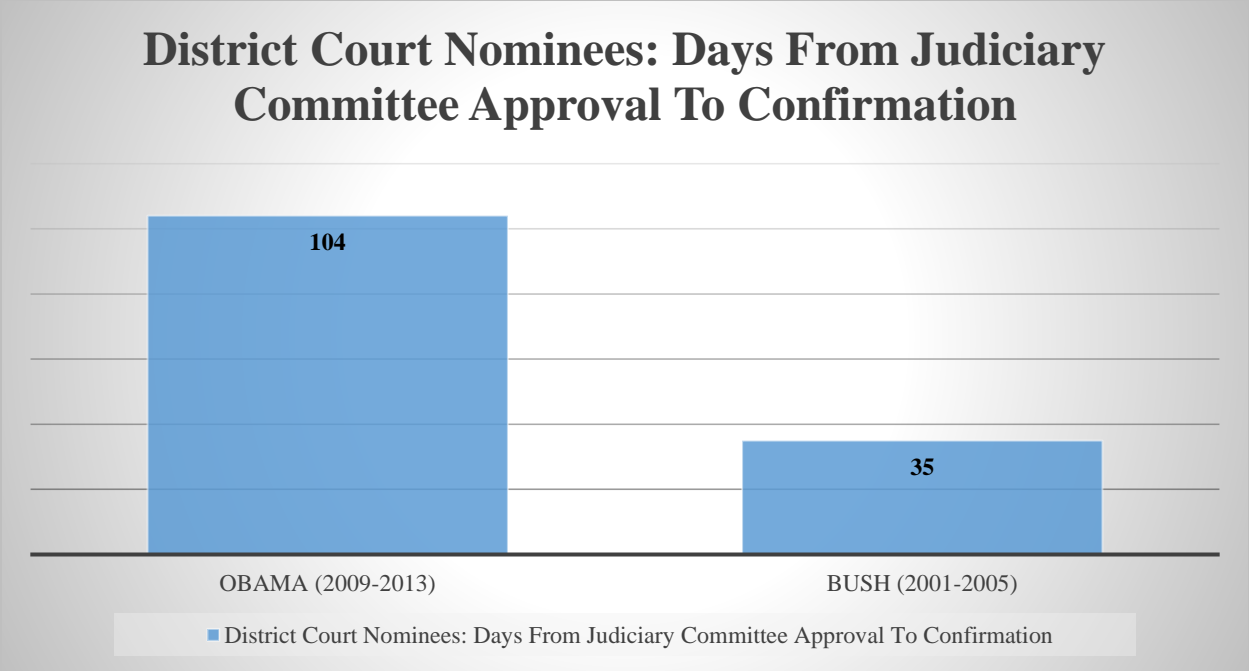


Figure 2
Source: Congressional Research Service

After five years of obstruction, Republicans in 2013 prevented President Obama from filling any of the three vacancies on the D.C. Circuit Court of Appeals by filibustering all three of his nominees to that court. The *New York Times* noted:

“[T]he dispute is not as much about the judges’ individual political leanings as it is about the overall ideological makeup of the court. Republicans have raised few objections to the three candidates’ qualifications or legal positions. Rather, Republicans are seeking to prevent Mr. Obama from filling any of the three existing vacancies on the 11-seat court, fearing that he will alter its conservative tilt. The court has immense political importance because it often rules on questions involving White House and federal agency policy.”²²

Obstruction reached new heights in 2015 when Republicans took the Senate majority. The Judiciary Committee considered only five circuit court nominees in the final two years of the Obama administration, and Leader McConnell allowed only 22 judicial nominees to be confirmed. This marked the fewest judicial nominees confirmed in a Congress since President Truman.²³

²² Peters, Jeremy W. “Obama Pick for Court Is 3rd in a Row Blocked by Republicans.” *The New York Times*. November 18, 2013. Accessed December 29, 2017. <http://www.nytimes.com/2013/11/19/us/politics/republicans-block-another-obama-nominee-for-key-judgeship.html>.

²³ Rucker, Philip, and Robert Barnes. “Trump to inherit more than 100 court vacancies, plans to reshape judiciary.” *The Washington Post*. December 25, 2016. Accessed December 29, 2017. https://www.washingtonpost.com/politics/trump-to-inherit-more-than-100-court-vacancies-plans-to-reshape-judiciary/2016/12/25/d190dd18-c928-11e6-85b5-76616a33048d_story.html?utm_term=.ba1b7379557a.

In contrast, when Senate Democrats controlled the Senate in the last two years of President Bush’s term, 68 judicial nominees were confirmed.²⁴

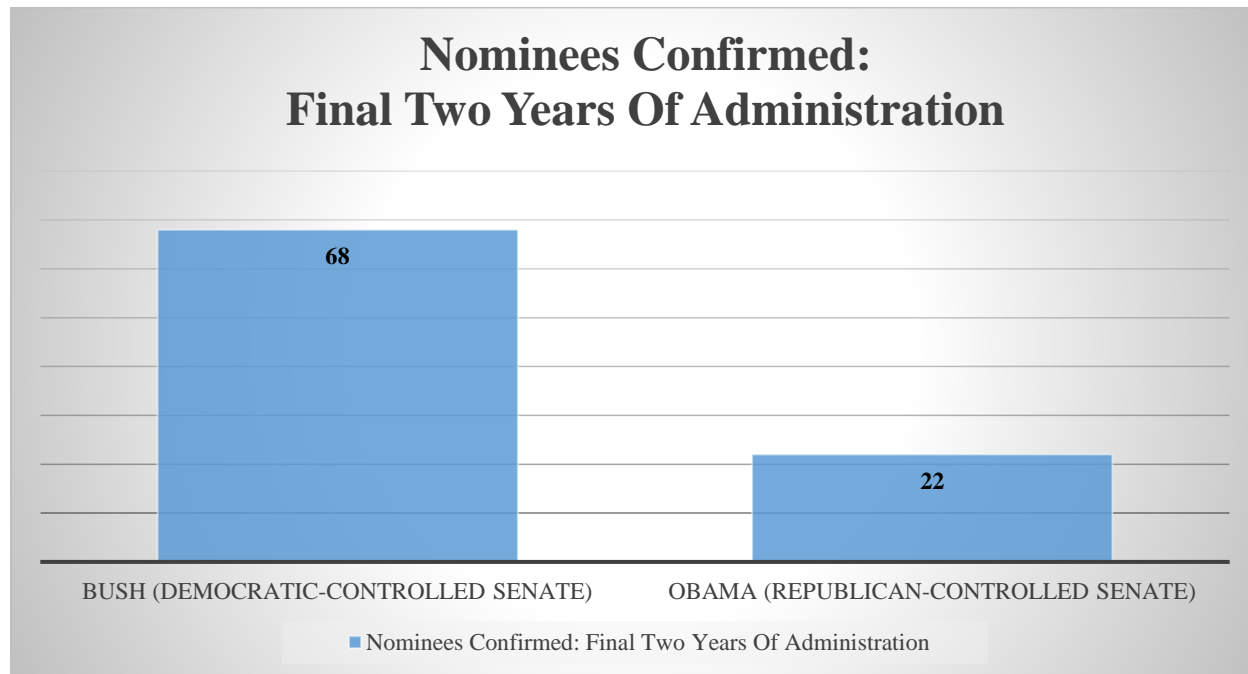


Figure 3

Source: Congressional Research Service

Republican-controlled Judiciary Committee considered just five circuit court nominees from 2015-2016

- Luis Restrepo (Third Circuit-Pa.) Nominated: January 7, 2015; Hearing: June 10, 2015
- Kara Farnandez Stoll (Federal Circuit) Nominated: January 7, 2015; Hearing: March 11, 2015
- Donald Schott (Seventh Circuit-Wis.) Nominated: January 12, 2016; Hearing: May 18, 2016
- Jennifer Klemetsrud Puhl (Eighth Circuit-N.D.) Nominated: January 28, 2016; Hearing: June 21, 2016
- Lucy Koh (Ninth Circuit-Calif.) Nominated: February 25, 2016; Hearing: July 13, 2016

Obama nominees blocked, seats held open with blue slips

The Senate’s blue-slip tradition, since 1917, has required both home-state senators to sign off on judicial nominees before they receive a hearing in the Judiciary Committee. Senate Republicans

²⁴ Savage, David G. “This Congress filled the fewest judgeships since 1952. That leaves a big opening for Trump.” *Los Angeles Times*. Accessed February 02, 2018. <http://www.latimes.com/politics/la-na-judges-trump-senate-20161231-story.html>.

used the blue-slip tradition to block and delay nominees, even preventing nominees from being sent to the Senate.

- **Blocked Nominees:** Senate Republicans used blue slips to block 18 Obama nominees—six circuit court nominees and 12 district court nominees.²⁵
- **Delayed Nominees:** Senate Republicans also used blue slips to delay the consideration of nominees they ultimately supported. For example, Judge Jill Pryor was nominated to the Eleventh Circuit in February 2012, but Senators Johnny Isakson and Saxby Chambliss (both R-Ga.) did not return their blue slips until April 2014—803 days later.²⁶
- **Vacancies Held Open:** In general, if Republican senators signaled to the administration that they would not return blue slips on any Obama nominees, the White House did not nominate candidates and vacancies were held open.

For example, two Fifth Circuit vacancies in Texas opened in 2012 and 2013, respectively. The Obama administration never nominated candidates for these vacancies because it could not reach consensus with Senators John Cornyn and Ted Cruz (both R-Texas), and blue slips would not be returned on nominees who did not have their approval.²⁷

²⁵ McMillion, Barry. “The Blue Slip Process for U.S. Circuit and District Court Nominations: Frequently Asked Questions.” Congressional Research Service. October 2, 2017. Accessed May 4, 2017. <https://fas.org/sgp/crs/misc/R44975.pdf>.

²⁶ Kang, Christopher. “10 Things You Need to Know about Blue Slips.” American Constitution Society. September 13, 2017. Accessed February 02, 2018. <https://www.acslaw.org/acsblog/10-things-you-need-to-know-about-blue-slips>.

²⁷ Daugherty, Alex. “Trump could change Texas voter-ID law by reshaping 5th U.S. Circuit Court of Appeals.” *McClatchy*. February 2, 2017. Accessed December 28, 2017. <http://www.mcclatchydc.com/news/politics-government/article130380354.html>.

Confirming judges as quickly as possible, without thorough review

To further the long-standing goal of remaking the federal judiciary with young, ideological judges, Republican leadership has steadily eroded the Senate’s ability to vet judicial nominees and ensure they are qualified, independent, and mainstream.

Senate Republicans have repeatedly placed two circuit court nominees on hearings, scheduled hearings before nominees were evaluated by the ABA, ignored “not qualified” ABA ratings, neglected to follow up when nominees failed to disclose information required by the committee questionnaire, changed the committee’s standard for clearing confidential background investigations, undermined the 100-year-old blue-slip tradition, and rushed nominees to the floor.

These actions, taken together, clearly demonstrate that Republicans have undermined long-standing committee policies for the judicial nominee vetting process. These practices have been removed to jam President Trump’s ideological and often unqualified nominees through the Senate at a record pace.

President Trump had 12 circuit court nominees confirmed in 2017—the most of any president since the circuit courts were created by the *Judiciary Act of 1891*. His twelfth circuit court nominee was confirmed just 328 days after President Trump took office—the fewest in history.

While 12 circuit court judges confirmed in one year is one more than Presidents Kennedy and Nixon, the nominations process is far less collegial than it was during the 1960s. Confirming 12 circuit court judges in one year is even more significant when viewed in the context of the modern nominations process.

Scholars often view the contentious Supreme Court nomination of Robert Bork, who served as acting attorney general to President Nixon after the Saturday Night Massacre, as a marker of the modern nominations process. As Sarah Binder, fellow at the Brookings Institute noted:

“The duration of the nomination and confirmation processes has stretched out in recent decades. From the 1940s to the 1980s, a typical court of appeals nominee was confirmed within two months of nomination. By the late 1990s, the wait for successful nominees had stretched to about six months.”²⁸

²⁸ Binder, Sarah A., and Forrest Maltzman. *Advice and Dissent: The Struggle to Shape the Federal Judiciary*. Brookings Institution Press, 2010.

Modern Nominations Era: Circuit Court Judges Confirmed In Year One

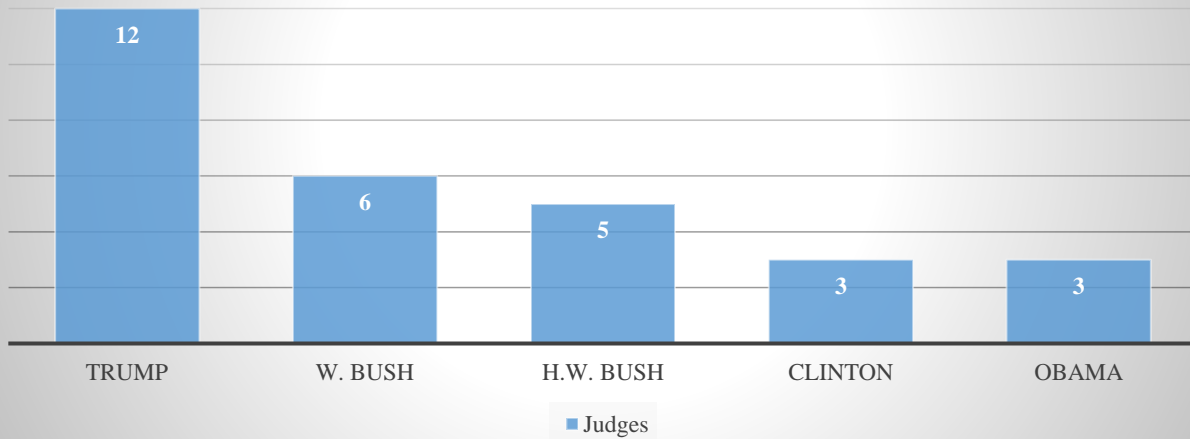


Figure 4
Source: Federal Judicial Center

Days From Inauguration To Confirmation: 12th Circuit Court Judge

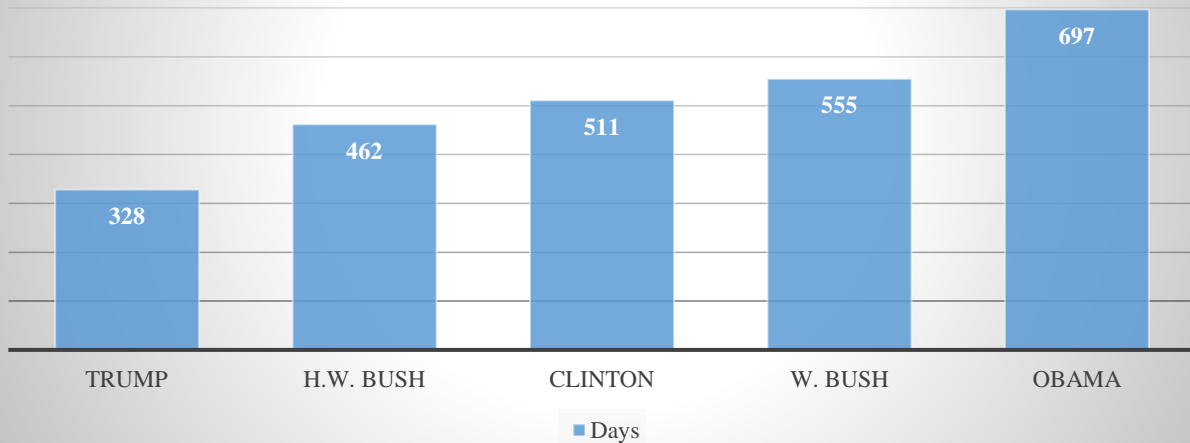


Figure 5
Source: Senate Judiciary Committee

Rushing hearings without proper vetting

The Judiciary Committee typically holds hearings on one circuit court nominee at a time to ensure that senators are able to thoroughly review nominees' records and allow senators ample time to ask questions of nominees.

