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Trump's Takeover of the Courts

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ARTICLE

TRUMP’S TAKEOVER OF THE COURTS

LENA ZWARENSTEYN*

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I. INTRODUCTION

Courts administer justice only when fair judges sit on the bench—judges who truly believe in and recognize the words inscribed above the US Supreme Court—“Equal Justice Under Law.” Federal courts have acknowledged and protected our civil and human rights over time: ending legal apartheid in education in 1954;¹ recognizing marriage equality for interra-

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

cial couples in 1968² and for LGBTQ persons in 2015;³ recognizing the right to privacy in 1965;⁴ and upholding the right to bodily autonomy and abortion in 1973.⁵ For these fundamental rights and more, the role of federal courts is significant.

However, our courts have not always protected and recognized the rights of all people. Two notorious decisions, *Plessy v. Ferguson*⁶ and *Korematsu v. United States*,⁷ demonstrate how the federal courts can protect the interests of the powerful and maintain systems of injustice under the guise of promoting the “rule of law.” Though *Plessy* and *Korematsu* are nearly universally accepted as stains on our courts’ history, rollbacks of our civil and human rights continue today. The courts have been transformed into a tool to threaten civil rights and our democratic safeguards. Decisions like *Shelby County v. Holder*,⁸ which gutted the Voting Rights Act, and *Trump v. Hawaii*,⁹ which upheld President Trump’s Muslim ban, are products of an intentional strategy to reverse progress toward equal justice under law and rob communities of color of power. The strategy is two-pronged: pursue litigation and stack the courts with ideologues. This ensures that attorneys arguing anti-civil rights cases are met with sympathetic judges in court.

Who serves on the bench matters, especially for civil and human rights. The Trump administration, aided by Senate Republican Leader Mitch McConnell, made transforming the courts a priority because it is perhaps the most enduring and damaging strategy for cementing their political agenda. This article reviews the Trump administration’s efforts to align with Senate Republicans and stack the federal judiciary with biased and unqualified judges. In particular, this article explores: (1) Trump’s fixation on the federal judiciary; (2) Trump and Senate Republicans’ campaign to break the judicial selection and nominations process; and (3) how ideological and extreme nominees are being used to transform the courts to roll back vital civil and human rights.

II. TRUMP’S FIXATION ON THE FEDERAL JUDICIARY¹⁰

President Trump, who is constitutionally charged with nominating federal judges, openly flouts constitutional norms and laws, and condemns

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2. *Loving v. Virginia*, 388 U.S. 1 (1967).
 3. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
 4. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
 5. *Roe v. Wade*, 410 U.S. 113 (1973).
 6. *Plessy v. Ferguson*, 163 U.S. 537 (1896).
 7. *Korematsu v. U.S.*, 323 U.S. 214 (1944).
 8. *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).
 9. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

10. Note: The information presented in this article is accurate as of September 2019. While the trends in the rapid confirmation of judges and the types of judicial nominees we have seen since this remain consistent, a number of additional lifetime nominees have been confirmed,

court decisions. Courts have been a backstop against some of the Trump administration's most egregious, racist, and xenophobic policies. Lower courts have, for example, ruled the Muslim ban illegal and unconstitutional,¹¹ protected sanctuary cities,¹² and refused to allow a citizenship question on the 2020 census form.¹³ In response, the president regularly takes to Twitter and lashes out with his disdain for our judiciary—and the judges who rule against his administration and his personal financial interests.

When Judge James Robart in the US District Court for the Western District of Washington issued a temporary restraining order blocking Trump's discriminatory Muslim ban,¹⁴ he blamed the judge for any potential future security issues. He tweeted, "Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!"¹⁵ Then, when Judge Jon Tigar in the US District Court for the Northern District of California issued a temporary restraining order that blocked the administration from prohibiting people from seeking asylum,¹⁶ Trump once again took to Twitter, writing that the Ninth Circuit is

out of control, has a horrible reputation . . . They know nothing about [security and safety at the border] and are making our Country [sic] unsafe. Our great Law Enforcement [sic] professionals MUST BE ALLOWED TO DO THEIR JOB! If not there will be only bedlam, chaos, injury, and death. We want the Constitution as written!¹⁷

And before taking office, then-candidate Trump attacked Judge Gonzalo P. Curiel of the US District Court for the Southern District of California, who was assigned the case of alleged fraud by Trump University.¹⁸ While on the campaign trail, Trump claimed the Indiana-born judge was a "hater" be-

numerous concerning lawsuits have been filed and/or decided, the president has personally gone after additional federal judges, the president was impeached for demanding interference in our elections, and many other relevant events that impact our federal judiciary have occurred.

11. See, e.g., *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

12. See, e.g., *City and County of San Francisco v. Sessions*, 372 F. Supp. 3d 928 (N.D. Cal. 2019).

13. See, e.g., *New York v. Dep't of Commerce*, 2019 WL 190285 (S.D.N.Y. Jan. 15, 2019).

14. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *1 (W.D. Wash. Feb. 3, 2017).

15. Donald J. Trump (@realDonaldTrump), TWITTER, (Feb. 5, 2017, 12:39 PM), <https://twitter.com/realDonaldTrump/status/828342202174668800>.

16. Maria Sacchetti & Isaac Stanley-Becker, *In Blow to Trump's Immigration Agenda, Federal Judge Blocks Asylum Ban for Migrants who Enter Illegally from Mexico*, WASH. POST (Nov. 20, 2018), <https://www.washingtonpost.com/nation/2018/11/20/blow-trumps-immigration-agenda-federal-judge-blocks-asylum-ban-migrants-who-enter-illegally-mexico>.

17. Jonathan Allen, *After Rare Rebuke, Trump Rips into Chief Justice John Roberts*, NBC NEWS (Nov. 22, 2018), <https://www.nbcnews.com/politics/politics-news/trump-ripping-roberts-says-judges-make-our-country-unsafe-n939286>.

18. Hanna Trudo, *Trump Escalates Attack on "Mexican" Judge*, POLITICO (June 2, 2019), <https://www.politico.com/story/2016/06/donald-trump-judge-gonzalo-curiel-223849>.

cause his “Mexican heritage” made it so Judge Curiel had “an inherent conflict of interest” given Trump’s promise of “building a wall.”¹⁹ By assailing the character and dignity of judges—even ascribing future threats to judges’ decisions—Trump aims to discredit and delegitimize the entire judicial system as an independent and equal branch of our government.

Additionally, Trump is actively working to change the outcomes in cases like these by installing his own judges. Already, the Senate has confirmed 152 lifetime judges nominated by the president.²⁰ In just two and a half years in office, the president has nominated two of the nine Supreme Court justices and transformed nearly 25 percent of seats on the US circuit courts of appeals. Trump and Vice President Mike Pence laud themselves for these appointments in ways previous presidents bragged about their policy changes,²¹ and the Senate majority leader, Kentucky Republican Mitch McConnell, brags about this when he is criticized for his stunning lack of legislative action.²²

Trump, Pence, McConnell, and their allies have confidence that the judges they choose to serve in lifetime positions will be able to achieve through the courts what they cannot do legislatively.²³ Those they nominate for judgeships are selected by a few in the small legal conservative community because their records align with the Republican party’s agenda.²⁴ Their work to advance a partisan agenda through the courts has been in the making for decades,²⁵ and their current operations to fundamentally alter our courts are incredibly well-funded by “the wealthy donor class.”²⁶

While vying for the Republican presidential nomination, Trump desperately tried to assert some *bona fides* to make more of the “establishment” Republican party comfortable. To do so, he appealed to the Republican base’s cultivated interest in the courts. In May 2016, Trump

19. *Id.*

20. *Judicial Confirmations for January 2019*, ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2019/01/confirmations> (last updated Jan. 1, 2019); *Confirmation Listing*, ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/confirmation-listing> (last updated Aug. 2, 2019).

21. Tom McCarthy, *All the President’s Judges: How Trump Can Flip Courts at a Record-Setting Pace*, GUARDIAN (May 11, 2019), <https://www.theguardian.com/law/2019/may/11/trump-judge-nominees-appointments-circuit-court-flip>.

22. Nancy LeTourneau, *Mitch McConnell Revels in His Strategy of Political Polarization*, WASH. MONTHLY (Apr. 6, 2018), <https://washingtonmonthly.com/2018/04/06/mitch-mcconnell-revels-in-his-strategy-of-political-polarization>.

23. Deanna Paul, “*Keep Those Judges Coming*”: *Conservatives Praise Trump’s Success in Filling the Courts*, WASH. POST (Nov. 16, 2018), <https://www.washingtonpost.com/politics/2018/11/16/keep-those-judges-coming-conservatives-praise-trumps-success-filling-courts>.

24. *See, e.g.*, LeTourneau, *supra* note 22; Carl Hulse, *The Court Mitch McConnell Built*, N.Y. TIMES (June 29, 2019), <https://www.nytimes.com/2019/06/29/opinion/sunday/supreme-court-mitch-mcconnell-john-roberts.html>.

25. Lewis F. Powell, Jr., *Powell Memorandum: Attack on American Free Enterprise System* (Aug. 23, 1971), <https://scholarlycommons.law.wlu.edu/powellmemo>.

26. Senator Sheldon Whitehouse (D-R.I.) has written and spoken extensively on this topic. Many of these writings are available at <https://medium.com/captured-court>.

released a list of potential nominations for the very Supreme Court seat that Chief Judge Merrick Garland had been nominated to fill.²⁷ This list was compiled by the Federalist Society and Heritage Foundation—extreme right-wing institutions that have been masterminding the takeover of our courts to roll back vital civil rights and protections.²⁸ Trump promised that his nominees would be in the mold of Justice Antonin Scalia and that they would eviscerate *Roe v. Wade*, devastate the Affordable Care Act, and strike down any gun safety law.²⁹

As Trump's first White House counsel, Don McGahn, bragged, the Federalist Society and Heritage Foundation nominees were "too hot for prime time . . . the kind of people that would make some people nervous."³⁰ McGahn and others were assured that they could build a list of non-mainstream potential nominees because "Leader McConnell is going to get it done."³¹ Ultimately, the shortlist assuaged many in the Republican party's fears about Trump. At least in this regard, it appeared Trump might take direction from those entrenched in institutions whose purpose is to concentrate conservative power for the benefit of the Republican party and the wealthy.³²

Since winning the presidency, Trump has delivered on his promise to his base to stack the courts with those who serve his agenda. During his

27. Alan Rappeport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), <https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html>. President Trump updated this list in November 2017. Press Release, White House, *President Donald J. Trump's Supreme Court List* (Nov. 17, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-supreme-court-list>.

28. See, e.g., Senator Sheldon Whitehouse (D. R.I.), *The Third Federalist Society*, Speech (Mar. 27, 2019), <https://www.whitehouse.senate.gov/news/speeches/the-third-federalist-society>; Melissa Quinn, *Inside the Mind of Leonard Leo, Trump's Supreme Court Right-hand Man*, WASH. EXAMINER (Jan. 28, 2018), <https://www.washingtonexaminer.com/inside-the-mind-of-leonard-leo-trumps-supreme-court-right-hand-man>.

29. See, e.g., Sopot Deb, *Donald Trump's Supreme Court Litmus Test*, CBS NEWS (Feb. 17, 2016), <https://www.cbsnews.com/news/campaign-2016-donald-trump-supreme-court-litmus-test/>; Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016), <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html>; Nick Gass, *Trump Promises 'Absolute Litmus Test' on Religious Liberty*, POLITICO (Feb. 25, 2016), <https://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/02/donald-trump-religious-litmus-test-republican-debate-219824>; Jeremy W. Peters, *Trump's New Judicial Litmus Test: Shrinking "the Administrative State,"* N.Y. TIMES (Mar. 2, 2018), <https://www.nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html>.

30. Robert Barnes, *Federalist Society, White House Cooperation on Judges Paying Benefits*, WASH. POST (Nov. 18, 2017), https://www.washingtonpost.com/politics/courts_law/federalist-society-white-house-cooperation-on-judges-paying-benefits/2017/11/18/4b69b4da-cb20-11e7-8321-481fd63f174d_story.html.

31. *Id.*

32. Deanna Paul, "Keep Those Judges Coming": Conservatives Praise Trump's Success in Filling the Courts, WASH. POST (Nov. 16, 2018), <https://www.washingtonpost.com/politics/2018/11/16/keep-those-judges-coming-conservatives-praise-trumps-success-filling-courts>.

time in office, by virtue of the more than 150 lifetime confirmations thus far, his impact will endure for decades.

III. RIGGING THE JUDICIAL SELECTION AND NOMINATION PROCESS

Some of the most solemn constitutional responsibilities for the president and Senate are the selection and confirmation of judges who serve in these lifetime seats.³³ The process for the selection and confirmation of judges has been shaped by decades of rules, traditions, and norms. To achieve their transformation of the courts, Trump and the Senate Republicans have broken these rules, traditions, and norms surrounding the selection and confirmation process, rigging the process in their favor.

A. *The Judicial Selection and Nominations Process*

To understand this breakdown, we will first review how this process has traditionally worked. Article III, the shortest article in our Constitution, describes the role of the judicial branch, but prescribes little guidance. It does say that judges serve “during good behavior,” which has come to mean lifetime appointments.³⁴ This was intended to insulate judges from political whims and provide independence from the other two political branches of government.³⁵ Further, to ensure lifetime judges do not simply act as agents of the president, Article II, Section 2, of the Constitution provides that the president nominates individuals to serve as federal judges and the Senate provides “advice and consent” on those nominations.³⁶ Over time, norms have developed to facilitate the process of “advice and consent,” provide some predictability, and check the president’s power.

Only by working together do the two political branches, the executive and legislative, appoint the 870 active Article III judgeships.³⁷ Announcements of judicial vacancies initiate the process. Senators play an instrumental role in selecting the district and circuit court judges who would serve in

33. Though the Constitution does not give members in the House of Representatives a formal role in the nomination and confirmation of judges, they do play important roles when it comes to the judiciary. The Constitution only requires us to have one Supreme Court (U.S. CONST. art. III, § 1), but Congress—both the House and Senate—establish lower courts. (U.S. CONST. art. I, § 8). They decide the number of judgeships and locations of districts. They also can pass law requiring codes of ethics, provide oversight on the courts, impeach sitting judges (discussed below), and use the power of their position to discuss the power of the courts. Representatives also have an important role in raising visibility about the importance of the courts.

34. U.S. CONST. art. III, § 1.

35. THE FEDERALIST NO. 78 (Alexander Hamilton).

36. U.S. CONST. art. II, § 2.

37. There are 870 active Article III judgeships—nine Supreme Court justices, 179 Courts of Appeals judges, 673 (663 of which are permanent) district court judges, and nine Court of International Trade judges. See Administrative Office of the U.S. Courts, *Authorized Judgeships*, <https://www.uscourts.gov/sites/default/files/allauth.pdf>.

their state.³⁸ This is especially true at the district court level because the courts are entirely within the states the senators represent.³⁹ Conversely, circuit court nominees will serve several states in a region, and therefore senators who represent the states where that appellate seat is located often recommend candidates and are consulted by the White House to reach an agreement on the nomination.⁴⁰

While no clear rules exist for how senators work with the White House on selecting nominees, their input has historically been considered invaluable. Senators often understand the landscape of their jurisdictions, know their legal community and needs of the bench, and are aware of issues facing the community. In addition, because the next steps of the process involve the Senate's review and consideration of nominees, this input and "advice" is critical for securing confirmation of the nominees. Upon reviewing senators' recommendations, and often after significant negotiation, the president publicly nominates an individual for a judicial vacancy.