Placing two circuit court nominees on the same panel hampers the ability of senators to adequately vet each nominee. Nominees often produce thousands of pages of material to the Judiciary Committee, and stacking nominees makes it more difficult to thoroughly analyze each nominee's materials in advance of his or her hearing.

Placing two circuit court nominees on the same panel also hampers senators' ability to ask questions. Senators typically have just five minutes to question each panel of nominees, and when two circuit court nominees are placed on the same panel, they inevitably are less thoroughly vetted, because they are asked fewer questions than they would be on a panel alone.

During the eight years of the Obama administration, there were only three instances where two circuit court nominees appeared on the same hearing. Republicans, who were in the minority, were consulted in each case.

For example, then-Ranking Member Jeff Sessions (R-Ala.) confirmed that he approved of holding one hearing for two Fourth Circuit nominees from North Carolina, James A. Wynn and Albert Diaz, who were supported by both North Carolina Senators. Ranking Member Sessions stated, "We will have two [circuit] nominees today for hearing, which is unusual and not something we do often, but it is something we were requested to do. So I think under those circumstances, I have agreed to go forward with both nominees today."²⁹

At the second hearing in 2017 with two circuit court nominees, Chairman Chuck Grassley (R-Ia.) acknowledged that it was "unusual."³⁰ Nonetheless, in November 2017 he held two additional hearings with two circuit court nominees each time.

In 2017, the committee held four hearings with two circuit court nominees on the same panel—more than all eight years of the Obama administration—and each time over the objection of Democratic senators.

The committee held hearings for five circuit court nominees in November 2017 alone, which had not be done in at least the past 25 years. In contrast, the committee held hearings for just five circuit court nominees in the final two years of the Obama administration.

²⁹ "Nominations of James A. Wynn, Jr. nominee to be United States circuit judge for the Fourth Circuit; and, Albert Diaz, nominee to be United States circuit court judge for the Fourth circuit." Government Printing Office. Accessed December 29, 2017. <https://www.congress.gov/111/chrg/shrg63004/CHRG-111shrg63004.htm>.

³⁰ "Nominations hearing." Committee on the Judiciary. September 06, 2017. Accessed February 02, 2018. <https://www.judiciary.senate.gov/meetings/08/08/2017/nominations>.

One of these 2017 hearings with two circuit court nominees was for James Ho and Don Willett, both nominated to the Fifth Circuit. They were rushed through on the same hearing to fill vacancies that only existed because Republican senators for years refused to engage with President Obama to select candidates, leaving those seats vacant from 2012 and 2013.

Hearings in 2017 with two Trump circuit court nominees

- John Bush (Sixth-Ky.) and Kevin Newsom (Eleventh-Ala.): June 14, 2017
- Joan Larsen (Sixth-Mich.) and Amy Coney Barrett (Seventh-Ind.): September 6, 2017
- James Ho and Don Willett (both Fifth-Texas): November 15, 2017
- David Stras (Eighth-Minn.) and Kyle Duncan (Eleventh-La.): November 29, 2017

Hearings from 2009-2016 with two Obama circuit court nominees

- David Hamilton (Seventh-Ind.) and Andre Davis (Fourth-Md.): April 29, 2009
- James A. Wynn and Albert Diaz (both Fourth-N.C.): December 16, 2009
- Jill Pryor and Julie Carnes (both Eleventh-Ga.): May 13, 2014

Attempts to discredit the American Bar Association

Since President Eisenhower's administration, the ABA has played an independent, nonpartisan role in evaluating the professional qualifications of the lawyers and judges nominated to lifetime federal judgeships.

In more recent history, Presidents Barack Obama and Bill Clinton had the ABA review potential candidates prior to their nominations to ensure their picks were qualified.³¹ President Obama did not nominate at least 14 candidates that the ABA determined to be "not qualified."³²

While the George W. Bush administration did not have potential nominees vetted in advance by the ABA, Chairman Orrin Hatch (R-Utah) almost always waited until the ABA had completed its evaluations before holding hearings on nominees. During the eight years of the Bush administration, only seven nominees received hearings in committee before they had received their ABA rating.

The Trump administration has again eliminated the ABA's role in evaluating judicial nominees prior to their nominations. So far in the Trump administration, five nominees have received hearings without ABA evaluations.

The decisions to not have nominees evaluated in advance, and to hold hearings before evaluations are complete, indicate a desire to minimize scrutiny on nominees' records and qualifications.

Since 1989, the ABA has evaluated more than 1700 judicial nominees. Sixteen have been rated "not qualified," and four unanimously "not qualified."³³

In the first year of the Trump administration, four nominees were rated "not qualified"—L. Steven Grasza, Brett Talley, Holly Teeter and Charles Goodwin. And both Grasza and Talley were rated unanimously "not qualified." This represents 30 percent of the nominees rated "not qualified" and half of the nominees rated unanimously "not qualified" in the past 28 years.

Only two nominees since 1989 have been rated unanimously "not qualified" based on their judicial temperament and concerns over impartiality—Michael Wallace in 2006, who was never

³¹ Rawles, Lee. "Second Trump judicial nominee gets 'not qualified' rating from ABA: What's the rating process?" *ABA Journal*. October 30, 2017. Accessed December 29, 2017. http://www.abajournal.com/news/article/standing_committee_on_federal_judiciary_not_qualified_rating.

³² Savage, Charlie. "Ratings Shrink President's List for Judgeships." *New York Times*. November 22, 2011. Accessed December 29, 2017. <http://www.nytimes.com/2011/11/23/us/politics/screening-panel-rejects-many-obama-picks-for-federal-judgeships.html>.

³³ Bresnahan, Pam. "ABA Standing Committee on the Federal Judiciary responses to Grassley, Feinstein QFRs." Senate Judiciary Committee. December 5, 2017. <https://www.judiciary.senate.gov/imo/media/doc/Bresnahan%20Responses%20to%20QFRs.pdf>.

confirmed, and Steven Grasz who was confirmed 50-48 on a party-line vote to the Eight Circuit in 2017.

Instead of examining allegations by Grasz's colleagues, who had deep concerns about his ability to be fair and impartial, Senate Republicans attacked the ABA. These attacks of "bias" came despite the fact that the ABA rated 54 of 58 of President Trump's judicial nominees "qualified" or "well-qualified."³⁴

American Bar Association Ratings Since 1989 (*nominated by President Trump)

Four unanimous "not qualified" ratings

- Fredrick Rohlfig (District-Hawaii): Not confirmed (2003)
- Michael Wallace (Fifth Circuit-Miss.): Not confirmed (2006)
- L. Steven Grasz (Eighth Circuit-Neb.): Confirmed 50-48 on December 12, 2017*
- Brett Talley (Middle District-Ala.): Withdrawn (2017)*

Two unanimous "not qualified" ratings based on temperament

- Michael Wallace (Fifth Circuit-Miss.): Not confirmed (2006)
- L. Steven Grasz (Eighth Circuit-Neb.): Confirmed 50-48 on December 12, 2017*

³⁴ Wolf, Richard. "Lawyers' group fuels Republicans' ire over its negative reviews of Trump judicial picks." *USA Today*. December 27, 2017. Accessed December 29, 2017. <https://www.usatoday.com/story/news/politics/2017/12/26/lawyers-group-fuels-republicans-ire-over-its-negative-reviews-trump-judicial-picks/974095001/>.

Lack of disclosure by nominees makes review harder

The Judiciary Committee must work in a bipartisan manner to ensure that nominees disclose information and materials relevant to their nominations. Unfortunately, the failure of nominees to fully disclose their records and writings has hampered the ability of senators to evaluate nominees.

Brett Talley (Middle District-Ala.)

After Brett Talley was approved by the Judiciary Committee on a party-line vote, reporting from the *New York Times*, *Slate* and *BuzzFeed* revealed that he had failed to disclose to the committee more than 15,000 pieces of online commentary,³⁵ or that his wife was employed as the Chief of Staff to President Trump's White House Counsel.³⁶

In one online post that he did not provide to the committee, Talley defended the founder of the KKK, saying that the first KKK was "was entirely different than the KKK of the early 19th century."³⁷ In another, he joked about a case where a 20-year-old babysitter committed statutory rape against the 14-year-old boy she was responsible for watching.³⁸

Senator Dianne Feinstein (D-Calif.) sent Talley a number of questions about these online posts that he failed to disclose.³⁹ Talley did not respond to Senator Feinstein's questions. While the White House withdrew Talley's nomination, he continues to guide President Trump's other judicial nominees through the committee process in his position at the Justice Department's Office of Legal Policy.

³⁵ Tillman, Zoe. "A Trump Judicial Nominee Appears To Have Written About Politics On A Sports Website And Didn't Disclose It." *BuzzFeed*. November 13, 2017. Accessed December 14, 2017. https://www.buzzfeed.com/zoetillman/a-trump-judicial-nominee-appears-to-have-written-about?utm_term=.bu5mWBYx6#.fpwYO7q0G.

³⁶ Apuzzo, Matt, and Michael S. Schmidt. "Trump Judicial Pick Did Not Disclose He Is Married to a White House Lawyer." *New York Times*. November 13, 2017. Accessed December 14, 2017. <https://www.nytimes.com/2017/11/13/us/politics/trump-judge-brett-talley-nomination.html>.

³⁷ Stern, Mark Joseph. "Trump Judicial Nominee Brett Talley Appears to Have Defended "the First KKK" in Message Board Post." *Slate Magazine*. November 15, 2017. Accessed December 14, 2017. http://www.slate.com/blogs/the_slatest/2017/11/15/trump_nominee_brett_talley_appears_to_have_defended_the_first_kkk.html.

³⁸ Levin, Josh. "Trump Nominee Brett Talley Appears to Support 20-Year-Old Woman Having Sex with 14-Year-Old Boy." *Slate Magazine*. November 16, 2017. Accessed December 14, 2017. http://www.slate.com/blogs/the_slatest/2017/11/16/trump_nominee_brett_talley_appears_to_support_20_year_old_woman_having_sex.html.

³⁹ Feinstein, Dianne. "Feinstein Requests Answers on Talley Conflicts, Online Commentary." Dianne Feinstein: U.S. Senator for California. November 17, 2017. Accessed December 14, 2017. <https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=5BBF3A16-49AF-4AA7-8F95-2C7FEC50F74C>.

Tom Farr (Eastern District-N.C.)

Media reports from *Indy Week*⁴⁰ and the *Huffington Post*⁴¹ suggest that Tom Farr was not truthful in his response to Senator Feinstein’s questions for the record about his involvement in voter suppression efforts orchestrated by the Jesse Helms campaign and the Republican Party of North Carolina. Farr was a lawyer for Jesse Helms’s Senate campaigns in 1984 and 1990.⁴²

Farr has claimed that he had no knowledge of the Helms campaign’s efforts to mail more than 100,000 postcards to African American voters in North Carolina in 1990 for the purpose of intimidating them from voting.

Senator Cory Booker (D-N.J.) sent Farr a number of questions relating to these reports and also requested a copy of a Justice Department memo that reportedly detailed Farr’s role in this voter suppression incident.⁴³

Farr responded to Senator Booker by saying that he participated in meetings on “ballot security,” but never saw postcards that were designed to intimidate voters in predominantly African American neighborhoods.⁴⁴ The Justice Department has not provided a copy of the memo.

Despite these serious allegations, Senate Republicans did not consider the matter further and pushed his nomination through the committee on a party-line vote.

⁴⁰ Goldsmith, Thomas. “Did Former Helms Lawyer Thomas Farr Lie to the Senate Judiciary Committee? It Sure Looks That Way.” *Indy Week*. November 15, 2017. Accessed December 18, 2017. <https://www.indyweek.com/news/archives/2017/11/15/did-former-helms-lawyer-thomas-farr-lie-to-the-senate-judiciary-committee-it-sure-looks-that-way>.

⁴¹ Levine, Sam. “Former DOJ Official Accuses Trump Judicial Pick Of Misleading Senate About Past Work.” *Huffington Post*. November 21, 2017. Accessed December 18, 2017. https://www.huffingtonpost.com/entry/thomas-farr-voter-intimidation-senate_us_5a0f0c98e4b0e97dffed03a2.

⁴² Berman, Ari. “He defended North Carolina’s voter suppression law. Now he’s set to become a federal judge there.” *Mother Jones*. October 18, 2017. Accessed January 11, 2018. <http://www.motherjones.com/politics/2017/10/he-defended-north-carolinas-voter-suppression-law-now-hes-set-to-become-a-federal-judge-there/>.

⁴³ Booker, Cory. “Booker Seeks Explanation for Discrepancies in Testimony of Trump Judicial Nominee.” Cory Booker | U.S. Senator for New Jersey. December 13, 2017. Accessed December 19, 2017. https://www.booker.senate.gov/?p=press_release&id=709.

⁴⁴ Goldsmith, Thomas. “Judicial Nominee Farr Tells Sen. Cory Booker He Had No Prior Knowledge of Infamous Postcard Campaign, But Did Attend Meeting on ‘Ballot Security’.” *Indy Week*. December 25, 2017. Accessed December 28, 2017. <https://www.indyweek.com/news/archives/2017/12/21/judicial-nominee-farr-tells-sen-cory-booker-he-had-no-prior-knowledge-of-infamous-postcard-campaign-but-did-attend-meeting-on-ballot-securi>.

James Ho (Fifth Circuit-Texas)

From 2001-2003, James Ho served as an attorney adviser in the Office of Legal Counsel (OLC). Ho's tenure at OLC coincided with the time frame during which OLC issued extremely controversial "torture memos," although the existence of these memos was not disclosed until years later. Ho provided almost no information to the committee about the work he did while at OLC — he wrote only that he "provided formal and informal legal advice on various issues facing the Executive Branch." Research by committee staff revealed that Ho wrote a memo cited in one of these now-discredited torture memos.

On August 1, 2002, Assistant Attorney General for the Office of Legal Counsel Jay Bybee signed two of the so-called torture memos. One was a general memo to then-White House Counsel Alberto Gonzales, outlining what constituted torture. The memo concluded that 18 U.S.C. § 2340A's definition of torture means physical pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."⁴⁵

This Bybee memo, in turn, cites a February 1, 2002 memo from then-Attorney Advisor James Ho to then-OLC Deputy Assistant Attorney General John Yoo. Ho's memo was titled "Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War."⁴⁶

The memo that Ho authored, which is cited in the Bybee memo, is not publicly available. A copy of the memo was requested by Ranking Member Feinstein but never provided before Ho was confirmed.

Wendy Vitter (Eastern District-La.)

Wendy Vitter was nominated in January 2018. Vitter failed to disclose several public speeches, including to anti-choice groups, as well as a political ad on her Judiciary Committee questionnaire. In total, after Vitter was alerted to missing material by committee staff, she supplemented her original questionnaire with more than 100 speeches, interviews and press articles.

In one speech she failed to disclose, Vitter had spoken at a rally protesting the future site of a Planned Parenthood health center.⁴⁷ In another, Vitter also moderated a panel discussion, titled

⁴⁵ Bybee, Jay S. Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, available at <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf>

⁴⁶ *Id.* at pg. 15 n. 8 and pg. 17 n. 9.

⁴⁷ Galofaro, Claire. "Uptown Clinic Roils Emotions." *Baton Rouge Advocate*. May 21, 2013.

“Abortion Hurts Women’s Health.”⁴⁸ The discussion promoted myths about contraception and abortion. One of the panelists discussed a brochure entitled, “The Pill Kills.”⁴⁹ Vitter urged attendees to ask their doctors to display the brochure in their waiting rooms. Vitter said to the participants that by doing so, “[e]ach one of you can be the pro-life advocate to take that next step.”⁵⁰

The Senate should not accept these omissions from nominees up for lifetime appointments.

⁴⁸ Sherman, Carter, and Taylor Dolven. “A Trump Judge Pick Left Anti-abortion Speeches Off Her Senate Disclosure Form.” *VICE News*. March 1, 2018. Accessed May 07, 2018. https://news.vice.com/en_us/article/vbpany/a-trump-judge-pick-left-anti-abortion-speeches-off-her-senate-disclosure-form.

⁴⁹ *Id.*

⁵⁰ *Id.*

Republicans change committee standard for FBI background checks

The FBI conducts background investigations of all judicial nominees. Republican and Democratic staffs review these investigations and both sides must “clear” them before nominees are scheduled for hearings.

Since at least the Clinton administration, Judiciary Committee Republicans did not clear background investigations of judicial nominees who reported to the FBI that they had ever used marijuana after taking the bar exam. Because of this Republican policy, a number of judicial nominees were either blocked or never nominated in the first place.

Eleven months into the Trump administration, Chairman Grassley changed Republicans’ long-standing policy. With President Trump in the White House, Republicans will now clear background investigations of judicial nominees who report having used marijuana up to two times after taking the bar exam, if the use was at least five years prior to the date of nomination.

While Democrats did not object to the policy change on the merits, they noted that Republicans only made this change because of a political change to Republican control of the presidency and Senate. Senator Dick Durbin (D-Ill.) stated, “I am not opposed to a different standard, but we should not have a double standard for nominees who are presented under a Democratic president and nominees that are presented under a Republican president. And we need to be transparent about what we are doing and why we are doing it.”⁵¹

⁵¹ “Executive Business Meeting.” Committee on the Judiciary. November 16, 2017. Accessed February 02, 2018. <https://www.judiciary.senate.gov/meetings/11/16/2017/executive-business-meeting>.

Republicans change blue-slip tradition, cutting senators out of the process

The blue slip process translates the Senate’s constitutional responsibility of “advice and consent” on judicial nominees into practice by ensuring that the president consults with home-state senators on lifetime appointments, and that nominees are within the mainstream of legal thought and are well-regarded members of the legal communities in the states where they will serve.

Democratic chairmen of the Judiciary Committee have **never** held a hearing for a nominee over the objection of a Republican senator. In contrast, the past three Republican chairman have held hearings over the objection of Democratic senators.

Fewer than five nominees have been confirmed without two blue slips from home-state senators since 1956. Prior to Chairman Grassley changing his blue slip policy under President Trump, the last time a circuit judge was confirmed without two blue slips was over 30 years ago.⁵² There is no record of a judicial nominee being confirmed without at least one blue slip. According to CRS:

“Three known nominees (one U.S. circuit court nominee and two U.S. district court nominees)—from January 1, 1956 through November 15, 2017—were confirmed by the Senate while having a negative blue slip from one, but not both, of his or her home-state senators.

“CRS has not identified any known instances from January 1, 1956 through November 15, 2017 of a U.S. circuit or district court nominee who was confirmed by the Senate while having negative blue slips from both of his or her home-state senators.”⁵³

During the administrations of Presidents Barack Obama, George W. Bush and Bill Clinton, no circuit court or district court nominees were confirmed without blue slips from both home-state senators.⁵⁴

During the Obama administration, a nominee **never** received a hearing without two blue slips, including when:

⁵² McMillion, Barry J. “The Blue Slip Process for U.S. Circuit and District Court Nominations: Frequently Asked Questions.” Congressional Research Service. October 2, 2017. Accessed December 11, 2017. <https://fas.org/sgp/crs/misc/R44975.pdf>.

⁵³ McMillion, Barry J. “Number of U.S. Circuit and District Court Nominees Confirmed by the Senate After Having Received One or Two Negative Blue Slips (1956-2017).” November 17, 2017. Accessed December 11, 2017. https://www.feinstein.senate.gov/public/_cache/files/c/d/cd23cb92-b5b4-488c-8067-e6d486f375b8/BD96949A89A55A72C8E7372CAD60916E.nominees-confirmed-by-the-senate-after-having-received-one-or-two-negati...-.pdf

⁵⁴ McMillion, Barry J. “The Blue Slip Process for U.S. Circuit and District Court Nominations: Frequently Asked Questions.” Congressional Research Service. October 2, 2017. Accessed December 11, 2017. <https://fas.org/sgp/crs/misc/R44975.pdf>.

- One home-state senator returned a blue slip, but the other home-state senator did not.
- Senators returned blue slips but later rescinded them.
- Judicial vacancies were left open for years.
- Senators had recommended a nominee to the White House in the first place, but then refused to return a blue slip on that nominee.
- Senators recommended a nominee to the White House for a district court vacancy, but refused to return a blue slip for that nominee when nominated to a circuit court vacancy.

Altogether, 18 Obama judicial nominees did not advance because they did not have blue slips from both home-state senators, and dozens of vacancies were left open because Republicans refused to support any nominee.

Senator Grassley became chairman in January 2015. From 2015 to 2016, no hearings were held on judicial nominees unless they had two blue slips from home-state senators—the same policy as when Senator Pat Leahy (D-Vt.) chaired the committee. Chairman Grassley denied hearings to nine of the 18 Obama judicial nominees who were blocked because they did not have two blue slips from home-state senators.

Obama nominees blocked by Republican senators not returning blue slips (*Denied hearing by Grassley)

Circuit Court

- Assistant U.S. Attorney Rebecca Haywood (Third Circuit-Pa.)*
- Kentucky Supreme Court Justice Lisabeth Tabor Hughes (Sixth Circuit-Ky.)*
- U.S. District Court Judge Abdul Kallon (Eleventh Circuit-Ala.)*
- Victoria Nourse (Seventh Circuit-Wisc.)
- Former Indiana Supreme Court Justice Myra Selby (Seventh Circuit-Ind.)*
- Former Kansas Attorney General Steve Six (Tenth Circuit-Kan.)

District Court

- South Carolina Supreme Court Justice Don Beatty (District-S.C.)*
- Former Wisconsin Supreme Court Justice Louis Butler (Western District-Wisc.)
- Judge Elissa Cadish (District-Nev.)
- Former Judge Mary Barzee Flores (Southern District-Fla.)*
- Judge Alison Lee (District-S.C.)
- Judge Dax Lopez (Northern District-Ga.)*
- Assistant U.S. Attorney Jennifer May Parker (Eastern District-N.C.)
- Assistant U.S. Attorney Arvo Mikkanen (Western District-Okla.)
- Judge William Thomas (Southern District-Fla.)
- Natasha Silas (Northern District-Ga.)

- Former North Carolina Supreme Court Justice Patricia Timmons-Goodson (Eastern District-N.C.)*
- Anne Traum (District-Nev.)*

In November 2017, just 11 months into the Trump administration, Chairman Grassley changed his policy and held a hearing for David Stras over the objection of a home-state senator, former Senator Al Franken (D-Minn.).

Grassley again abandoned the blue-slip tradition in January 2018, holding a hearing for Michael Brennan, nominated to the Seventh Circuit, over the objection of Senator Tammy Baldwin (D-Wis.).

Baldwin cited the White House's failure to consult with her and to nominate a candidate with the approval of her and Senator Ron Johnson's (R-Wis.) federal nominating commission.⁵⁵

Brennan reported in his questionnaire: "On March 15, 2017, I interviewed with attorneys from the White House Counsel's Office and the U.S. Department of Justice Office of Legal Policy."⁵⁶

On February 13, 2017, Senators Baldwin and Johnson announced that their bipartisan commission would only begin accepting applications for the vacancy on March 15, 2017. In other words, Brennan had already interviewed with the White House before the nominating commission considered him. While Brennan eventually interviewed with the commission, he did not receive its approval.⁵⁷

Grassley further undermined the prerogative of home-state senators in May 2018, holding a hearing on Ryan Bounds, nominated to the Ninth Circuit over the objection of Senators Ron Wyden and Jeff Merkley (both D-Ore.).

Bounds was nominated in September 2017 without the approval of Oregon's bipartisan judicial selection committee.

As Senators Wyden and Merkley detailed in their letter to White House Counsel Don McGahn:

⁵⁵ Marley, Patrick, and Jason Stein. "Baldwin: Trump ignored bipartisan panel by nominating Gov. Scott Walker ally to 7th Circuit Court of Appeals." *Milwaukee Journal Sentinel*. August 04, 2017. Accessed December 11, 2017. <https://www.jsonline.com/story/news/politics/2017/08/04/donald-trump-appoints-gov-scott-walker-ally-federal-7th-circuit-court-appeals/539442001/>.

⁵⁶ Brennan, Michael B. "Michael Brennan Judiciary Committee Questionnaire." Senate Judiciary Committee. <https://www.judiciary.senate.gov/imo/media/doc/Brennan%20SJQ.pdf>

⁵⁷ Marley, Patrick, and Jason Stein. "Baldwin: Trump ignored bipartisan panel by nominating Gov. Scott Walker ally to 7th Circuit Court of Appeals." *Milwaukee Journal Sentinel*. August 04, 2017. Accessed December 11, 2017. <https://www.jsonline.com/story/news/politics/2017/08/04/donald-trump-appoints-gov-scott-walker-ally-federal-7th-circuit-court-appeals/539442001/>.

“Unfortunately, it is now apparent that you never intended to allow our longstanding process to play out. Instead, you have demonstrated that you were only interested in our input if we were willing to preapprove your preferred nominee.”⁵⁸

Prior to the decision to move the Bounds nomination, CRS could not find a single instance where a circuit court nominee without at least one blue slip had a hearing or was confirmed by the Senate.⁵⁹

Fact-Check: Democratic chairmen honor Republican blue slips, Republican chairmen don’t honor Democratic blue slips

To justify the decision to eliminate the blue-slip tradition, Chairman Grassley has stated that it is a “courtesy” to which Democratic chairmen did not adhere. However, the facts show differently.

The past three Democratic chairmen—Senators Ted Kennedy, Joe Biden and Patrick Leahy—never held a hearing for a nominee over the objection of a Republican senator.

Chairmen Kennedy and Biden held hearings for one and two nominees, respectively, without a blue slip from Democratic senators.⁶⁰

During the Carter administration, Chairman Kennedy held a hearing for James Sheffield, nominated to the Eastern District of Virginia, over the objection of Democratic Senator Harry Byrd Jr. Sheffield was never confirmed.

During the Reagan and Bush administrations, Chairman Biden held hearings for two nominees—Bernard Siegan, nominated to the Ninth Circuit in 1987, and Vaughn Walker, nominated to the Northern District of California in 1989—over the objections of California Democratic Senator Alan Cranston. Siegan’s nomination failed in committee by a vote of 8-6 and Walker was confirmed in 1989.⁶¹

In contrast, three of the past four Republican chairmen of the committee—Senators Strom Thurmond (R-S.C.), Orrin Hatch, and Chuck Grassley—have held hearings for nominees who did not have Democratic blue slips.

⁵⁸ Kim, Seung Min. “Democrats Prepare to Block Another Trump Judicial Nominee.” *Politico*. September 7, 2017. Accessed May 03, 2018. <https://www.politico.com/story/2017/09/07/democrats-prepare-to-block-trump-judicial-nominee-242462>.

⁵⁹ Sollenberger, Mitchel. “The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present.” Congressional Research Service. October 22, 2003. Accessed December 11, 2017. <https://fas.org/sgp/crs/misc/RL32013.pdf>.

⁶⁰ McMillion, Barry J. “The Blue Slip Process for U.S. Circuit and District Court Nominations: Frequently Asked Questions.” Congressional Research Service. October 2, 2017. Accessed December 11, 2017. <https://fas.org/sgp/crs/misc/R44975.pdf>.

⁶¹ Id.

Republicans demand approval of Obama judicial nominees

The blue slip is designed to ensure meaningful consultation between the White House and home-state senators. For example, many senators rely on bipartisan commissions in their home states to screen potential judicial nominees and recommend them to the White House.

In 2009, every Republican senator signed a letter to President Obama that went even further, saying that Republicans' approval—not just consultation—was required. They wrote:

“And as a former colleague, we know you appreciate the Senate’s unique constitutional responsibility to provide or withhold its advice and consent on nominations. The principle of senatorial consultation (or senatorial courtesy) is rooted in this special responsibility, and its application dates to the administration of George Washington. Democrats and Republicans have acknowledged the importance of maintaining this principle, which allows individual senators to provide valuable insights into their constituents’ qualifications for federal service.

“We hope your administration will consult with us as it considers possible nominations to the federal courts from our states. **Regretfully, if we are not consulted on, and approve of, a nominee from our states, the Republican Conference will be unable to support moving forward on that nominee.**”⁶²

During the Obama administration, Republican senators who refused to return blue slips suggested that the White House had failed to properly consult with them, or simply that they did not like the nominee.

Republican senators often gave no reason at all for their decision not to return blue slips. No matter the reason for declining to return blue slips, their failure to return blue slips stopped the committee from considering the nomination.

Examples of Republican blue slips being honored

- **2016:** “I’ve had a back and forth with the administration for a year and a half or two over that particular seat on the Sixth Circuit and I’m not going to support the person they’ve sent up.”⁶³

⁶² “Letter To The President On Judges.” Senate Republican Conference. March 2, 2009. Accessed December 11, 2017. <https://www.republican.senate.gov/public/index.cfm/blog?ID=3C522434-76E5-448E-9EAD-1EC214B881AC>.

⁶³ Gerth, Joseph. “McConnell: No Supreme Court Justice or appeals judge.” *The Courier-Journal*. March 22, 2016. Accessed December 29, 2017. <https://www.courier-journal.com/story/news/politics/mitch-mcconnell/2016/03/22/mcconnell-no-supreme-court-justice-appeals-judge/82125848/>.

Leader Mitch McConnell (R-Ky.) on his refusal to return a blue slip on Justice Lisabeth Hughes's nomination to the Sixth Circuit. Chairman Grassley did not schedule a hearing for Hughes.

- **2016:** “It is so disappointing that—for the first time since I’ve been in the Senate—President Obama is nominating someone for the federal bench in Pennsylvania without the approval of both Senator Casey and me.”⁶⁴

Senator Pat Toomey (R-Pa.) on his refusal to return a blue slip on Assistant U.S. Attorney Rebecca Haywood's nomination to the Third Circuit. Chairman Grassley never scheduled Haywood for a hearing.

- **2016:** “After a thorough review of the professional and judicial record of DeKalb County Judge Dax Lopez, I have become uncomfortable with his long-standing participation in a controversial organization including his service on its board of directors... Unfortunately, our personal meeting, while cordial and informative, did not fully alleviate my concerns.”⁶⁵

Senator David Perdue (R-Ga.) on his refusal to return a blue slip on Dax Lopez's nomination to the Northern District of Georgia, despite having recommended Lopez to the White House. Chairman Grassley never scheduled Lopez for a hearing.

Examples of Republicans supporting the blue-slip tradition

- **2015:** “For nearly a century, the chairman of the Senate Judiciary Committee has brought nominees up for committee consideration only after both home-state senators have signed and returned what's known as a ‘blue slip.’ This tradition is designed to encourage outstanding nominees and consensus between the White House and home-state senators.

“Over the years, Judiciary Committee chairs of both parties have upheld a blue-slip process, including Sen. Patrick Leahy of Vermont, my immediate predecessor in chairing the committee, who steadfastly honored the tradition even as some in his own party called for its demise. I appreciate the value of the blue-slip process and also intend to honor it.”⁶⁶

⁶⁴ Toomey, Pat. “Toomey’s Statement on the Nomination of Rebecca Haywood to the Third Circuit.” Pat Toomey | U.S. Senator for Pennsylvania. March 16, 2016. Accessed December 29, 2017. <https://www.toomey.senate.gov/?p=news&id=1702>.