After this formal announcement, the nomination is sent to the Senate and referred to the Senate Judiciary Committee. As part of the committee's vetting process, senators and their staff research nominees' records and review the "Senate Judiciary Questionnaire," a document that requires nominees to provide information about their work experience, memberships, affiliations, conflicts, awards, and more.⁴¹ In addition, the committee reviews FBI background checks and other materials, including letters of support or opposition from individuals and organizations.⁴²

For more than a hundred years, the Senate Judiciary Committee chair has provided for home-state senators' input into the nomination. More formally, a tradition was created where the Committee chair provides "blue slips," literal blue pieces of paper, to those senators to indicate their support or opposition to the nominee.⁴³ When both senators from a state return their blue slips supporting the nomination to the chair, the committee holds a hearing for the nominee. This hearing is the only public opportunity for committee members to question the nominee about their experience, temperament, candor, judgment, and judicial philosophy.⁴⁴ After the committee hearing, senators can follow up with written questions that the nominee must answer.⁴⁵ Then, the committee either takes no action or moves for-

38. DENIS STEVEN RUTKUS AND BARRY J. McMILLION, CONG. RESEARCH SERV., RL34405, *ROLE OF HOME STATE SENATORS IN THE SELECTION OF LOWER FEDERAL COURT JUDGES* 5 (2013).

39. *Id.*

40. *Id.*

41. COMMITTEE ON THE JUDICIARY, FAQ, <https://judiciary.senate.gov/about/faq>.

42. ELIZABETH RYBICKI, CONG. RESEARCH SERV., RL31980, *SENATE CONSIDERATION OF PRESIDENTIAL NOMINATIONS: COMMITTEE AND FLOOR PROCEDURE* 4–5 (2017).

43. BARRY J. McMILLION, CONG. RESEARCH SERV., R44975, *THE BLUE SLIP PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: FREQUENTLY ASKED QUESTIONS* 1 (2017).

44. COMMITTEE ON THE JUDICIARY, *supra* note 41.

45. *Id.*

ward with the nomination by “reporting out” the nomination as favorable, unfavorable, or without recommendation.⁴⁶

B. *Breaking Norms*

In the past two years, however, the process has quickly unraveled. The Supreme Court nominations of both Neil Gorsuch and Brett Kavanaugh demonstrated the lengths to which Senator McConnell will abandon tradition and norms to rig the process. McConnell’s raw naked power grab in 2016 exemplifies the extent to which he will abuse the process to take over the courts.⁴⁷ After US Supreme Court Justice Antonin Scalia passed away, McConnell refused to let his Republican caucus, which controlled the Senate majority and thus the ability to schedule hearings and votes, consider President Obama’s nominee, US Court of Appeals for the District of Columbia Circuit Chief Judge Merrick Garland. Initially, then-Senate Judiciary Committee chair, Chuck Grassley, a Republican from Iowa, considered scheduling a hearing for Garland.⁴⁸ Other Republican senators also expressed interest in reviewing the record of the next Supreme Court nominee,⁴⁹ yet McConnell quickly tamped down any defections from his caucus, taking an unprecedented and unprincipled position that no president should have her or his nominee considered during a presidential election year.⁵⁰ McConnell even bragged, “One of my proudest moments was when I looked at Barack Obama in the eye and . . . said ‘Mr. President, you will not fill this Supreme Court vacancy.’”⁵¹ Ultimately, McConnell prevented the Senate from fulfilling its constitutional responsibility and converted the Senate confirmation process into a partisan power grab.⁵²

In addition to putting Gorsuch in a Supreme Court seat that should have been filled by President Obama, Trump had the opportunity to fill a second Supreme Court vacancy. To confirm Kavanaugh, the Senate Republicans once again fundamentally changed the process. From the start, Kavanaugh’s confirmation process was riddled with unprecedented

46. RYBICKI, *supra* note 42, at 6.

47. Dahlia Lithwick, *Republicans Stole the Supreme Court*, SLATE (Nov. 14, 2016), <https://slate.com/news-and-politics/2016/11/what-democrats-should-do-about-the-supreme-court.html>.

48. Eric Bradner, *Grassley Hasn’t Decided Whether to Give Obama’s Supreme Court Pick a Hearing*, CNN (Feb. 16, 2016), <https://www.cnn.com/2016/02/16/politics/chuck-grassley-obama-antonin-scalia-nominee-hearing/index.html>.

49. *See, e.g.*, Mike Zapler, *GOP Sen. Moran Breaks with McConnell on Supreme Court*, POLITICO (Mar. 24, 2016), <https://www.politico.com/story/2016/03/jerry-moran-supreme-court-merrick-garland-nomination-hearing-221213>.

50. Karoun Demirjian, *Republicans Refuse to Budge Following Garland Nomination to Supreme Court*, WASH. POST (Mar. 16, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/03/16/republicans-refuse-to-budge-following-garland-nomination-to-supreme-court>.

51. Mike DeBonis, *Will Hillary Clinton Stick with Merrick Garland if She Wins the White House?*, WASH. POST (Aug. 16, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/08/16/the-forgotten-nominee-merrick-garlands-fate-rests-on-forces-beyond-his-control>.

52. Lithwick, *supra* note 47.

breakdowns—from hiding records to a disastrous limited background investigation after multiple sexual assault allegations were made public.⁵³ Most importantly, this breakdown was not isolated to the Supreme Court; to stack the lower courts, the Senate Republicans devastated several long-standing traditions and norms.

During Obama's final years in office, in addition to holding open a Supreme Court seat, McConnell refused to fill more than one hundred lower federal court vacancies in hopes that a Republican president would do his bidding and place more conservative judges on these courts.⁵⁴ As soon as Trump took office, he and his then White House Counsel, Don McGahn, quickly moved to transform all federal courts by rapidly nominating individuals to seats that the Republican majority held open during Obama's final years in office. For example, on March 21, 2017, Trump nominated Amul Thapar to a Kentucky seat on the US Court of Appeals for the Sixth Circuit.⁵⁵ This seat had been open since August 2013, and after years of trying to consult with the senators from Kentucky, Obama nominated Kentucky Supreme Court Justice Lisabeth Tabor Hughes to that seat in 2016.⁵⁶ McConnell refused to move her nomination and let it expire. Trump then nominated Thapar, who was the first judicial nominee to be confirmed after Gorsuch.⁵⁷

Other seats were also quickly filled. Shortly after Thapar's confirmation, Trump nominated Kevin Newsom to an Alabama seat on the US Court of Appeals for the Eleventh Circuit. This seat had also been vacant since 2013, as the senators from Alabama could not reach an agreement with the Obama White House.⁵⁸ Eventually, Obama nominated Judge Abdul Kallon to the seat, who would have been the first African American from Alabama to serve on the circuit,⁵⁹ but his nomination also expired. Trump instead

53. Josh Gerstein, *Democrats Not Giving Up Kavanaugh Battle*, POLITICO (Oct. 10, 2018), <https://www.politico.com/story/2018/10/10/kavanaugh-faces-drip-drip-drip-on-records-892054>.

54. *Judicial Vacancy List for January 2017*, ADMIN. OFFICE OF THE U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/01/vacancies> (last updated Jan. 1, 2017).

55. Press Release, The White House, *President Donald J. Trump Announces Intent to Nominate Judge Amul R. Thapar for the U.S. Court of Appeals for the Sixth Circuit* (Mar. 21, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judge-amul-r-thapar-u-s-court-appeals-sixth-circuit>.

56. Press Release, The White House, *President Obama Nominates Judge Lisabeth Tabor Hughes to Serve on the U.S. Court of Appeals* (Mar. 17, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/03/17/president-obama-nominates-justice-lisabeth-tabor-hughes-serve-united>.

57. *U.S. Senate Roll Call Votes 115th Congress—1st Session, No. 137*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00137 (last visited Jan. 26, 2020).

58. Kevin Faulk, *Obama Nominates Judge Abdul Kallon for U.S. 11th Circuit Court of Appeals*, AL.COM (Feb. 11, 2016), https://www.al.com/news/birmingham/2016/02/obama_nominates_judge_abdul_ka.html.

59. *Id.*

nominated, and the Senate swiftly confirmed, Newsom, who is on Trump's Supreme Court shortlist,⁶⁰ to that seat.⁶¹ Stephanos Bibas was nominated and confirmed to a seat on the US Court of Appeals for the Third Circuit, a seat to which Obama previously nominated Rebecca Haywood. Haywood would have been the first African American woman on the Third Circuit, but Republican Pennsylvania Senator Pat Toomey slowed her nomination so it would expire.⁶² Ralph Erickson was confirmed quickly after his nomination to the US Court of Appeals for the Eighth Circuit by Trump, displacing Obama's nominee, Jennifer Puhl.⁶³

C. *Discarding Consultation and Blue Slips*

As discussed above, before the Trump administration, the home-state senators played a significant role in providing "advice and consent" as demonstrated in the blue slip tradition. In the more than hundred-year blue slip tradition, the Senate confirmed only three nominees over the objection of a single home-state senator.⁶⁴ A nominee was never confirmed over objections of two home-state senators.⁶⁵ However, to accomplish the Trump administration's record-setting number of circuit court confirmations, the Senate Judiciary Committee chairs discarded the blue slip tradition and pushed forward nominees who lacked the support of their home-state senators.

The first senator to devastate the tradition of respecting home-state senators' role in consultation was then-Chair Chuck Grassley. Previously, Grassley spoke and wrote extensively about his commitment to upholding the blue slip.⁶⁶ He betrayed his word when he moved forward with a nominee to the US Court of Appeals for the Eighth Circuit, David Stras, despite a home-state senator's objection.⁶⁷ Stras, who was nominated to a Minne-

60. The White House, *supra* note 27.

61. *U.S. Senate Roll Call Votes 115th Congress—1st Session, No. 182*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm? (last visited Jan. 26, 2020).

62. Kadida Kenner, *Casey, Toomey Need to Right the Gender and Racial Imbalance on Pa.'s 3rd Circuit Appeals Court: Opinion*, PENNLIVE.COM (July 18, 2017), https://www.pennlive.com/opinion/2017/07/casey_toomey_need_to_right_the.html.

63. *U.S. Senate Roll Call Votes 115th Congress—1st Session, No. 207*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm? (last visited Jan. 1, 2020).

64. MITCHEL A. SOLLENBERGER, CONG. RES. SERV., *THE HISTORY OF THE BLUE SLIP IN THE SENATE COMMITTEE ON THE JUDICIARY, 1917-PRESENT* (2003).

65. Christopher Kang, *10 Things You Need to Know About Blue Slips*, HUFFPOST (Sept. 13, 2017, 4:13 PM), https://www.huffpost.com/entry/10-things-you-need-to-know-about-blue-slips_b_59b98494e4b02c642e4a1368.

66. *See, e.g.*, Chuck Grassley, *Opinion, Working to Secure Iowa's Judicial Legacy*, DES MOINES REGISTER (Apr. 14, 2015, 11:15 PM), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2015/04/15/working-secure-iowas-judicial-legacy/25801515> ("I appreciate the value of the blue-slip process and also intend to honor it.").

67. *Confirmation Hearing on the Nomination of David Ryan Stras, of Minnesota, to be United States Circuit Judge for the Eighth Circuit, Vice Diana E. Murphy, Retired: Hearing*

sota seat on the appellate court, was on Trump's Supreme Court shortlist.⁶⁸ At the time of his nomination, he had neither then-Senator Al Franken nor Senator Amy Klobuchar's support. As Franken's spokesperson explained, "Rather than discuss how senators traditionally approached circuit court vacancies or talk about a range of potential candidates, the White House made clear its intention to nominate Justice Stras from the outset."⁶⁹ After a few months, Klobuchar returned her blue slip to indicate her support for the nomination. With only one blue slip returned, Grassley scheduled a hearing for Stras,⁷⁰ and the nomination was reported out of committee to the full Senate.⁷¹ At the time of his confirmation, Senator Tina Smith, Franken's successor, also a Democrat, was serving in the Senate. She, like her predecessor, did not support the nomination. She voted against Stras's confirmation, citing her concerns about his judicial philosophy.⁷² Other accounts of the Trump White House discarding the role of senators in the selection process have been well-documented.⁷³

The lack of consultation between the White House and senators has not been limited to Democratic senators. Senator John Kennedy, a Republican from Louisiana, reluctantly returned a blue slip for Kyle Duncan, a nominee to a Louisiana seat on the US Court of Appeals for the Fifth Circuit.⁷⁴ However, Kennedy wrote on his blue slip that he was "undecided."⁷⁵

Before the S. Comm. on the Judiciary, 115th Cong. (2017), <https://www.judiciary.senate.gov/meetings/11/29/2017/nominations>.

68. The White House, *supra* note 27.

69. Seung Min Kim, *Trump's Judges Picks Snub Democrats*, POLITICO (Aug. 11, 2017, 5:15 AM), <https://www.politico.com/story/2017/08/11/senate-judges-democrats-trump-241448>.

70. *Confirmation Hearing on the Nomination of David Ryan Stras*, *supra* note 67.

71. Stephen Montemayor, *Stras Clears Senate Committee Vote on Federal Appeals Court Nomination*, STAR TRIB. (Jan. 18, 2018, 6:31 PM), <http://www.startribune.com/stras-clears-senate-committee-vote-on-federal-appeals-court-nomination/469990213>.

72. During his hearing, Stras was asked about the unanimous landmark civil rights decision *Brown v. Board of Education* which ended the appalling "separate but equal" doctrine that allowed for legal apartheid in the U.S. Senator Smith stated:

I may not agree with the way in which Justice Stras approaches every decision that comes before him, but I think it's important to understand how he grapples with questions of basic justice—questions where the case demands more than simply a rote application of precedent, but instead requires that judges fully appreciate the moral gravity of the questions presented. . . . Justice Stras' judicial philosophy does not leave room for that kind of decisionmaking, and I decided to vote against him.

Jennifer Brooks & Stephen Montemayor, *Senate Confirms Justice Stras to Federal Bench*, STAR TRIB. (Jan. 30, 2018, 10:00 PM), <http://www.startribune.com/senate-confirms-stras-to-federal-bench/471810643>.

73. For example, Trump nominated Michigan Supreme Court Justice Joan Larsen, who is also on his U.S. Supreme Court shortlist, to a Michigan seat on the U.S. Court of Appeals for the Sixth Circuit in May 2017. It was reported that Senators Debbie Stabenow and Gary Peters from Michigan were not consulted, and only given notice shortly before the public announcement. Senators Peters and Stabenow eventually did return their blue slips which advanced Larsen's nomination and she was confirmed a few months later in November. Kim, *supra* note 69.

74. Bryn Stole, *Sen. John Kennedy Keeping Mum on Nomination of Conservative Kyle Duncan to 5th Circuit Judgeship*, ADVOCATE (Nov. 14, 2017, 6:04 PM), https://www.theadvocate.com/baton_rouge/news/politics/article_c0465f52-c98f-11e7-ae9e-d39e31680e13.html; Charlie

Grassley insisted on scheduling a hearing at which Kennedy expressed that White House Counsel Don McGahn had not consulted with him, but, instead, was “on the scarce side in one conversation of being polite” when he told Kennedy that Duncan was to be the nominee.⁷⁶ Ultimately, Kennedy did support Duncan’s nomination and he was narrowly confirmed.⁷⁷

In addition to advancing numerous nominees lacking support from one of their home-state senators, Grassley scheduled an unprecedented hearing over objections from both home-state senators during a Senate recess. Eric Miller was nominated to a Washington seat on the US Court of Appeals for the Ninth Circuit over strong objections of both Democratic Senators from Washington State, Patty Murray and Maria Cantwell.⁷⁸ His nomination garnered significant opposition, not only for the historic nature in which it proceeded but also for his long record of arguing against tribal sovereignty.⁷⁹ Still, the Senate Republican majority confirmed him in February 2019.⁸⁰

Dismissing consultation and pushing through nominees over objections of home-state senators rewarded Trump with forty-three circuit court confirmations, thirteen of which occurred only as a result of destroying this tradition.⁸¹ The Senate confirmed six nominees over objections of at least

Savage, *Trump Is Rapidly Reshaping the Judiciary. Here’s How.*, N.Y. Times (Nov. 11, 2017), <https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html>.