⁶⁵ Pugh, Tony. “With focus on Supreme Court, Georgia's federal court controversy is under radar.” *McClatchyDC*. February 19, 2016. Accessed December 29, 2017. <http://www.mcclatchydc.com/news/politics-government/white-house/article61365212.html>.

⁶⁶ Grassley, Senator Chuck. “Working to secure Iowa's judicial legacy.” *Des Moines Register*. April 15, 2015. Accessed December 11, 2017. <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2015/04/15/working-secure-iowas-judicial-legacy/25801515/>.

Chairman Chuck Grassley, *Des Moines Register*, April 14, 2015

- **2014:** “I continued this blue slip tradition. Not a single district court nominee received a committee hearing, and not one appeals court nominee was confirmed without the support of their home-state senators.”⁶⁷

Senator Orrin Hatch, *The Hill*, April 11, 2014

Consultation with home-state senators: A lack of consultation by the Trump administration results in nominees confirmed narrowly, while consultation results in nominees with broad support

Consultation with home-state Democratic senators has resulted in consensus, broadly supported nominees, while a lack of consultation resulted in controversial nominees.

Communications between senators and the White House on judicial nominees are often not captured in media reports or other publically available documents. As such, nominees’ questionnaires are a useful tool to help determine whether home-state senators were consulted. Question 26 requires nominees to describe their selection process, including meetings with home-state senators and their staff.

As of May 7, 2018, the committee has considered 23 circuit court nominees, requiring 44 blue slips. Seventeen blue slips were required from Democratic senators and 27 blue slips were required from Republican senators.

Four of the nominees who required a Democratic blue slip reported contacts or meetings with the Democratic home-state senator(s) or their staff prior to their nomination. In contrast, all but one of the nominees who required Republican blue slips reported contacts or meetings with the Republican home-state senator(s) or their staff prior to their nomination.

As evidenced by the confirmation of Ralph Erickson to the Eighth Circuit, consultation between the White House and senators of the opposite party ensures nominees are mainstream and able to garner broad support. Judge Erickson was in contact with Senators John Hoeven (R-N.D.) and Heidi Heitkamp (D-N.D.) during the selection process.⁶⁸ He was confirmed 95-1.⁶⁹

⁶⁷ Hatch, Orrin. “Protect the Senate’s important ‘advice and consent’ role.” *The Hill*. April 11, 2011. Accessed December 28, 2017. <http://thehill.com/opinion/op-ed/203226-protect-the-senates-important-advice-and-consent-role>.

⁶⁸ Erickson, Ralph. “Selection Process.” Senate Judiciary Questionnaire at pg. 64. Accessed May 1, 2018. https://www.judiciary.senate.gov/imo/media/doc/SJQ_Erickson.pdf.

⁶⁹ “Roll Call Vote 115th Congress - 1st Session.” U.S. Senate: U.S. Senate Roll Call Votes 115th Congress - 1st Session. September 28, 2017. Accessed December 29, 2017. https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00207.

In contrast, other appellate nominees from states with one Democratic senator were not in contact with their Democratic senators during the selection process. The result was nominees with less support. For example, Amy Coney Barrett (Seventh-Ind.) was confirmed 55-43⁷⁰ and Stephanos Bibas (Third-Penn.) was confirmed 53-43.⁷¹

For states represented by two Democratic senators, there is strong evidence of the benefits of consultation. For example, Michael Scudder and Amy St. Eve, nominated to the Seventh Circuit, were recommended by a nonpartisan screening committee set up by Senators Dick Durbin and Tammy Duckworth (both D-Ill.).⁷² Both nominees were voted out of committee unanimously, with a 21-0 vote.⁷³

Similarly, Mark Bennett, who has been nominated to the Ninth Circuit, has the support of both home-state Senators Mazie Hirono and Brian Schatz (both D-Hawaii).⁷⁴ Bennett indicated that he was initially contacted by the senators before interviewing with the White House.⁷⁵ His nomination is currently pending in committee.

The benefits of consultation is also evidenced by several district court nominees. Senators Chris Coons and Tom Carper (both D-Del.) indicated that Maryellen Noreika and Colm F. Connolly were recommended by them when they were nominated.⁷⁶ Senators Brian Schatz and Mazie

⁷⁰ “Roll Call Vote 115th Congress - 1st Session.” U.S. Senate: U.S. Senate Roll Call Votes 115th Congress - 1st Session. October 31, 2017. Accessed December 29, 2017. https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00255.

⁷¹ “Roll Call Vote 115th Congress - 1st Session.” U.S. Senate: U.S. Senate Roll Call Votes 115th Congress - 1st Session. November 2, 2017. Accessed December 29, 2017. https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00261

⁷² Duckworth, Tammy. “Durbin, Duckworth Statement On Nomination Of Michael Scudder & Amy St. Eve For The 7th Circuit Court Of Appeals.” U.S. Senator Tammy Duckworth of Illinois. February 12, 2018. Accessed May 1, 2018. <https://www.duckworth.senate.gov/news/press-releases/durbin-duckworth-statement-on-nomination-of-michael-scudder-and-amy-st-eve-for-the-7th-circuit-court-of-appeals>.

⁷³ “Results of Executive Business Meeting.” Senate Judiciary Committee Votes 115th Congress – 2nd Session. April 19, 2018. Accessed May 1, 2018. <https://www.judiciary.senate.gov/imo/media/doc/Results%20of%20Executive%20Business%20Meeting%2004-19-18.pdf>

⁷⁴ Hirono, Mazie. “Hirono & Schatz Statements on the Nomination of Mark Bennett to U.S. Circuit Court.” U.S. Senator Mazie Hirono of Hawaii. February 12, 2018. Accessed May 1, 2018. <https://www.hirono.senate.gov/news/press-releases/hirono-and-schatz-statements-on-the-nomination-of-mark-bennett-to-us-circuit-court>.

⁷⁵ Bennett, Mark. “Selection Process.” Senate Judiciary Questionnaire at pg.123. Accessed May 1, 2018. <https://www.judiciary.senate.gov/imo/media/doc/Bennett%20SJQ13.pdf>.

⁷⁶ Coons, Chris. “Carper, Coons' Judicial Candidates Nominated for U.S. District Court Bench | U.S. Senator Christopher Coons of Delaware.” U.S. Senator Christopher Coons of Delaware. December 21, 2017. Accessed

Hirono (both D-Hawaii) similarly confirmed that Jill Otake was one of the candidates recommended by their judicial selection commission.⁷⁷ These senators expressed their support for the nominees, and all three were voted out by an overwhelming bipartisan majority.⁷⁸

December 29, 2017. <https://www.coons.senate.gov/newsroom/press-releases/carper-coons-judicial-candidates-nominated-for-us-district-court-bench>.

⁷⁷ Schatz, Brian. "Schatz & Hirono Announce Nomination of Jill Otake to U.S. District Court." U.S. Senator Brian Schatz of Hawaii. December 20, 2017. Accessed December 29, 2017. <https://www.schatz.senate.gov/press-releases/schatz-and-hirono-announce-nomination-of-jill-otake-to-us-district-court>.

⁷⁸ "Results of Executive Business Meeting." Senate Judiciary Committee Votes 115th Congress – 2nd Session. March 15, 2018 and April 12, 2018. Accessed May 1, 2018. <https://www.judiciary.senate.gov/imo/media/doc/03-15-18%20Results%20of%20Executive%20Business%20Meeting.pdf> *see also* <https://www.judiciary.senate.gov/imo/media/doc/04-12-18%20Results%20of%20Executive%20Business%20Meeting.pdf>.

Outside and dark-money political groups play central role in selecting and confirming nominees

Outside and dark-money political groups, including the Federalist Society, the Judicial Crisis Network, and the Heritage Foundation, have been central to the conservative effort to fill vacancies with ideological nominees. They have used their power and resources to influence the selection of nominees and to pressure Republicans to jam nominations through the Senate.

This raises serious concerns about whether the president and Senate Republicans have ceded their constitutional responsibilities to provide advice and consent on judicial nominees to unaccountable organizations with litmus tests for membership.

Seeking to solidify conservative support during the 2016 campaign, then-candidate Trump announced a list of potential Supreme Court nominees, hand-picked by outside groups:

“This list is definitive and I will choose only from it in picking future Justices of the United States Supreme Court. I would like to thank **the Federalist Society, the Heritage Foundation** and the many other individuals who helped in composing this list of twenty-one highly respected people who are the kind of scholars that we need to preserve the very core of our country, and make it greater than ever before.”⁷⁹

The Judicial Crisis Network helped block President Obama’s nominee to the Supreme Court and confirm President Trump’s nominee by spending \$17 million on advertising and grassroots mobilization. The group spent \$7 million opposing the nomination of Merrick Garland and \$10 million supporting the nomination of Neil Gorsuch, who was on the groups-approved Trump short-list.⁸⁰

Three anonymous donors funded the Judicial Crisis Network in 2015-2016. The group received \$17.9 million from a single donor—nearly 97 percent of its revenue.⁸¹

The involvement of outside groups was not limited to the Supreme Court. The selection of circuit court nominees has also been outsourced to the Federalist Society.

⁷⁹ “Donald J. Trump Finalizes List of Potential Supreme Court Justice Picks.” Donald J. Trump for President. September 23, 2016. Accessed December 11, 2017. <https://web.archive.org/web/20170428033632/https://www.donaldjtrump.com/press-releases/donald-j.-trump-adds-to-list-of-potential-supreme-court-justice-picks>.

⁸⁰ Sessa-Hawkins, Margaret, and Andrew Perez. “Dark Money Group Received Massive Donation In Fight Against Obama’s Supreme Court Nominee.” *MapLight*. October 24, 2017. Accessed December 12, 2017. <https://maplight.org/story/dark-money-group-received-massive-donation-in-fight-against-obamas-supreme-court-nominee/>.

⁸¹ *Id.*

“You saw the 11 names I gave,” Trump told *Breitbart News Daily*, referring to the list of 11 potential U.S. Supreme Court nominees he released last month. “And we’re going to have great judges, conservative, all picked by **Federalist Society**.”⁸²

All but two of President Trump’s first 15 confirmed circuit court nominees are members of the Federalist Society. Ralph Erickson, one of the two circuit court nominees to not be a member of the Federalist Society, is also the only nominee to have had contact with a Democratic home-state senator prior to his nomination. Erickson was confirmed by a vote of 95-1. The other, Elizabeth Branch, was confirmed by a vote of 73-23.

Once circuit court picks were nominated, outside groups pressured home-state senators to immediately return their blue slips and pushed for the elimination of the blue-slip tradition.

The Koch brothers pushed wealthy donors to lobby their senators to eliminate the blue slip at their summer retreat, distributing a “one-page document, explaining the blue-slip practice and urging attendees—many of them big players in Republican politics—to press the issue with the Senate’s GOP leadership and ‘other Republican senators you know.’”⁸³

The Judicial Crisis Network in 2017 spent \$815,000 on ads aimed at pressuring senators to return positive blue slips. The group also threatened to spend \$250,000 on ads pressuring Leader McConnell to eliminate the blue slip.

Ads did not target only Democratic senators. The Judicial Crisis Network spent \$100,000 supporting the nomination of Kyle Duncan for the Fifth Circuit. While the ad did not mention Senator John Kennedy by name, it appeared designed to pressure him to return his blue slip.⁸⁴

Recap: Judicial Crisis Network ads

- **Ads to push nominees through quickly (May 2018):** “The Judicial Crisis Network will launch a \$1 million ad buy on Saturday according to officials familiar with the effort. The ad will run on CNN, Fox News and airport channels that might be seen by traveling senators returning from recess next week. Senate Democrats cannot block those judges, but they can delay each of them more than a day under Senate rules. And JCN’s ad buy is specifically calling them out for using Senate rules to drag out judicial confirmations, a

⁸² Maleske, Melissa. “Trump Says Federalist Society Will Pick His Judges For Him” *Law360*. June 14, 2016. Accessed December 11, 2017. <https://www.law360.com/articles/806797/trump-says-federalist-society-will-pick-his-judges-for-him>.

⁸³ Schouten, Fredreka. “Why the Koch brothers want to kill an obscure Senate rule to help shape the federal courts.” *USA Today*. July 04, 2017. Accessed December 12, 2017. <https://www.usatoday.com/story/news/politics/2017/07/04/why-koch-brothers-want-kill-obscure-senate-rule-help-shape-federal-courts/441424001/>.

⁸⁴ Broach, Drew. “As conservatives push to get judge nominee Kyle Duncan confirmed, liberals express alarm.” *NOLA.com*. November 12, 2017. Accessed December 12, 2017. http://www.nola.com/crime/index.ssf/2017/11/kyle_duncan_conservative_supp.html

tactic also used by Republicans when they were in the minority under President Barack Obama.”⁸⁵

- **Ads to kill the blue-slip tradition (August 2017):** “The Judicial Crisis Network is partnering with other conservative groups on a new \$500,000 ad campaign opposing Democrats blocking President Trump’s judicial nominees... Because of their gridlock, there are now far more judicial vacancies than there were when President Trump took office... This Democratic obstruction can end by reforming the so-called “blue slip” process...”⁸⁶
- **Ads against Senators Debbie Stabenow and Gary Peters (both D-Mich.) (June 2017):** “The Judicial Crisis Network, a conservative advocacy group focusing on the courts, is pouring \$140,000 into a new ad campaign going after Michigan Democratic Sens. Debbie Stabenow and Gary Peters over a circuit judge nominated from their home state.”⁸⁷
- **Ads threatened against Leader Mitch McConnell (R-Ky.) (October 2017):** “McConnell indicated to The Weekly Standard that he plans to push through judicial nominees even if they are opposed by their home-state senators — abandoning the so-called blue-slip rule that has been in practice for at least a century. . . . The Judicial Crisis Network had planned a \$250,000 ad buy this week to run in Washington asking McConnell to call off all recesses until the 149 judicial vacancies are filled. McConnell’s aides reached out to JCN to assuage the group, and JCN suspended the ad buy hours before it was supposed to begin.”⁸⁸
- **Ads against Senator John Kennedy (R-La.) (November 2017):** “The Judicial Crisis Network in Washington said Thursday (Nov. 9) it is paying more than \$100,000 for two

⁸⁵ Lovelace, Ryan. “Conservative groups launch new \$500,000 ad campaign to boost Trump judicial nominees.” *Washington Examiner*. August 21, 2017. Accessed December 12, 2017. <http://www.washingtonexaminer.com/conservative-groups-launch-new-500000-ad-campaign-to-boost-trump-judicial-nominees/article/2632128>.

⁸⁶ Lovelace, Ryan. “Conservative groups launch new \$500,000 ad campaign to boost Trump judicial nominees.” *Washington Examiner*. August 21, 2017. Accessed December 12, 2017. <http://www.washingtonexaminer.com/conservative-groups-launch-new-500000-ad-campaign-to-boost-trump-judicial-nominees/article/2632128>.

⁸⁷ Caygle, Heather. “Huddle.” *Politico*. June 30, 2017. Accessed December 12, 2017. <https://www.politico.com/tipsheets/huddle/2017/06/30/politico-huddle-senators-head-home-with-no-deal-221126>.