75. Zoe Tillman, *A Republican Senator Is Getting in the Way of One of Trump’s Biggest Successes*, BUZZFEED NEWS (Nov. 30, 2017, 12:09 PM), <https://www.buzzfeednews.com/article/zoetillman/a-republican-senator-is-getting-in-the-way-of-one-of-trumps>; Seung Min Kim, *Grassley Rips up “Blue Slip” for a Pair of Trump Court Picks*, POLITICO (Nov. 16, 2017, 3:30 PM), <https://www.politico.com/story/2017/11/16/chuck-grassley-trump-court-picks-245367>.

76. Tillman, *supra* note 75; *John Kennedy’s Opening Statement at Kyle Duncan Confirmation Hearing*, C-SPAN (Nov. 29, 2017), <https://www.c-span.org/video/?c4694344/john-kennedy-opening-statement-kyle-duncan-confirmation-hearing>.

77. Drew Broach, *Kyle Duncan Confirmed in Tight Senate Vote for 5th Circuit Court Judgeship*, NOLA.COM (Apr. 24, 2018, 7:31 PM), https://www.nola.com/nation_world/article_4b257495-d5f0-5427-b250-a7c833cd09fd.html.

78. Agueda Pacheco-Flores, *Cantwell and Murray Object to Process for Filling Federal Appeals Court Seat*, SEATTLE TIMES (Oct. 23, 2018, 3:49 PM), <https://www.seattletimes.com/seattle-news/cantwell-and-murray-object-to-process-for-filling-federal-appeals-court-seat>.

79. Gene Johnson & Lisa Mascaro, *U.S. Senate Confirms Seattle Attorney to 9th Circuit over Objections from Sens. Murray and Cantwell*, SEATTLE TIMES (Feb. 26, 2019, 4:05 PM), <https://www.seattletimes.com/seattle-news/u-s-senate-confirms-seattle-attorney-to-9th-circuit-court-over-murrays-and-cantwells-objections>.

80. *U.S. Senate Roll Call Votes 116th Congress—1st Session, No. 29*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm? (last visited Jan. 26, 2020).

81. To date, the Senate Judiciary Committee chairs—Grassley and Graham—have proceeded over objection of home-state senators fourteen times—including seven times over objection of both home-state senators. Nominees who lacked one blue slip: (1) David Stras (8th Cir., Minn.) confirmed Jan. 30, 2018; (2) Michael Brennan (7th Cir., Wis.) confirmed May 10, 2018; (3) David Porter (3d Cir., Pa.) confirmed Oct. 11, 2018; (4) Chad Readler (6th Cir., Ohio) confirmed Mar. 6, 2019; (5) Eric Murphy (6th Cir., Ohio) confirmed Mar. 7, 2019; and (6) Peter Phipps (3d Cir., Pa.) confirmed July 16, 2019. Nominees who lacked two blue slips: (1) Ryan Bounds (9th Cir., Or.)

one home-state senator and made history by confirming the first nominee—and then an additional six more—who lacked blue slips from both home-state senators.⁸² Six more individuals were also nominated and confirmed without senate consultation to serve on federal courts in the District of Columbia (DC).⁸³ Because DC does not yet have statehood, and therefore no senators with voting privileges in the chamber, there are no blue slips. Nonetheless, traditionally the delegate from DC has a say in who serves on the district and circuit courts in DC.⁸⁴

The most recent Senate Judiciary Committee chair, Senator Lindsay Graham, has also refused to respect the position of home-state senators for appellate positions. At the time of writing this article, Graham has not abandoned blue slips for district court nominees and has repeatedly stated he will keep that tradition in place during his tenure.⁸⁵ Given the damage to the process and the senate majority's efforts to render the blue slip meaningless, the previous blue slip practice of proceeding only when both home-state senators support the nomination is relegated to history. As the ranking member of the Senate Judiciary Committee, Senator Dianne Feinstein from California, noted, "what goes around, comes around,"⁸⁶ and "it's hard not to see [the disregard of blue slips] coming back to bite Republicans when they're no longer in power in the Senate."⁸⁷

D. *Limiting Inquiry: Stacked and Sham Hearings*

Under the leadership of Senators Grassley and Graham, the Senate Judiciary Committee hearings have largely become a charade. Prior to Senator Grassley's tenure as chair, the practice was to have only one circuit court nominee testify at a hearing. This allowed senators time to ask nominees

withdrawn 2018; (2) Eric Miller (9th Cir., Wash.) confirmed Feb. 26, 2019; (3) Paul Matey (3d Cir., N.J.) confirmed Mar. 12, 2019; (4) Joseph Bianco (2d Cir., N.Y.) confirmed May 8, 2019; (5) Michael Park (2d Cir., N.Y.) confirmed May 9, 2019; (6) Kenneth Lee (9th Cir., Cal.) confirmed May 15, 2019; (7) Daniel Collins (9th Cir., Cal.) confirmed May 21, 2019; and (8) Daniel Bress (9th Cir., Cal.) confirmed July 9, 2019.

82. Deanna Paul, "*Damaging Precedent*": *Conservative Federal Judge Installed Without Consent of Home-State Senators*, WASH. POST (Feb. 28, 2019, 12:34 PM), <https://www.washingtonpost.com/politics/2019/02/27/dangerous-first-conservative-judge-installed-after-vetting-by-only-two-senators>.

83. Timothy Kelly (D.D.C.); Trevor McFadden (D.D.C.); Dabney Friedrich (D.D.C.); Gregory Katsas (D.C. Cir.); Neomi Rao (D.C. Cir.); Carl Nichols (D.D.C.).

84. Press Release, Eleanor Holmes Norton, *After Trump Nominee to D.C. District Court Withdraws Name, Norton Says White House Should Consult Her and Her Nominating Commission on Candidates* (Dec. 18, 2017), <https://norton.house.gov/media-center/press-releases/after-trump-nominee-to-dc-district-court-withdraws-name-norton-says>.

85. Patrick L. Gregory, *Graham Holds Line on Blue Slips for District Court Nominees*, BLOOMBERG L. (Jan. 29, 2019, 4:10 PM), <https://news.bloomberglaw.com/us-law-week/graham-holds-line-on-blue-slips-for-district-court-nominees>.

86. Press Release, Dianne Feinstein, *Feinstein Decries Disregard of Blue Slips for Ninth Circuit* (Apr. 4, 2019), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?>

87. Paul, *supra* note 82.

important questions about their experience, judicial philosophy, integrity, and temperament. The hearing is often the only time senators talk to the nominee directly and it is the only opportunity for the public to hear from the nominee. Since Trump took office, the Senate Judiciary Committee chairs have scheduled nine hearings with more than one circuit court nominee on the panel.⁸⁸

In addition to stacked hearings, for the first time in history, the Senate Judiciary Committee chair scheduled and held hearings during a Senate recess.⁸⁹ Shortly after Kavanaugh's contentious confirmation to the Supreme Court, Grassley scheduled two hearings for other controversial nominees during the October senate recess.⁹⁰ In total, ten nominees had hearings with only one or two senators in attendance.⁹¹

E. *Speedy Confirmations*

Once the committee reports out a nomination, even if unfavorably, the nomination is placed on the Senate's executive calendar. The Senate majority leader is then able to schedule a vote on the nomination. In recent years,

88. The nine hearings include: (1) John Bush (6th Cir., Ky.) and Kevin Newsom (11th Ala.): Committee on the Judiciary, *Nominations*, U.S. SENATE (June 14, 2017), <https://www.judiciary.senate.gov/meetings/06/14/2017/nominations>; (2) Joan Larsen (6th Cir., Mich.) and Amy Coney Barrett (7th Cir., Ind.): Committee on the Judiciary, *Nominations*, U.S. SENATE (Sept. 8, 2017, 10:00 AM), <https://www.judiciary.senate.gov/meetings/08/08/2017/nominations>; (3) Don Willett (5th Cir., Tex.) and James Ho (5th Cir., Tex.): Committee on the Judiciary, *Nominations*, U.S. SENATE (Nov. 15, 2017, 10:00 AM), <https://www.judiciary.senate.gov/meetings/11/15/2017/nominations>; (4) Michael Scudder (7th Cir., Ill.) and Amy St. Eve (7th Cir., Ill.): Committee on the Judiciary, *Nominations*, U.S. SENATE (Mar. 21, 2018, 10:00 AM), <https://www.judiciary.senate.gov/meetings/03/21/2018/nominations>; (5) Marvin Quattlebaum (4th Cir., S.C.) and Eli Richardson (4th Cir., S.C.): Committee on the Judiciary, *Nominations*, U.S. SENATE (June 20, 2018, 10:00 AM), <https://www.judiciary.senate.gov/meetings/06/20/2018/nominations>; (6) Chad Readler (6th Cir., Ohio) and Eric Murphy (6th Cir., Ohio): Committee on the Judiciary, *Nominations*, U.S. SENATE (Oct. 10, 2018, 10:00 AM), <https://www.judiciary.senate.gov/meetings/10/10/2018/nominations>; (7) Eric Miller (9th Cir., Wash.) and Bridget Bade (9th Cir., Ariz.): Committee on the Judiciary, *Nominations*, U.S. SENATE (Oct. 24, 2018, 10:00 AM), <https://www.judiciary.senate.gov/meetings/10/24/2018/nominations>; (8) Joseph Bianco (2d Cir., N.Y.) and Michael Park (2d Cir., N.Y.): Committee on the Judiciary, *Nominations*, U.S. SENATE (Feb. 13, 2019, 10:00 AM), <https://www.judiciary.senate.gov/meetings/02/13/2019/nominations>; and (9) Kenneth Lee (9th Cir., Cal.) and Daniel Collins (9th Cir., Cal.): Committee on the Judiciary, *Nominations*, U.S. SENATE (Mar. 13, 2019, 10:00 AM), <https://www.judiciary.senate.gov/meetings/nominations-hearing>.

89. Nina Totenberg, *Trump, Republicans Continue Remaking the Federal Courts – Even as Senate on Recess*, NPR (Oct. 27, 2018, 7:00 AM), <https://www.npr.org/2018/10/27/660643999/trump-republicans-continue-remaking-the-federal-courts-even-as-senate-on-recess>.

90. The two hearings were: (1) Allison Jones Rushing (4th Cir., N.C.); Corey Maze (N.D. Ala.); Rodney Smith (S.D. Fla.); Thomas Barber (M.D. Fla.); T. Kent Wetherell III (N.D. Fla.); and Wendy Berger (M.D. Fla.): Committee on the Judiciary, *Nominations*, U.S. SENATE (Oct. 17, 2018, 10:00 AM), <https://www.judiciary.senate.gov/meetings/10/17/2018/nominations>; and (2) Eric Miller (9th Cir., Wash.); Bridget Bade (9th Cir., Ariz.); Karin Immergut (D. Ore.); and Richard Hertling (Ct. Fed. Cl.): Committee on the Judiciary, *Nominations*, U.S. SENATE (Oct. 24, 2018, 10:00 AM), <https://www.judiciary.senate.gov/meetings/10/24/2018/nominations>.

91. Totenberg, *supra* note 89.

to move to the final vote, cloture has been frequently invoked on nominations. Cloture ends debate in the Senate by establishing a time limit for debate.⁹² Until 2013, Senate rules required a vote of at least sixty senators to support cloture and proceed to ending debate on the nomination.⁹³ This changed when Republicans refused to move forward on nominees, including blocking Obama's three nominees to the US Court of Appeals for the DC Circuit.⁹⁴ Then-Majority Leader Harry Reid, a Democrat from Nevada, reduced the threshold to a simple majority for nominations to district and circuit court judgeships.⁹⁵ In 2017, to end debate on Neil Gorsuch's nomination to the Supreme Court, McConnell reduced the number of votes needed for Supreme Court nominations as well.⁹⁶ Once the final vote occurs, every senator can cast a vote in support or opposition of the nomination. If the nomination receives a majority of "yes" votes, the nominee is confirmed, and the president appoints her or him as a federal judge.

In the 115th Congress, the Senate could debate a nomination after cloture was invoked for thirty hours. During this time, the Senate confirmed a record number of Trump's circuit court nominees—thirty—in addition to fifty-three district court nominees.⁹⁷ In an attempt to fill district court vacancies quickly, McConnell unilaterally changed the number of post-cloture debate hours for district court nominees from thirty to two hours.⁹⁸ This led to a significant uptick in the number of district court confirmations—forty-six since the change.⁹⁹

Given the troubles with vetting and other ways in which the Senate majority has short-circuited the process, the reduction of debate time is troubling. For senators who do not serve on the Judiciary Committee, this debate time is often their first opportunity to seriously review the nominee. At least twice during post-cloture debate time, nominations have failed because deeply disturbing information has come to senators' attention.

First, the nomination of Ryan Bounds to an Oregon seat on the US Court of Appeals for the Ninth Circuit failed moments before the final con-

92. ELIZABETH RYBICKI, *SENATE CONSIDERATION OF PRESIDENTIAL NOMINATIONS: COMMITTEE AND FLOOR PROCEDURE* 9 (2019).

93. VALERIE HEITSHUSEN, *SENATE PROCEEDINGS ESTABLISHING MAJORITY CLOTURE FOR SUPREME COURT NOMINATIONS: IN BRIEF*, 1 (2017).

94. Jeremy W. Peters, *Obama Pick for Court Is 3rd in a Row Blocked by Republicans*, N.Y. TIMES (Nov. 18, 2013), <https://www.nytimes.com/2013/11/19/us/politics/republicans-block-an-other-obama-nominee-for-key-judgeship.html>.

95. DENIS STEVEN RUTKUS, *APPOINTMENT PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: AN OVERVIEW* 5 (2016).

96. HEITSHUSEN, *supra* note 93.

97. RYBICKI, *supra* note 92, at 9–10.

98. Paul Kane, *Republicans Change Senate Rules to Speed Nominations as Leaders Trade Charges of Hypocrisy*, WASH. POST (Apr. 3, 2019, 5:59 PM), https://www.washingtonpost.com/politics/republicans-change-senate-rules-to-speed-nominations-as-leaders-trade-charges-of-hypocrisy/2019/04/03/86ec635a-5615-11e9-aa83-504f086bf5d6_story.html.

99. *Confirmation Listing*, ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/confirmation-listing> (last updated Jan. 17, 2020).

firmation vote. Bounds, nominated over objections of Democratic Senators Jeff Merkley and Ron Wyden of Oregon, did not reveal controversial racist and sexist college writings to the commission that interviewed him.¹⁰⁰ Still, his nomination proceeded and the Senate invoked cloture by a narrow vote of fifty to forty nine.¹⁰¹ In the last few hours of debate, his record came into focus and senators found it to be too extreme. The day after cloture was invoked, Bounds' nomination was withdrawn.¹⁰²

Similarly, Thomas Farr's nomination to the US District Court for the Eastern District of North Carolina failed in the final hours of post-cloture debate. Farr vigorously defended North Carolina's voter suppression law, which the US Court of Appeals for the Fourth Circuit held "target[s] African Americans with almost surgical precision" and is "the most restrictive voting law North Carolina has seen since the era of Jim Crow."¹⁰³ Additionally, his involvement in Jesse Helms' senate campaigns in 1984 and 1990 came into sharp focus in the post-cloture debate hours. Ultimately, Senator Tim Scott, a Republican from South Carolina, concluded that he could not support Farr's nomination, and the nomination failed.¹⁰⁴

The lack of proper vetting, stacked hearings, extreme nominees, and limited time for the full Senate to consider nominations has reduced senators' ability to fulfill their constitutional responsibilities.¹⁰⁵ Thus, by Trump and Senate Republicans' design, the Senate has confirmed more nominees without appropriate scrutiny. The next section discusses the consequences of this lower threshold for the independence and impartiality of the federal judiciary.