⁸⁸ Everett, Burgess., and Seung Min Kim. “McConnell ratchets up judicial wars — again.” *Politico*. October 11, 2017. Accessed December 12, 2017. <https://www.politico.com/story/2017/10/11/mitch-mcconnell-judicial-battles-243669>.

weeks of television, radio and digital advertising to back Duncan. The ads have Louisiana Attorney General Jeff Landry praising his former employee.”⁸⁹

⁸⁹ Broach, Drew. “As conservatives push to get judge nominee Kyle Duncan confirmed, liberals express alarm.” *NOLA.com*. November 12, 2017. Accessed December 12, 2017.
http://www.nola.com/crime/index.ssf/2017/11/kyle_duncan_conservative_supp.html.

Rushing ideological nominees

Senate Republicans are prioritizing filling vacancies on circuit courts. President Trump's first 15 circuit court nominees took an average of 131 days to be confirmed. In contrast, President Obama's first 15 circuit court nominees took an average of 254 days to be confirmed—nearly twice as long.

Contrary to Republican claims, there has been no obstruction to justify efforts to undermine the Senate's vetting process. In his first year in office, President Trump had 12 circuit court nominees confirmed.

In contrast, President Obama had only three circuit court nominees confirmed in the first year of his administration. President Obama's 12th circuit court nominee was not confirmed until December 18, 2010. It took President Obama two years to confirm as many circuit court nominees as President Trump confirmed in one year.

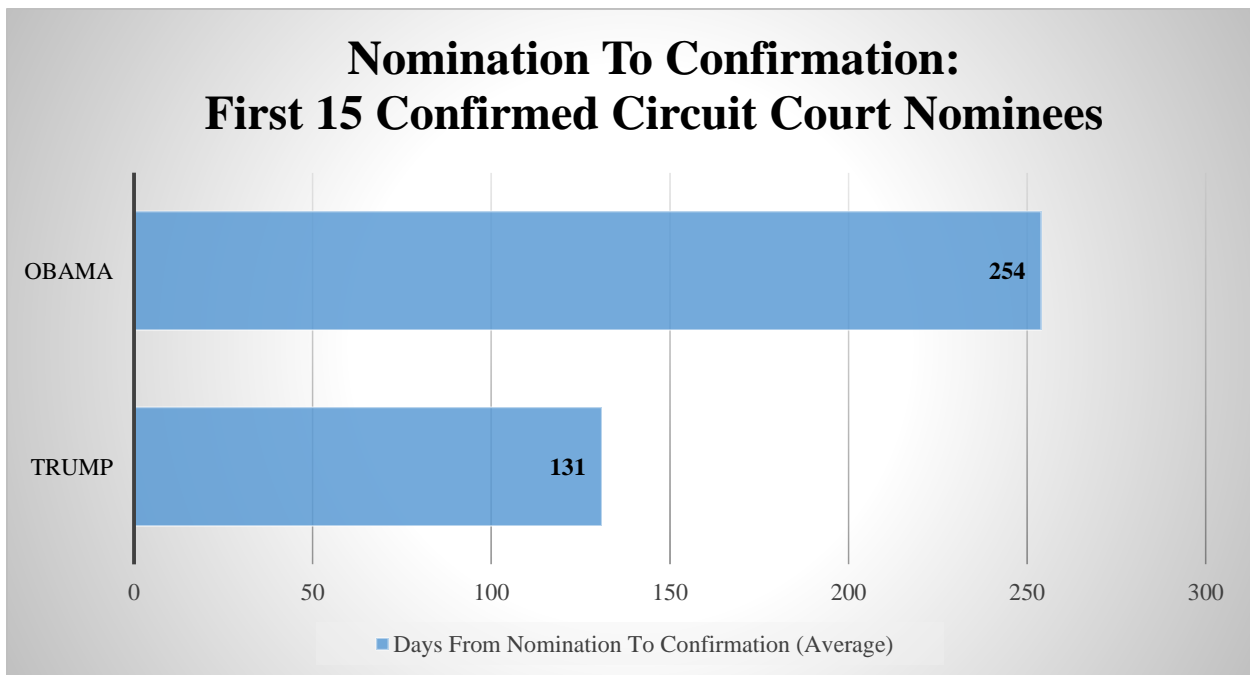


Figure 6
Source: Senate Judiciary Committee

Efforts to remake the judiciary by obstructing President Obama’s noncontroversial nominees and rushing through President Trump’s controversial nominees are further captured by a comparison between the numbers of days between nominees’ Judiciary Committee and confirmation votes, and confirmation vote totals.

President Trump’s first 15 circuit court nominees waited 20 days on average from committee approval to confirmation on the floor. These nominees were confirmed largely along party lines, reflecting nominees’ ideological records and insufficient efforts to work with home-state Democratic senators to select consensus picks.

President Obama’s first 15 circuit court nominees waited 167 on average from approval by the committee to confirmation on the floor—eight times as long as President Trump’s nominees. For the most part, these nominees were confirmed with overwhelming bipartisan votes. Three were confirmed by voice vote and seven did not receive a single vote in opposition.

Trump’s first 15 circuit court nominees: Controversial, confirmed at record pace

Judge	Markup	Confirmed	Days Elapsed	Vote
Amul Thapar	5/18/17	5/25/17	7	52–44
John K. Bush	7/13/17	7/20/17	7	51–47
Kevin Newsom	7/13/17	8/1/17	19	66–31
Ralph R. Erickson	9/14/17	9/28/17	14	95–1
Amy Coney Barrett	10/5/17	10/31/17	26	55–43
Joan Larsen	10/5/17	11/1/17	27	60–38
Allison H. Eid	10/26/17	11/2/17	7	56–41
Stephanos Bibas	10/26/17	11/2/17	7	53–43
Gregory G. Katsas	11/9/17	11/28/17	19	50–48
L. Steven Grasz	12/7/17	12/12/17	5	50–48
Don Willett	12/7/17	12/13/17	6	50–47
James C. Ho	12/7/17	12/14/17	7	53–43
David Stras	1/18/18	1/30/18	12	56–42
Elizabeth Branch	1/18/18	2/27/18	40	73–23
Kyle Duncan	1/8/18	4/24/18	96	50–47
		AVERAGE	20	

Figure 7

Source: Senate Judiciary Committee

Obama's first 15 circuit court nominees: Broadly supported, confirmed after long delays

Judge	Markup	Confirmed	Days Elapsed	Vote
Gerard E. Lynch	6/11/2009	9/17/09	98	94-3
Andre M. Davis	6/4/2009	11/9/09	158	72-16
David Hamilton	6/4/2009	11/19/09	168	59-39
Beverly B. Martin	9/10/2009	1/20/10	132	97-0
Joseph A. Greenaway, Jr.	10/1/2009	2/9/10	131	84-0
Barbara Milano Keenan	10/29/2009	3/2/10	124	99-0
O. Rogeriee Thompson	1/21/2010	3/17/10	55	98-0
Thomas I. Vanaskie	12/3/2009	4/21/10	139	77-20
Denny Chin	12/10/2009	4/22/10	133	98-0
James A. Wynn, Jr.	1/28/2010	8/5/10	189	Voice Vote
Jane Branstetter Stranch	11/19/2009	9/13/10	298	71-21
Albert Diaz	1/28/2010	12/18/10	324	Voice Vote
Raymond Lohier	5/13/2010	12/19/10	220	92-0
Mary H. Murguia	8/5/2010	12/22/2010	139	89-0
Scott Matheson, Jr.	6/10/2010	12/22/10	195	Voice Vote
		AVERAGE	167	

Figure 8

Source: Senate Judiciary Committee

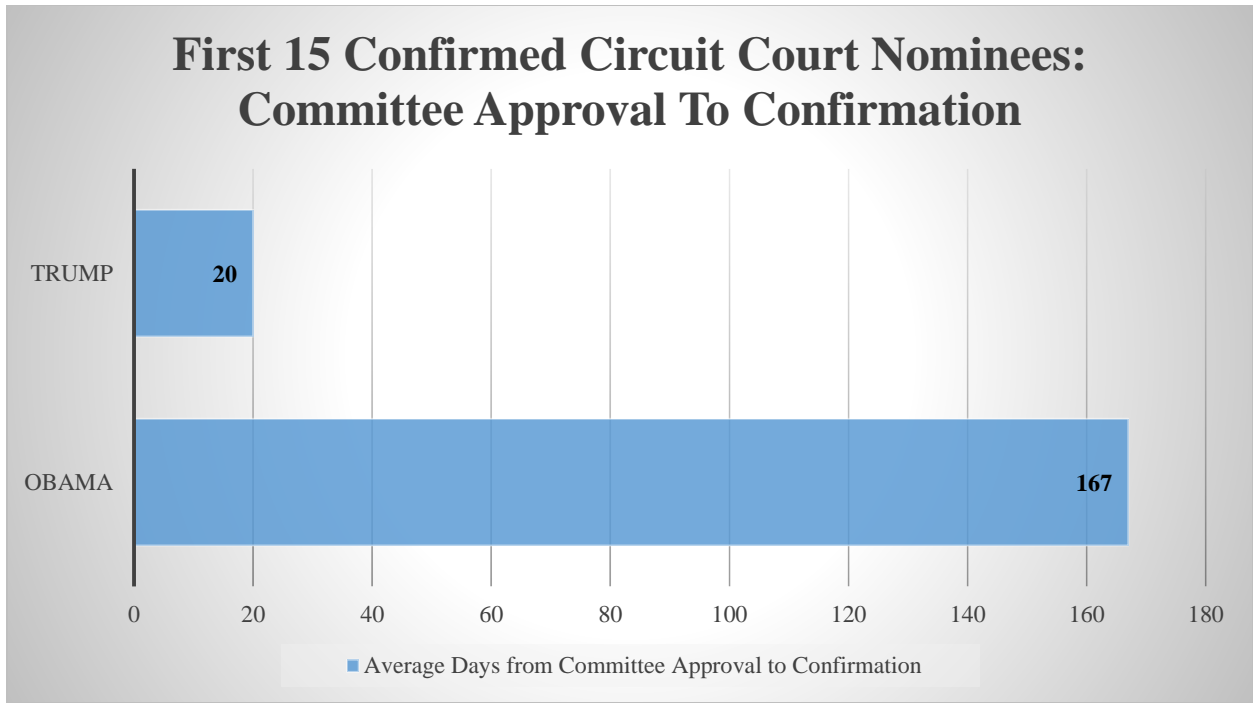


Figure 9
Source: Senate Judiciary Committee

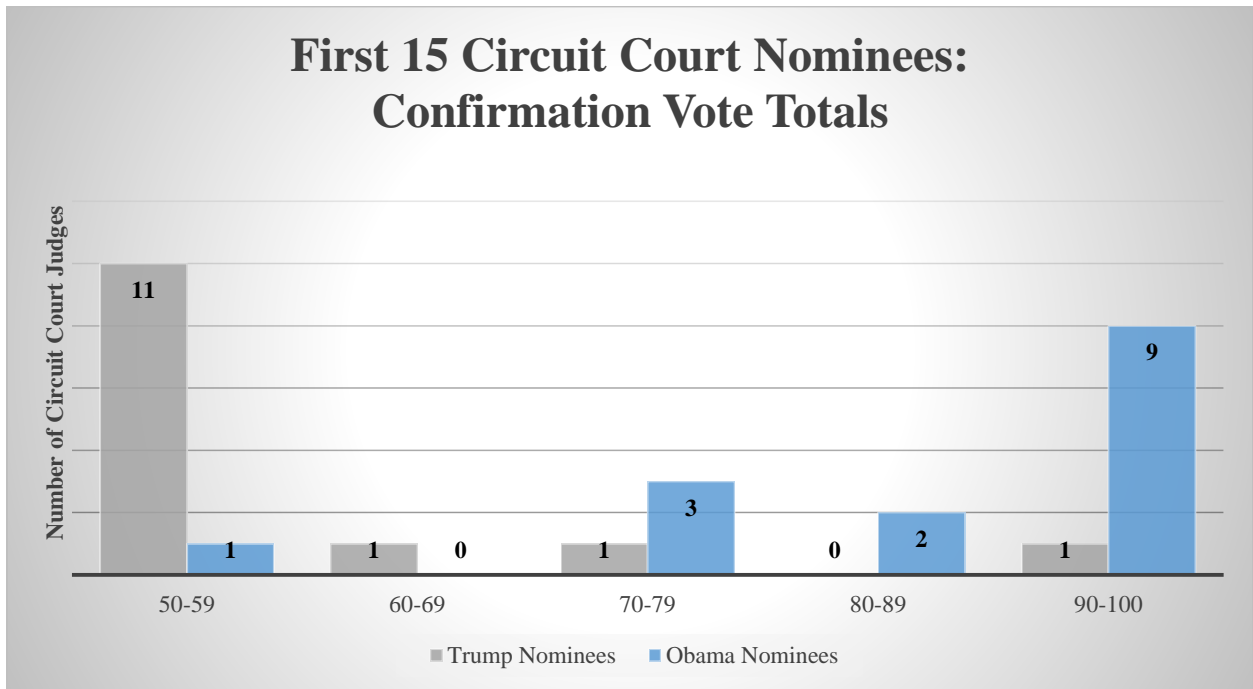


Figure 10
Source: Senate Judiciary Committee

Young nominees who will serve for decades

President Trump has prioritized selecting nominees who are young, allowing them to serve for decades. As Leader McConnell noted in an interview:

“And by appointing and confirming these strict constructionists to the courts who are in their **late 40s or early 50s**, I believe working in conjunction with the administration, **we’re making a generational change in our country** that will be repeated over and over and over down through the years.”⁹⁰

President	Median Age Of First 15 Confirmed Circuit Court Judges
Trump	48 years
Obama	56 years

Nine of President Trump’s first 15 confirmed circuit court nominees, or 60 percent, are in their 40s. By comparison, only one of President Obama’s first 15 confirmed circuit court nominees was in their 40s.

According to CRS, the median age of President Trump’s first 15 confirmed circuit court nominees is eight years younger than the median age of President Obama’s first 15 confirmed circuit court nominees. In other words, President Trump’s confirmed judges could serve an average of two presidential terms longer.

⁹⁰ “Senate Majority Leader Mitch McConnell On The Federal Judiciary And The Pace Of Appointments.” The Hugh Hewitt Show. May 03, 2018. Accessed May 03, 2018. <http://www.hughhewitt.com/senate-majority-leader-mitch-mcconnell-on-the-federal-judiciary-and-the-pace-of-appointments/>.

Failed nominees who lack basic qualifications

After President Trump's first year in office, five judicial nominees were not re-nominated due to their lack of qualifications and failure to disclose information to the Senate. Three of these nominees had a history of troubling commentary, casting doubt on their ability to be perceived as impartial on the bench. While these nominees were never confirmed, they are emblematic of the types of nominees President Trump is choosing.

Brett Talley (Middle District-Ala.)

Brett Talley was nominated in September 2017. Talley serves as deputy assistant attorney general in the Office of Legal Policy,⁹¹ where he is responsible for vetting judicial nominees and assisting them in completing their Judiciary Committee questionnaires.

The ABA found Talley unanimously “not qualified,” given that he has only practiced law for three years, never tried a case to verdict or judgment, and never argued a motion in federal court.⁹² Talley's committee hearing was scheduled prior to the ABA completing its evaluation, so senators could not review a nonpartisan analysis of his record and qualifications prior to questioning him.

Talley's hearing focused on his highly political blog posts. In one post, written shortly after the Sandy Hook Elementary School mass shooting, Talley wrote:

“Today I pledge my support to the NRA; financially, politically, and intellectually. I ask you to do the same. Join the NRA. They stand for all of us now, and I pray that in the coming battle for our rights, they will be victorious.”⁹³

Despite these posts and the fact that he is an active member of the National Rifle Association,⁹⁴ Talley declined to commit to recusing himself in cases involving the NRA or cases in which the NRA has taken a position.⁹⁵

⁹¹ Talley, Brett. “Brett Talley Senate Judiciary Committee Questionnaire.” Accessed December 18, 2017. <https://www.judiciary.senate.gov/imo/media/doc/Talley%20SJQ.pdf>.

⁹² Wang, Vivian. “Trump Nominee for Federal Judgeship Has Never Tried a Case.” *New York Times*. November 11, 2017. Accessed December 19, 2017. https://www.nytimes.com/2017/11/11/us/brett-talley-judge-senate.html?_r=0.

⁹³ Talley, Brett. “A Call To Arms: It's Time To Join The National Rifle Association.” *Government in Exile*. January 26, 2013. Accessed December 19, 2017. <https://happywarriordotme.wordpress.com/2013/01/26/a-call-to-arms-its-time-to-join-the-national-rifle-association/>.

⁹⁴ Talley, Brett. “Brett Talley Senate Judiciary Committee Questionnaire.” Accessed December 18, 2017. <https://www.judiciary.senate.gov/imo/media/doc/Talley%20SJQ.pdf>.

⁹⁵ Wang, Vivian. “Trump Nominee for Federal Judgeship Has Never Tried a Case.” *The New York Times*. November 11, 2017. Accessed December 19, 2017. https://www.nytimes.com/2017/11/11/us/brett-talley-judge-senate.html?_r=0. See Brett Talley Hearing Testimony, U.S. Senate Judiciary Committee, October 17, 2017, <https://www.judiciary.senate.gov/meetings/10/17/2017/nominations>.

After Talley was voted out of committee 11-9, reporting from the *New York Times*, *Slate*, and *BuzzFeed* revealed that he did not disclose more than 15,000 pieces of online commentary,⁹⁶ or that his wife worked in the White House Counsel's Office as Don McGahn's chief of staff.⁹⁷

In one post, Talley defended the founder of the KKK, saying that the first KKK "was entirely different than the KKK of the early 19th century."⁹⁸ In another, he joked about a case where a 20-year-old babysitter committed statutory rape against the 14-year-old boy she was responsible for watching.⁹⁹

Senator Feinstein sent Talley a number of questions relating to his failures to disclose.¹⁰⁰ He never responded to the follow-up letter and the White House announced that his nomination would not move forward.¹⁰¹

Jeff Mateer (Eastern District-Texas)

Jeff Mateer was nominated in September 2017. Two weeks after his nomination, *CNN* reported on Mateer's 2015 speech: "The Church and Homosexuality." Mateer discussed the case of a transgender girl in Colorado whose parents sued her school for not allowing her to use the girls' restroom:

⁹⁶ Tillman, Zoe. "A Trump Judicial Nominee Appears To Have Written About Politics On A Sports Website And Didn't Disclose It." *BuzzFeed*. November 13, 2017. Accessed December 14, 2017. https://www.buzzfeed.com/zoetillman/a-trump-judicial-nominee-appears-to-have-written-about?utm_term=.bu5mWBYx6#.fpwYO7q0G.

⁹⁷ Apuzzo, Matt, and Michael S. Schmidt. "Trump Judicial Pick Did Not Disclose He Is Married to a White House Lawyer." *New York Times*. November 13, 2017. Accessed December 14, 2017. <https://www.nytimes.com/2017/11/13/us/politics/trump-judge-brett-talley-nomination.html>.

⁹⁸ Stern, Mark Joseph. "Trump Judicial Nominee Brett Talley Appears to Have Defended 'the First KKK' in Message Board Post." *Slate Magazine*. November 15, 2017. Accessed December 14, 2017. http://www.slate.com/blogs/the_slatest/2017/11/15/trump_nominee_brett_talley_appears_to_have_defended_the_first_kkk.html.

⁹⁹ Levin, Josh. "Trump Nominee Brett Talley Appears to Support 20-Year-Old Woman Having Sex with 14-Year-Old Boy." *Slate Magazine*. November 16, 2017. Accessed December 14, 2017. http://www.slate.com/blogs/the_slatest/2017/11/16/trump_nominee_brett_talley_appears_to_support_20_year_old_woman_having_sex.html.

¹⁰⁰ Feinstein, Dianne. "Feinstein Requests Answers on Talley Conflicts, Online Commentary." Dianne Feinstein: U.S. Senator for California. November 17, 2017. Accessed December 14, 2017. <https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=5BBF3A16-49AF-4AA7-8F95-2C7FEC50F74C>.

¹⁰¹ Johnson, Carrie. "White House: Nomination Of Alabama Lawyer Brett Talley 'Will Not Be Moving Forward'." *NPR*. December 13, 2017. Accessed May 04, 2018. <https://www.npr.org/2017/12/13/570499146/white-house-nomination-of-alabama-lawyer-brett-talley-will-not-be-moving-forward>.

“And the school said, ‘Well, she’s not using the girls’ restroom.’ And so she has now sued to have a right to go in. Now, I submit to you, a parent of three children who are now young adults, a first grader really knows what their sexual identity? **I mean it just really shows you how Satan’s plan is working and the destruction that’s going on.**”¹⁰²

Mateer also called same-sex marriage “disgusting.”¹⁰³ While not rescinding his blue slip for the nomination, Senator John Cornyn (R-Texas) told reporters that Mateer failed to disclose this speech and other materials to the state’s judicial nominating committee:

“We requested that sort of information about speeches and the like on his application. And to my knowledge there was no information given about those, so it’s fair to say I was surprised...I understand there may be even additional information other than that which has previously been disclosed.”¹⁰⁴

Mateer was not re-nominated after his nomination was returned to the president at the end of 2017.

Matthew Petersen (District-D.C.)

Matthew Petersen was nominated in September 2017. Like Talley, Petersen had never tried a case or argued a motion in federal court. He was a commissioner on the Federal Election Commission, where he served with White House Counsel Don McGahn.¹⁰⁵

Senator John Kennedy (R-La.) questioned Petersen at his hearing about basic trial court motions and standards of evidence.¹⁰⁶ Petersen was unable to answer these questions, and video of Kennedy’s questioning went viral. Petersen withdrew his nomination five days after the hearing.¹⁰⁷

¹⁰² Massie, Chris, and Andrew Kaczynski. “Trump judicial nominee said transgender children are part of ‘Satan’s plan’, defended ‘conversion therapy’.” *CNN*. September 20, 2017. Accessed December 19, 2017. <http://www.cnn.com/2017/09/20/politics/kfile-jeff-mateer-lgbt-remarks/index.html>.

¹⁰³ *Id.*

¹⁰⁴ Diaz, Kevin. “Cornyn has doubts about nominee who said transgender rights were ‘Satan’s plan’.” *San Antonio Express-News*. September 28, 2017. Accessed December 19, 2017. <http://www.expressnews.com/news/local/article/Cornyn-has-doubts-about-nominee-who-said-12239028.php>.

¹⁰⁵ Petersen, Matthew. “Senate Judiciary Questionnaire.” Senate Judiciary Committee. <https://www.judiciary.senate.gov/imo/media/doc/Petersen%20SJQ.pdf>.

¹⁰⁶ Blake, Aaron. “Analysis | That painful exchange between a Trump judicial pick and a GOP senator, annotated.” *Washington Post*. December 15, 2017. Accessed December 19, 2017. https://www.washingtonpost.com/news/the-fix/wp/2017/12/15/that-painful-exchange-between-a-trump-judicial-pick-and-a-gop-senator-annotated/?utm_term=.4f27aa42217f.

¹⁰⁷ Merica, Dan. “Trump Judicial Nominee Petersen Withdraws.” *CNN*. December 19, 2017. Accessed May 04, 2018. <https://www.cnn.com/2017/12/18/politics/trump-judicial-nominee-petersen-withdraws/index.html>.

Stephen Schwartz (Court of Federal Claims)

Stephen Schwartz was nominated in June 2017,¹⁰⁸ although he had no relevant experience. Schwartz had never tried a case before the Court of Federal Claims and was not even licensed to practice before the court.

Although Schwartz was nominated just nine years out of law school, he had a long history of cause litigation, arguing against civil rights, women’s rights and LGBT rights. Schwartz was involved in a series of ideological cases, including defending North Carolina voter suppression laws, the North Carolina anti-transgender bathroom bill, and Louisiana’s draconian abortion restrictions. Schwartz was not re-nominated after his nomination was returned to the president at the end of 2017.

Damien Schiff (Court of Federal Claims)

Damien Schiff was nominated in May 2017,¹⁰⁹ although he had no relevant experience.

In blog posts, Schiff called Justice Anthony Kennedy a “judicial prostitute”¹¹⁰ and criticized a school’s anti-bullying program for teaching that “homosexual families are the moral equivalent of heterosexual families.”¹¹¹ Schiff was not re-nominated after his nomination was returned to the president at the end of 2017. Schiff has also indicated that he has withdrawn himself from further consideration.¹¹²

¹⁰⁸ “President Donald J. Trump Announces Judicial Candidate Nominations.” The White House. June 7, 2017. Accessed February 02, 2018. <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-candidate-nominations/>.

¹⁰⁹ “Nine Nominations Sent to the Senate Today.” The White House. May 8, 2017. Accessed February 02, 2018. <https://www.whitehouse.gov/presidential-actions/nine-nominations-sent-senate-today-2/>.

¹¹⁰ Kim, Seung Min. “Trump nominee called Kennedy ‘judicial prostitute’.” *Politico*. May 26, 2017. Accessed February 01, 2018. <https://www.politico.com/story/2017/05/26/trump-judicial-nominee-justice-kennedy-slight-damien-schiff-238874>.

¹¹¹ Barry, Kyle. “The Strange Civil Rights Views of Trumps Latest Court Nominees.” *Politico Magazine*. June 14, 2017. Accessed February 01, 2018. <https://www.politico.com/magazine/story/2017/06/14/trump-judicial-nominees-civil-rights-newsom-bush-schiff-215253>.

¹¹² Tillman, Zoe. “The Judicial Nominee Who Called Justice Kennedy A ‘Judicial Prostitute’ Pulled Out Of Contention.” *BuzzFeed*. May 7, 2018. Accessed May 08, 2018. https://www.buzzfeed.com/zoetillman/judicial-prostitute-nominee-pulled-out?utm_term=.fxKqRV49R#.tqAAENwYX.

Nominees who would roll back civil rights, LGBT rights, and women's rights

The Trump administration has undermined civil rights, LGBT rights, and women's rights by changing the federal government's position in key voting rights cases, rolling back efforts to reform the criminal justice system, banning transgender individuals from the military, and giving employers the ability to restrict employees' birth control coverage, to name a few actions.

A key facet of the Trump administration's ongoing efforts on this front is the selection of judicial nominees with records that demonstrate opposition to fundamental rights and the Supreme Court precedents that underpin them.

Republicans' unprecedented obstruction of President Obama's Supreme Court nominee, Chief Judge Merrick Garland, allowed President Trump to appoint Justice Neil Gorsuch and preserve the court's 5-4 conservative majority, which has recently decided key cases rolling back civil rights and women's rights.

Having further solidified the Supreme Court's conservative ideological makeup, President Trump and Republicans have turned to the lower courts.

Civil rights

Tom Farr, nominee to the Eastern District of North Carolina, has a long record of supporting laws to restrict the voting rights and political representation of African Americans.

In several cases, Farr has defended North Carolina's congressional and legislative districts, drawn after the 2010 Census, against allegations the state legislature drew them to dilute the vote of African Americans. Farr has argued in favor of these districts before North Carolina state courts, federal courts, and the Supreme Court.

In *Covington v. North Carolina*, a three-judge panel in the Middle District of North Carolina found "that race was the predominant factor motivating the drawing of all challenged [state legislative] districts."¹¹³

In *Harris v. McCrory*, two of three federal judges on a panel held that the state's congressional redistricting plan violated the 14th Amendment's equal protection clause.¹¹⁴

Farr in 2016 defended North Carolina's restrictive voter ID law in federal court in *North Carolina State Conference of NAACP*. Farr "strongly den[ied] that the legislature engaged in

¹¹³ (316 F.R.D. 117, 124 (M.D.N.C. 2016)).

¹¹⁴ (159 F. Supp. 3d 600, 604 (M.D.N.C. 2016))

intentional discrimination”¹¹⁵ before the Fourth Circuit Court of Appeals. The court struck down the law and strongly disagreed with Farr’s defense, noting that its requirements “target African Americans with almost surgical precision.”¹¹⁶

The Congressional Black Caucus Foundation expressed its strong opposition to Farr’s nomination, writing that “Farr has amassed a record that puts him at the forefront of an extended fight to disenfranchise African-American voters.” Farr was voted out of committee on a party-line vote of 11-10 in January 2018,¹¹⁷ and his nomination is currently pending on the Senate floor.

Women’s rights

Leonard Steven Grasz, confirmed to the Eighth Circuit, argued in support of criminal bans on certain medical procedures and ignored the long-standing precedents of *Roe v. Wade* and *Planned Parenthood v. Casey*.

As chief deputy attorney general, Grasz defended a Nebraska law banning certain abortion procedures used by doctors in cases where a pregnant woman’s health is at risk or fatal fetal anomalies are present. The law had no exception for protecting a woman’s health.

In defending the constitutionality of this and similar bans, Grasz urged lower courts to ignore well-established precedents in *Roe* and *Casey*. Even before Nebraska passed its ban, Grasz wrote that the mere consideration of the ban’s legality “necessarily exposes the moral bankruptcy which is the legacy of *Roe v. Wade*.”¹¹⁸

The Eighth Circuit struck down Nebraska’s ban as unconstitutional. The Nebraska attorney general’s office then filed a petition for certiorari at the U.S. Supreme Court.¹¹⁹ The petition, which Grasz signed, argued that a woman’s right to choose had no basis in the Constitution’s text and should not be a constitutional issue decided by federal courts.

¹¹⁵ Berman, Ari. “He defended North Carolina’s voter suppression law. Now he’s set to become a federal judge there.” *Mother Jones*. October 18, 2017. Accessed January 11, 2018. <http://www.motherjones.com/politics/2017/10/he-defended-north-carolinas-voter-suppression-law-now-hes-set-to-become-a-federal-judge-there/>.

¹¹⁶ *Id.*

¹¹⁷ Tiberii, Jeff. “Thomas Farr’s Nomination For Federal Judge Moves To Full Senate.” *WUNC*. January 18, 2018. Accessed May 04, 2018. <http://wunc.org/post/thomas-farrs-nomination-federal-judge-moves-full-senate#stream/0>.

¹¹⁸ “Nebraska Attorney General Opinion: Constitutionality of a statutory ban on “partial-birth” abortions in Nebraska.” May 29, 1996. <https://ago.nebraska.gov/sites/ago.nebraska.gov/files/docs/opinions/AG%20Opinion%201996-043.pdf>. p.13. American Bar Association Standing Committee on the Federal Judiciary Nov. 13 statement, p. 14.

¹¹⁹ *Stenberg v. Carhart*. Petition for Writ of Certiorari from the State of Nebraska, 1999 WL33611376, *14, Nov. 15, 1999.

The day before the Supreme Court argument, Grasz told the *Los Angeles Times*, “We can’t lose this case... [but] if we lose, it will turn the public against abortion and help ensure that the next justices have a different view.”¹²⁰

Ultimately, the Supreme Court did strike down Nebraska’s ban and, contrary to Grasz’s argument, the court relied on *Roe* and *Casey* in deciding the law was an undue burden on women’s constitutional rights and was also unconstitutional for its lack of any exception to protect women’s health.¹²¹

Grasz was confirmed by a vote of 50-48, with all Democrats opposing his nomination.¹²²

LGBT rights

Kyle Duncan, confirmed to the Fifth Circuit, has a long record of arguing to undermine the rights of LGBT Americans.