IV. TAKING OVER THE COURTS

Senate Republicans have broken the rules to stack the courts with as many ideologues as possible—and as quickly as they can. This section dis-

100. Maxine Bernstein, *Democratic Senators Blast Oregon Prosecutor's Judicial Nomination on Senate Floor*, OREGONIAN/OREGONLIVE (July 27, 2018), https://www.oregonlive.com/politics/2018/07/democratic_senators_blast_ryan.html.

101. *U.S. Senate Roll Call Votes 115th Congress—2nd Session, No. 161*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm? (last visited Jan. 26, 2020).

102. Burgess Everett, *Trump Judicial Nominee Pulled over Racially Charged Writings*, POLITICO (July 29, 2018, 3:01 PM), <https://www.politico.com/story/2018/07/19/bounds-senate-withdrawn-733414>.

103. *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 211, 219 (4th Cir. 2016).

104. Catie Edmondson, *Senator Tim Scott Sinks Thomas Farr's Judicial Nomination Amid Racial Controversy*, N.Y. TIMES (Nov. 29, 2018), <https://www.nytimes.com/2018/11/29/us/politics/tim-scott-judicial-nominee-thomas-farr-race.html>.

105. Jennifer Haberkorn, *Trump is Appointing Judges at a Record Pace. Now McConnell Wants to Move Even Faster*, L.A. TIMES (Apr. 2, 2019, 3:45 PM), <https://www.latimes.com/politics/la-na-pol-congress-senate-nominations-rules-trump-mcconnell-20190402-story.html>.

cusses the extent to which most of the 152 confirmed lifetime nominees:¹⁰⁶ (1) reflect an extreme conservative ideology; (2) are primarily white and male, reflecting a stunning lack of diversity; (3) demonstrate incompetence based on lack of legal experience and troubling judicial temperament and bias; and, (4) have embarrassing and disqualifying records.

A. *Extreme Conservative Ideology*

The current judicial selection and nominations apparatus has been entrusted to a small circle of powerful legal conservative stalwarts, with Leonard Leo in the center.¹⁰⁷ Leo has served as an advisor to the White House and nearly every outside institution tangentially related to the nominations process, including the Federalist Society where he serves as an executive vice president.¹⁰⁸ Leo expressed his determination to transform the courts to reflect a specific extreme conservative ideology¹⁰⁹ while advising Trump during his campaign. It is clear Leo only recommended individuals who are hostile to reproductive rights, in particular, as well as other civil rights.¹¹⁰ Ed Whelan, a conservative activist, declared that “No one has been more dedicated to the enterprise of building a Supreme Court that will overturn *Roe v. Wade* than the Federalist Society’s Leonard Leo.”¹¹¹ Leo’s commitment to dismantling hard-fought civil and human rights achievements is evidenced in those he has helped bring into the nomination process.

Unsurprisingly, most of Trump’s judicial nominations are members of the far-right Federalist Society.¹¹² Gorsuch and Kavanaugh’s involvement in the Federalist Society and demonstrated records opposing civil and human rights landed both on Trump’s Supreme Court shortlist.¹¹³ Lower court nominees have also been selected for their demonstrated commitment to the conservative legal movement; those who have been confirmed share distinguishing characteristics—many have written briefs arguing that it was permissible to deny marriage equality in *Obergefell v. Hodges*,¹¹⁴ advanced

106. *Judicial Confirmations for January 2019*, ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2019/01/confirmations> (last updated Jan. 1, 2019); ADMIN. OFF. OF THE U.S. CTS., *supra* note 99.

107. Robert O’Harrow Jr. & Shawn Boburg, *A Conservative Activist’s Behind-the-Scenes Campaign to Remake the Nation’s Courts*, WASH. POST (May 21, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts>.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. Senator Sheldon Whitehouse, *The Third Federalist Society* (Mar. 27, 2019) (transcript available at <https://www.whitehouse.senate.gov/news/speeches/the-third-federalist-society>).

113. See Nolan D. McCaskill, *Trump Releases Updated Short List of Potential Supreme Court Nominees*, POLITICO (Nov. 17, 2017), <https://www.politico.com/story/2017/11/17/trump-supreme-court-nominees-247441>.

114. Eric Murphy was the nominee for and now judge on the Sixth Circuit. See, e.g., Brief for Respondent, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556).

legal arguments that *Roe v. Wade* is unconstitutional,¹¹⁵ filed briefs in *U.S. v. Texas* claiming the Affordable Care Act was unconstitutional,¹¹⁶ vigorously defended anti-educational equity causes in cases such as *Fisher v. University of Texas at Austin*,¹¹⁷ and advanced arguments that people should not have access to contraceptive services through their health care coverage in *Sebelius v. Hobby Lobby Stores*.¹¹⁸ Additional examples of conservative ideologues include Chad Readler, who was leading the US Department of Justice's Civil Division at the time of his nomination to an Ohio seat on the US Court of Appeals for the Sixth Circuit. Readler filed the Justice Department's brief in *Texas v. United States*, which refused to defend the Affordable Care Act and its protections for the millions of people who live with pre-existing conditions, claiming that it was unconstitutional.¹¹⁹ Furthermore, Eric Murphy was nominated and confirmed to the same court after serving as Ohio's solicitor general and defending numerous efforts to restrict voting rights and arguing against marriage equality in *Obergefell v. Hodges*, claiming that it would be "disruptive . . . to our constitutional democracy."¹²⁰ Lastly, Michael Park was nominated and confirmed to a seat on the US Court of Appeals for the Second Circuit while defending the Trump administration's attempts to add a citizenship question to the 2020 census¹²¹ and arguing that equal opportunity admissions programs in higher education should be dismantled.¹²²

115. Jeffrey Brown is now a judge for the Southern District of Texas. See Jeffrey Brown, *Nomination of Jeffrey Brown to the United States District Court for the Southern District of Texas: Questions for the Record*, 3–4 (April 17, 2019), <https://www.judiciary.senate.gov/imo/media/doc/Brown%20Responses%20to%20QFRs3.pdf>.

116. Chad Redler was the nominee for and now judge on the Sixth Circuit. See, e.g., Federal Defendants' Memorandum in Response to Plaintiffs' Application for Preliminary Injunction, No. 4:18-cv-00167-O (June 7, 2018), <https://www.afj.org/wp-content/uploads/2018/06/Texas-v-USA-CA.pdf>.

117. Michael Park was the nominee for and now judge on the Second Circuit. See, e.g., Brief for *Amici Curiae* Current and Former Federal Civil Rights Officials in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 136 S.Ct. 2198 (2016) (No. 11-345), https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-345_petitioneramcucur-rentandfmcivilrightsofficials.authcheckdam.pdf.

118. Daniel Collins was the nominee for and now judge on the Ninth Circuit. See, e.g., Brief for *Amici Curiae* Ethics and Public Policy Center in Support of Respondents in No. 13-354 and Petitioners in No. 13-356, *Sebelius v. Hobby Lobby*, 573 U.S. 682 (2014) (No. 13-354 & 13-356), https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_eppc.authcheckdam.pdf.

119. Josh Gerstein, *Justice Department Attorney Resigns After Legal Shift on Obamacare*, POLITICO (June 12, 2018, 7:19 PM), <https://www.politico.com/story/2018/06/12/obamacare-justice-department-resign-642992>.

120. Brief for Respondent, *supra* note 114, at 10.

121. See Motion For Leave to File Brief *Amicus Curiae* of Project on Fair Representation in Support of Defendant's Motion to Dismiss, *N.Y. v. Dep't of Commerce*, No. 1:18-CV-2921 (JMF) (S.D.N.Y. 2018), https://www.brennancenter.org/sites/default/files/legal-work/New-York_v_Dept-of-Commerce_Motion-for-Leave-to-File-Amicus-Brief_Project-on-Fair-Representation.pdf.

122. See Brief for *Amici Curiae* Current and Former Federal Civil Rights Officials in Support of Petitioner, *supra* note 117.