Duncan has repeatedly argued against a nationwide right to marriage equality. In *Obergefell v. Hodges*, which legalized same-sex marriage nationwide, he submitted an amicus brief on behalf of Louisiana and more than a dozen other states.¹²³

When the Supreme Court ruled in favor of marriage equality, Duncan wrote that the *Obergefell* decision “imperil[ed] civic peace.” Duncan also represented Virginia court clerks in *Schaefer v. Bostic*,¹²⁴ urging the U.S. Supreme Court to overturn a Fourth Circuit decision that struck down Virginia’s laws that banned same-sex marriage and prohibited recognizing same-sex marriages from other states.

Duncan has defended two anti-transgender bathroom laws. In *G.G. v. Gloucester County School Board*, Duncan defended a Virginia school board’s policy requiring students to use restrooms that correspond to their “biological genders.”¹²⁵

In defending a similar North Carolina law, Duncan claimed that if the law prohibiting transgender bathrooms were to be halted, the North Carolina’s citizens would be at “a

¹²⁰ Savage, David G. “High Court to Hear Arguments in Abortion Case.” *Los Angeles Times*. April 24, 2000.

¹²¹ *Stenberg v. Carhart*, 530 U.S. 914. 2000.

¹²² “Roll Call Vote 115th Congress - 1st Session.” U.S. Senate. December 12, 2017. Accessed May 04, 2018. https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00313.

¹²³ Brief of Louisiana et al. as Amici Curiae Supporting Respondents, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), 2015 WL 1608213.

¹²⁴ Petition for a Writ of Certiorari, *Schaefer v. Bostic*, 135 S. Ct. 308 (2014) (cert. denied), 2014 WL 4216041.

¹²⁵ Brief of Petitioner, *Gloucester County School Bd. v. G.G.*, 137 S. Ct. 1239 (2017), 2017 WL 65477.

substantially increased risk of privacy violations and sex crimes that, in various ways, would invade their legitimate expectations of privacy and bodily security.”¹²⁶

Duncan was confirmed by a vote of 50-48.¹²⁷

Greg Katsas was nominated to the D.C. Circuit after serving as a lawyer for President Trump in the White House Counsel’s Office, where he worked on many of the Trump administration’s initiatives and decisions that were most hostile to LGBT rights.

For example, Katsas told the committee, in both testimony and questions for the record,¹²⁸ that he was involved in the:

- Decision to ban transgender individuals from serving in the U.S. Armed Forces.
- Justice Department’s argument that the *Civil Rights Act of 1964* does not protect workers on the basis of their sexual orientation.
- Justice Department’s amicus brief arguing that the First Amendment allows a bakery to refuse to serve a gay couple’s wedding.
- Trump administration’s decision to withdraw guidance for schools outlining their obligations to protect the civil rights of transgender students.

This work on behalf of the Trump administration to undermine the civil rights of LGBT individuals is consistent with his earlier legal career. While still in private practice, for example, Katsas criticized Justice Kennedy’s opinion in *Obergefell* by saying it was “long on rhetoric” but “short on tradit[ional] legal reas[oning].”¹²⁹

In a 2011 Federalist Society speech, Katsas questioned the well-being of children raised by same-sex parents, stating, “It seems to me pretty self-evident, but at least a debatable point that other things being equal, the best arrangement for a child is to be raised by both of the child’s biological parents.”¹³⁰

¹²⁶ *Id.* at 2.

¹²⁷ “Roll Call Vote 115th Congress - 2nd Session.” U.S. Senate. April 24, 2018. Accessed May 04, 2018. https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=2&vote=00082.

¹²⁸ Katsas, Greg. “Questions for the Record.” Senate Judiciary Committee. October 24, 2017.

¹²⁹ Katsas, Greg. “Speech Notes ‘Supreme Court Roundup.’” Federalist Society for Law & Public Policy Studies. September 9, 2015. SJQ Attachment 12(d) at pp. 19-26.

¹³⁰ “Defending the Defense of Marriage Act – Event Audio.” Federalist Society for Law & Public Policy Studies. August 18, 2011. <https://fedsoc.org/commentary/podcasts/defending-the-defense-of-marriage-act-event-audio> (at 27:30).

Katsas was confirmed by a vote of 50-48.¹³¹ Senator John Kennedy was the lone Republican to oppose Katsas's nomination. He said that as a recent lawyer to the president on issues likely to go before the court he was appointed to, Katsas has a "conflict of interest" that "a first-year law student would see."¹³²

¹³¹ "Roll Call Vote 115th Congress - 1st Session." U.S. Senate. November 28, 2017. Accessed May 04, 2018. https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00283.

¹³² Kim, Seung Min. "Louisiana GOP Sen. Kennedy Opposes Controversial Trump Judicial Nominee." *Politico*. November 29, 2017. Accessed May 04, 2018. <https://www.politico.com/story/2017/11/28/kennedy-trump-judicial-nominee-267815>.

Trump nominees don't reflect diversity of the communities they serve

There is a stark contrast between the diversity of judicial nominees chosen by Presidents Obama and Trump. President Obama diversified the judiciary, while President Trump has worked to reverse those gains by overwhelmingly nominating white men.

Obama nominees

President Obama made a concerted effort to ensure the federal bench better reflected the people of our nation. This effort was evidenced by the number of “firsts” during his administration.

President Obama nominated, and a Democratic Senate confirmed, the first Latina Supreme Court Justice, the first African American circuit court judges in five states, the first Hispanic circuit court judges in three circuits, and the first women judges in 17 district courts.

In President Obama's first year, 42 percent of judicial nominees were women and 52 percent were people of color.¹³³ Altogether, 43 percent of confirmed Obama nominees were women and 37 percent were people of color. In total, President Obama appointed 140 women judges and 121 people of color.¹³⁴

President Obama would have achieved even greater success in diversifying the federal bench if not for the fact that Republicans used the blue slip and control of the Senate floor to block well-qualified Obama nominees who were women or people of color.

Republican obstruction made it possible for President Trump to reduce the diversity of the federal judiciary as the following examples show:

Abdul Kallon to Kevin Newsom

In February 2016, President Obama nominated Judge Abdul Kallon from the Northern District of Alabama to fill an open seat on the Eleventh Circuit. He would have been the first African American judge to sit on the Eleventh Circuit from Alabama.

Judge Kallon received blue slips from Senators Richard Shelby and Jeff Sessions (both R-Ala.) in 2009 when he was nominated by President Obama to the district court and had been unanimously confirmed. Judge Kallon also received a unanimous well-qualified rating from the ABA when nominated to the Eleventh Circuit. This time Senators Sessions and Shelby did not return their blue slips and Kallon never received a hearing.

¹³³ McMillion, Barry. “U.S. Circuit and District Court Nominations During President Trump's First Year in Office: Comparative Analysis with Recent Presidents.” Congressional Research Service. May 2, 2018. Accessed May 9, 2018. <http://www.crs.gov/Reports/R45189>.

¹³⁴ “This is the First Time Our Judicial Pool Has Been This Diverse.” White House: President Barack Obama. June 8, 2016. Accessed February 01, 2018. <https://obamawhitehouse.archives.gov/node/256756>.

President Trump nominated Kevin Newsom to this seat in May 2017 and he was confirmed in August 2017.

Jennifer May-Parker, Patricia Timmons-Goodson to Tom Farr

A vacancy has been open on the Eastern District of North Carolina since 2006—the longest judicial vacancy in the country.¹³⁵ In 2013, President Obama nominated Jennifer May-Parker, chief of the appellate division at the U.S. Attorney’s Office in the Eastern District of North Carolina, to the vacancy. May-Parker has served in the U.S. Attorney’s Office since 1999.¹³⁶

May-Parker would have been the first African American to serve on the court—a long-overdue milestone in a district where African Americans comprise more than 25 percent of the population.¹³⁷

While Senator Kay Hagan (D-N.C.) returned a blue slip on May-Parker, Senator Richard Burr (R-N.C.) did not,¹³⁸ even though he had initially recommended May-Parker to the White House as a potential nominee.¹³⁹ Senator Burr never explained why he didn’t return his blue slip.¹⁴⁰

After Senator Burr refused to return a blue slip on May-Parker, in 2016 President Obama nominated Patricia Timmons-Goodson, vice chair of the United States Commission on Civil Rights. Timmons-Goodson had previously served as an associate justice on the North Carolina Supreme Court and an associate judge for the North Carolina Court of Appeals.¹⁴¹ She would have also been the first African American to serve on the Eastern District of North Carolina.

¹³⁵ Dorosin, Mark, and Brent Ducharme. "In Eastern NC district, 10 years of waiting for a judge." *News & Observer*. March 1, 2016. Accessed January 11, 2018. <http://www.newsobserver.com/opinion/op-ed/article63396347.html>.

¹³⁶ "President Obama Announces Intent to Nominate Three to Serve on the United States District Court." Obama White House. June 20, 2013. Accessed January 11, 2018. <https://obamawhitehouse.archives.gov/the-press-office/2013/06/20/president-obama-announces-intent-nominate-three-serve-united-states-dist>.

¹³⁷ Dorosin, Mark, and Brent Ducharme. "In Eastern NC district, 10 years of waiting for a judge." *News & Observer*. March 1, 2016. Accessed January 11, 2018. <http://www.newsobserver.com/opinion/op-ed/article63396347.html>.

¹³⁸ Bendery, Jennifer, and Sam Stein. "Richard Burr Blocks Judicial Nominee After Recommending Her To Obama." *The Huffington Post*. January 08, 2014. Accessed January 11, 2018. https://www.huffingtonpost.com/2014/01/08/richard-burr-judicial-nominee_n_4563083.html.

¹³⁹ Burr, Richard. "Letter to President Obama." July 21, 2009. <http://big.assets.huffingtonpost.com/Burrletter.pdf>.

¹⁴⁰ Blythe, Anne. "Burr vows to block Obama nomination to NC federal court seat." *News & Observer*. April 26, 2016. Accessed January 11, 2018. <http://www.newsobserver.com/news/politics-government/state-politics/article74534012.html>.

¹⁴¹ "President Obama Nominates Eight to Serve on United States District Courts." Obama White House. April 28, 2016. Accessed January 11, 2018. <https://obamawhitehouse.archives.gov/the-press-office/2016/04/28/president-obama-nominates-eight-serve-united-states-district-courts>.

Senators Burr and Tillis both declined to return blue slips on Timmons-Goodson.¹⁴²

In July 2017, President Trump nominated Tom Farr to the vacancy.¹⁴³ Farr defended North Carolina's restrictive voter ID law in federal court. The Fourth Circuit Court of Appeals struck down the law, noting that its requirements "target African Americans with almost surgical precision."¹⁴⁴ Senators Burr and Tillis returned blue slips on Farr and strongly support Farr's nomination.¹⁴⁵

Rebecca Haywood to Stephanos Bibas

A vacancy was open on the Third Circuit in Pennsylvania from July 2015 to November 2017. In March 2016, President Obama nominated Rebecca Ross Haywood, chief of appeals for the U.S. attorney's office for the Western District of Pennsylvania, to the vacancy. Haywood received a unanimous "well qualified" rating from the ABA and would have been the first African American woman to sit on the Third Circuit. Haywood did not receive a blue slip from Senator Pat Toomey (R-Pa.) and never received a hearing.

In June 2017, President Trump nominated Stephanos Bibas to the vacancy and he was confirmed in November 2017.

Myra Selby to Amy Coney Barrett

A vacancy was open on the Seventh Circuit in Indiana from February 2015 to May 2017. In January 2016, President Obama nominated Myra Selby, the first African American woman to serve on the Indiana Supreme Court, to the vacancy. Selby was rated "qualified" by the ABA and would have been the first African American woman from Indiana to serve on the Seventh Circuit. Selby did not receive a blue slip from Senator Dan Coats (R-Ind.) and never received a hearing.

In May 2017, President Trump nominated Amy Coney Barrett to the vacancy and she was confirmed in November 2017.

¹⁴² Blythe, Anne. "Burr vows to block Obama nomination to NC federal court seat." *News & Observer*. April 26, 2016. Accessed January 11, 2018. <http://www.newsobserver.com/news/politics-government/state-politics/article74534012.html>.

¹⁴³ "President Donald J. Trump Announces Fifth Wave of Judicial Candidates." The White House. July 13, 2017. Accessed January 11, 2018. <https://www.whitehouse.gov/presidential-actions/5704/>.

¹⁴⁴ Berman, Ari. "He defended North Carolina's voter suppression law. Now he's set to become a federal judge there." *Mother Jones*. October 18, 2017. Accessed January 11, 2018. <http://www.motherjones.com/politics/2017/10/he-defended-north-carolinas-voter-suppression-law-now-hes-set-to-become-a-federal-judge-there/>.

¹⁴⁵ Tillis, Thom. "Tillis & Burr Applaud Senate Advancement of Thomas Farr Nomination." Senator Thom Tillis. October 20, 2017. Accessed January 11, 2018. <https://www.tillis.senate.gov/public/index.cfm/press-releases?ID=B07770F6-AD2B-4A71-880B-0E0FDDDCCF34>.

Trump nominees

Gender diversity

Just 8 percent of President Trump's U.S Attorney nominees are women. Twenty-five percent of district court nominees and 19 percent of circuit court nominees are women. (As of May 7, 2018)

Women U.S. attorney nominees: 5 of 65 nominees (8 percent)

- Jessie Liu (D-D.C.)
- Christina Nolan (D-Vt.)
- Erin Nealy Cox (ND-Texas)
- Erica MacDonald (D-Minn.)
- Cherly Lydon (D-S.C.)

Women district court nominees: 20 of 79 nominees (25 percent)

- Dabney Friedrich (D-D.C.)
- Claria Boom (ED-WD-Ky.)
- Annemarie Axon (ND-Ala.)
- Holly Teeter (D-Kan.)
- Rebecca Jennings (WD-Ky.)
- Karen Scholer (ND-Texas)
- Emily Marks (MD-Ala.)
- Susan Paradise Baxter (MD-Pa.)
- Kari Dooley (D-Conn.)
- Marilyn Jean Horan (WD-Pa.)
- Maryellen Noreika (D-Del.)
- Jill Otake (D-Hawaii)
- Wendy Vitter (ED-La.)
- Susan Brnovich (D-Az.)
- Nancy E. Brasel (D-Minn.)
- Holly Brady (ND-Ind.)
- Wendy Berger (MD-Fla.)
- Sarah Morrison (SD-Ohio)
- Pamela Barker (ND-Ohio)
- Mary McElroy (D-R.I.)

Women circuit court nominees: 5 of 27 nominees (19 percent)

- Allison Eid (Tenth Circuit: Colo.)
- Amy Coney Barrett (Seventh Circuit: Ind.)
- Joan Larsen (Sixth Circuit: Mich.)
- Elizabeth Branch (Eleventh Circuit: Ga.)

- Amy J. St. Eve (Seventh Circuit: Ill.)

Racial diversity

Eight percent of President Trump’s U.S. Attorney nominees have been people of color. Eight percent of district court nominees have been people of color (one African American, two Asian American/Pacific Islander, and one Hispanic). Eleven percent of circuit court nominees have been people of color (three Asian American/Pacific Islander).

Minority U.S. attorney nominees: 5 of 65 nominees (8 percent)

- Louis V. Franklin (MD-Ala.)
- Rob Hur (D-Md.)
- Jessie Liu (D-D.C.)
- B.J. Pak (ND-Ga.)
- Kenji Price (D-Hawaii)

Minority district court nominees: 6 of 79 nominees (8 percent)

- Terry Moorer (MD-Ala.)
- Karen Gren Scholer (ND-Texas)
- Fernando Rodriguez Jr. (SD-Texas)
- Jill Otake (D-Hawaii)
- Raúl Arias-Marxuach (D-PR)
- David Morales (SD-Tex.)

Minority circuit court nominees: 3 of 27 nominees (11 percent)

- Amul Thapar (Sixth Circuit-Ky.)
- James Ho (Fifth Circuit-Texas)
- John Nalbandian (Sixth Circuit-Ky.)

Obama v. Trump: Comparison of racial and gender diversity between year one judicial nominees

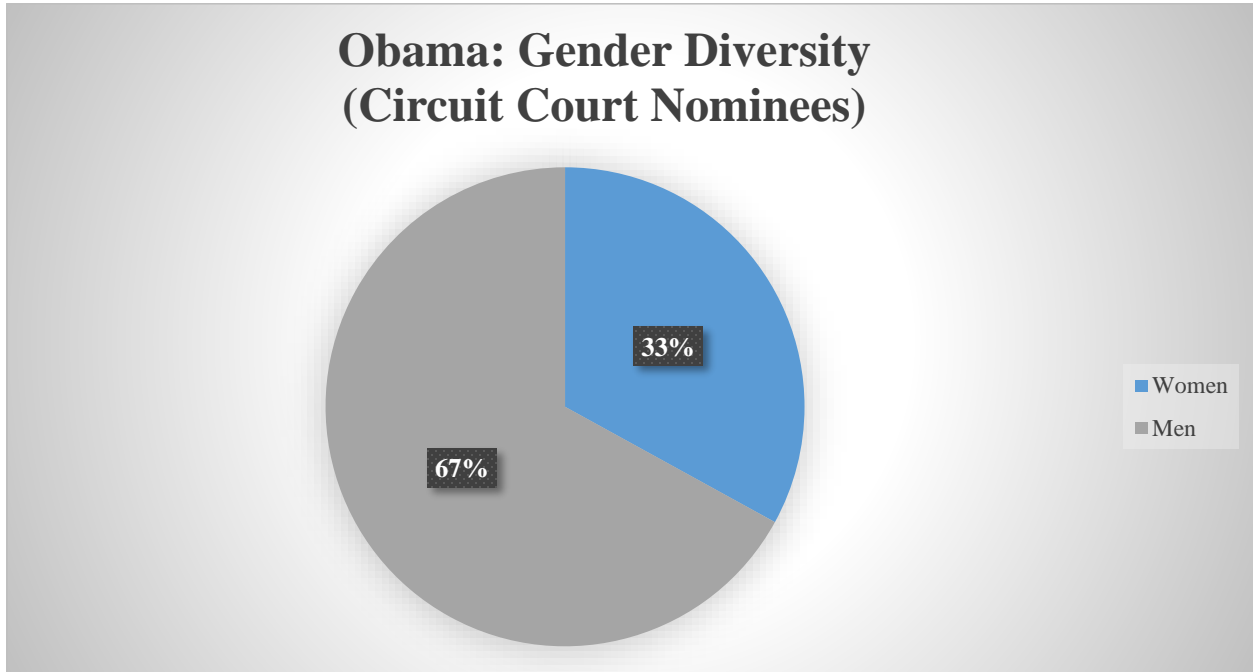


Figure 11
Source: Congressional Research Service

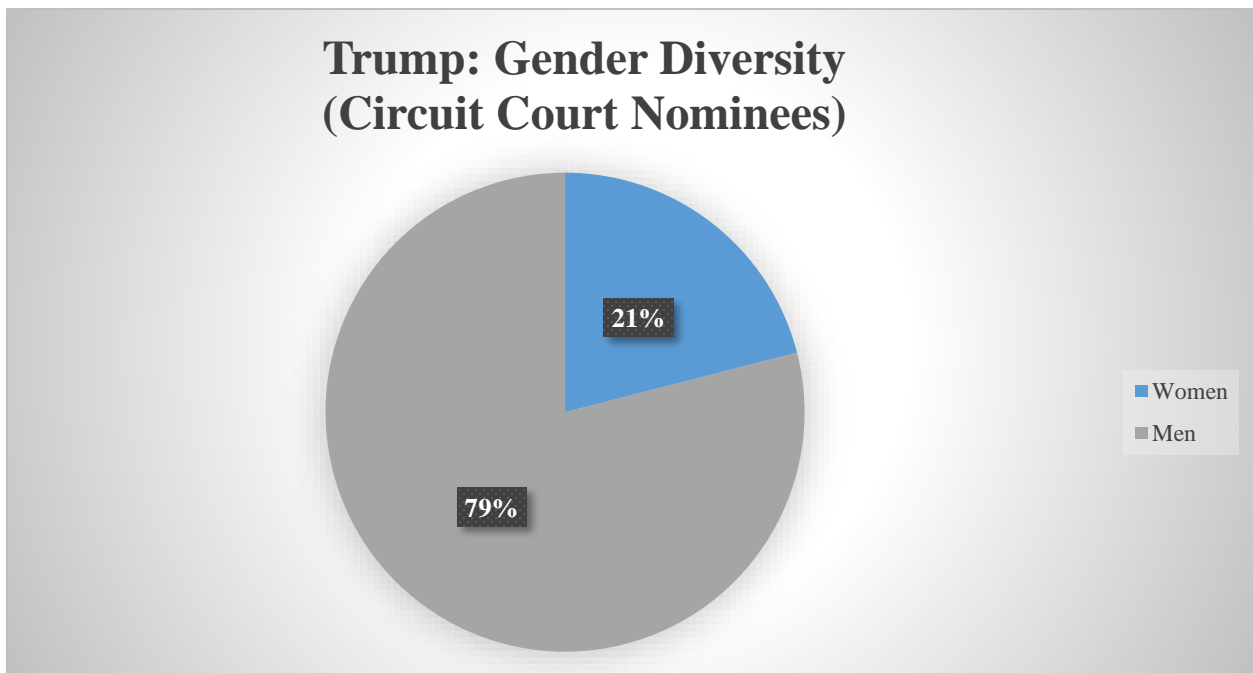


Figure 12
Source: Congressional Research Service

Obama: Racial Diversity (Circuit Court Nominees)

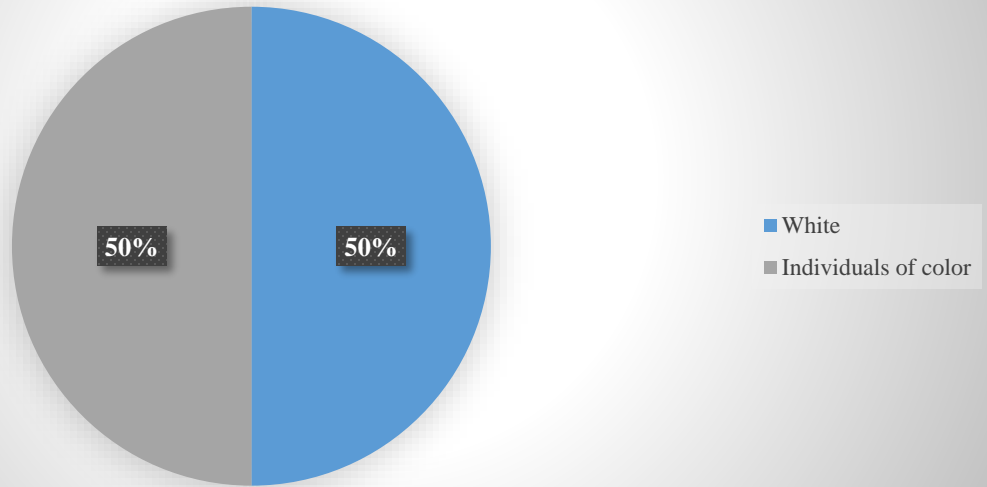


Figure 13
Source: Congressional Research Service

Trump: Racial Diversity (Circuit Court Nominees)

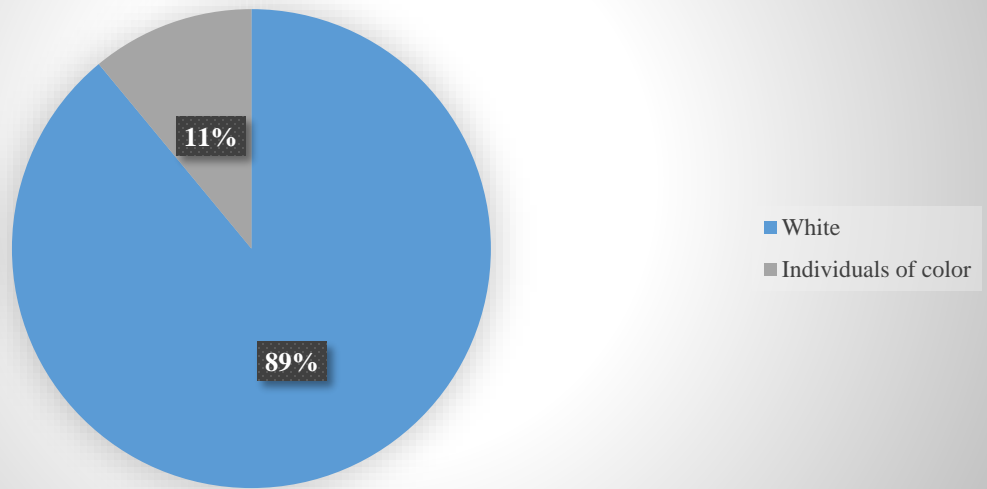


Figure 14
Source: Congressional Research Service

Obama: Gender Diversity (District Court Nominees)

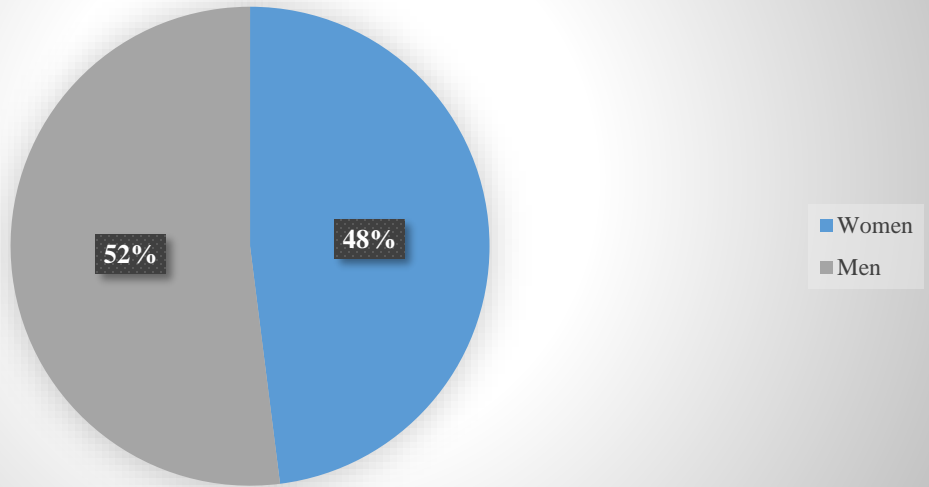


Figure 15
Source: Congressional Research Service

Trump: Gender Diversity (District Court Nominees)

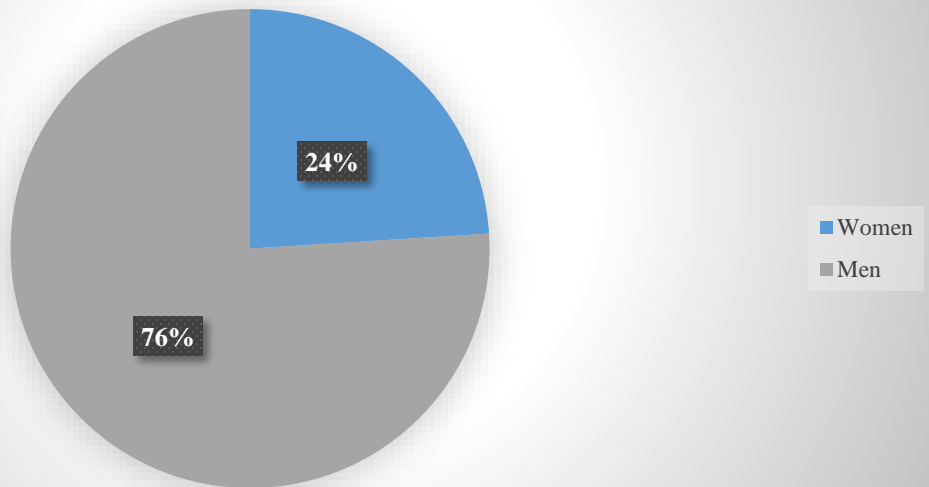


Figure 16
Source: Congressional Research Service

Obama: Racial Diversity (District Court Nominees)

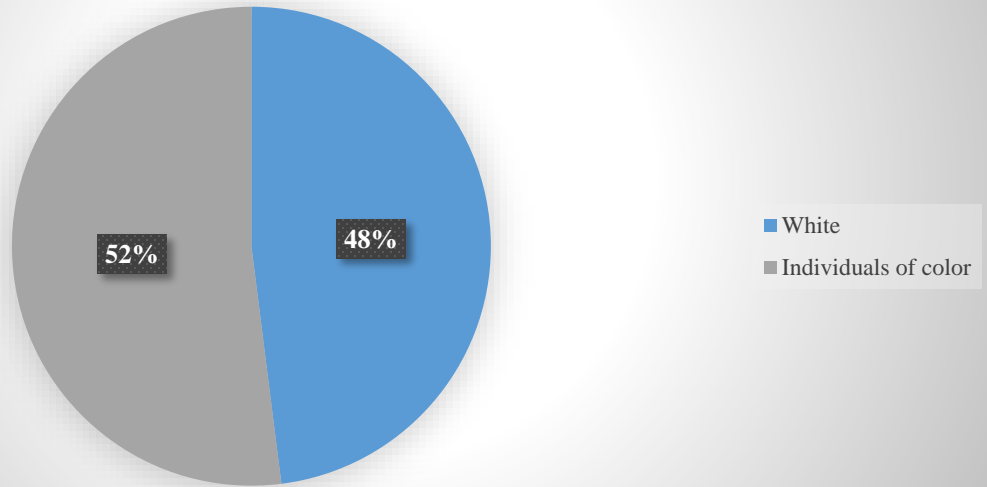


Figure 17
Source: Congressional Research Service

Trump: Racial Diversity (District Court Nominees)

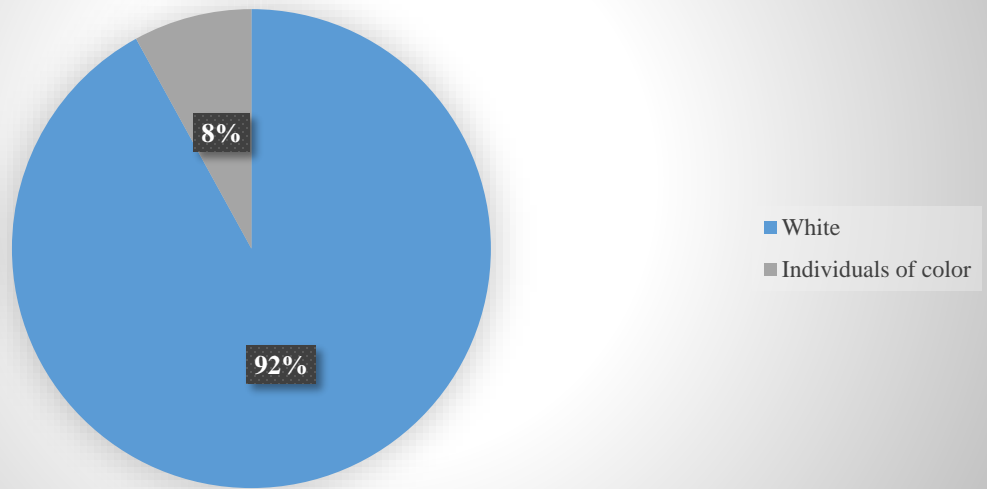


Figure 18
Source: Congressional Research Service