Many nominees proudly tout their loyalty to the conservative agenda. Don Willett was confirmed to the Fifth Circuit after serving as a Texas Supreme Court justice and proudly claiming:

I've built a record that is widely described—well, universally described—as the most conservative of anybody on the [Texas] Supreme Court. I've garnered support from every corner of the conservative movement. There's no ideological daylight to the right of me. . . . I'm universally regarded to be the most conservative member of the court, which is a label that I accept with, frankly, gladness and gusto.¹²³

Another nominee, Halil “Sul” Ozerden, the nominee for the US Court of Appeals for the Fifth Circuit, also tried to demonstrate his ties to the Republican party during his hearing. Ozerden received significant opposition from ultra conservative organizations,¹²⁴ including The First Liberty Institute, a far-right organization that was founded as part of the Free Market Foundation and specializes in defending clients such as Chick-fil-A, which they say has been targeted for “blatant religious discrimination.”¹²⁵ During the hearing, Texas Republican Senator Ted Cruz exposed that nominees receive Republicans' support only when they have a reliable record that openly demonstrates that they have met the “test” outlined by President Trump during his presidential campaign.¹²⁶ As Cruz stated, “Trump promised the American people he would nominate judges in the mold of Justice Scalia and Justice Thomas.”¹²⁷ And while on the campaign trail Trump clearly enunciated litmus tests for judges he would appoint, Cruz's Senate test also demands potential jurists' loyalty to advancing conservative political causes. He presented the First Liberty Institute's five standards for their opposition to Ozerden in front of the Committee:

He is not a conservative. He has never been affiliated with the conservative movement. He has never volunteered his time to advance conservative causes. He has never been active in conservative legal circles and he has never written any decisions that have advanced conservative principles.¹²⁸

Ozerden responded to the question about what he did for the cause prior to his service as a district court judge by saying:

123. Arlington Voice, *Justice Don Willet - Arlington Voice - 2012 TCGOP Straw Poll*, YOUTUBE (Feb. 6, 2012), <https://www.youtube.com/watch?v=ImznoCBCrnE>.

124. Marianne Levine, *Republican Senators May Sink Another Trump Judicial Nominee*, POLITICO (July 16, 2019), <https://www.politico.com/story/2019/07/16/trump-judicial-nominee-1417561>.

125. *Chick-fil-A*, FIRST LIBERTY INSTITUTE, <https://firstliberty.org/cases/chick-fil-a>.

126. *Nomination of Halil Suleyman Ozerden Questions from Senator Whitehouse*, COMMITTEE ON THE JUDICIARY 1 (July 24, 2019), <https://www.judiciary.senate.gov/imo/media/doc/Ozerden%20Responses%20to%20QFRs.pdf>.

127. *Id.*

128. *Id.*

During the time I was in practice, I did participate in supporting different candidates in different campaigns. . . . I was a board member of the County Republican Club, things like that, during my time in private practice. . . . And so, once I'm in public service, I can't engage in that type of activity. . . . I understand the concerns you've raised and I certainly respect these organizations you've mentioned and the work they do, but I think if you look at the totality of my record, it misunderstands my record.¹²⁹

He went on to insinuate he would have issued decisions touting his conservative credentials had he presided over the cases that would have been more controversial, saying:

I think is important to keep in mind is as a sitting District Court judge, I don't get to pick and choose my cases. I can only take the cases that are filed in front of me. And I don't sit in the state capital which tends to be where most of these kinds of cases I think you're referring to are filed.¹³⁰

By demanding Ozerden demonstrate conservative loyalty, Cruz unveils that he and Senate Republicans are not selecting umpires who will “call balls and strikes;”¹³¹ nor are they calling for a test of professional competence, fairness, integrity, or temperament. Rather, the standard applied to judicial nominees seeking Republican support is proof of commitment to advancing the conservative cause to serve in the independent judicial branch of government.

Other Trump nominees have said and/or written offensive and blatantly false information that goes even beyond party loyalty. Wendy Vitter was nominated and confirmed to the US District Court for the Eastern District of Louisiana. At a 2013 panel, she urged people to share disinformation about contraception, including a pamphlet containing dangerous lies such as contraceptive pills cause incest, infidelity, and violent death for women taking the pill.¹³² Vitter also spoke at a protest outside of a Planned Parenthood facility and claimed that “Planned Parenthood . . . kill[s] over 150,000 females a year.”¹³³ She was also one of the first nominees who refused to state that the landmark civil rights case ending legal apartheid in education in the United States, *Brown v. Board of Education*, was correctly

129. *Id.* at 6.

130. *Id.*

131. 9/12/05: *John Roberts' Baseball Analogy*, ABC NEWS (Sept. 14, 2016), <https://abcnews.go.com/Archives/video/sept-12-2005-john-roberts-baseball-analogy-10628259>.

132. Louisiana Right to Life, *Abortion Hurts Women's Health Panel*, YOUTUBE (Nov. 14, 2013), https://www.youtube.com/watch?v=Q6zJzIRr_EA. See also, Breast Cancer Prevention Institute, *The Pill Kills: The Life Threatening Medical Consequences of Oral Contraceptives or Estrogen-Progestin Combination Drugs* (2012), <https://web.archive.org/web/20150923205536/http://www.bcpinstitute.org/PDF/bcpi-pill-kills-brochure.pdf>.

133. Lindsey Frechou, *Hundreds Protest Future Abortion Clinic*, CLARION HERALD (May 22, 2013), <https://clarionherald.org/2013/05/22/hundreds-protest-planned-parenthood-abortion-clinic>.

decided.¹³⁴ Since then, dozens of other nominees have failed to state that *Brown* was correctly decided.¹³⁵ This raises alarming questions about nominees' adherence to precedent if placed on the bench and whether they believe that the question of legal segregation is open for debate.¹³⁶

Numerous nominees have controversial and offensive writings, some from their time as college and law students and others well into their professional careers. Ryan Bounds's offensive writings ended up costing him a seat on the US Court of Appeals for the Ninth Circuit. For others, however, the writings were but minor obstacles in their path to confirmation. For example, Neomi Rao, confirmed to the US Court of Appeals for the DC Circuit, wrote numerous offensive articles—complaining about the “hysteria over date rape” and blaming women for drinking before someone rapes her because “if she drinks to the point where she can no longer choose, well, getting to that point was part of her choice.”¹³⁷ She scoffed at public leaders who discuss race and discrimination, saying, “Race may be a hot, money-making issue.”¹³⁸ These and other demeaning statements demonstrating her hostility to the LGBTQ community and environmental protections have tracked well into her legal career, including as head of the Office of Management and Budget.¹³⁹

134. Mahita Gajanan, *Trump Judicial Nominee Won't Say if She Supports Brown v. Board of Education*, TIME (Apr. 12, 2018), <https://time.com/5237672/wendy-vitter-brown-v-board-segregation>.

135. Press Release, The Lead. Conf. on Civil and Human Rights, Senators Must Oppose Judicial Nominees Who Decline to Affirm *Brown v. Board of Education* (May 13, 2019), <https://civilrights.org/2019/05/13/senators-must-oppose-judicial-nominees-who-decline-to-affirm-brown-v-board-of-education>.

136. Lulu Garcia-Navarro, *Trump Judicial Nominees and “Brown v. Board of Education”*, NPR (May 19, 2019), <https://www.npr.org/2019/05/19/724747911/trump-judicial-nominees-and-brown-v-board-of-education>.

137. Neomi Rao, *Shades of Gray*, YALE HERALD (Oct. 14, 1994).

138. Neomi Rao, *The Hottest Duo in Academe*, WKLY. STANDARD (Apr. 22, 1996), <https://www.washingtonexaminer.com/weekly-standard/the-hottest-duo-in-academe>.

139. See Letter from The Lead. Conf. on Civil and Human Rights to the U.S. Senate, Oppose the Confirmation of Neomi Rao to the U.S. Court of Appeals for the District of Columbia Circuit (Feb. 1, 2019), <https://civilrights.org/resource/oppose-the-confirmation-of-neomi-rao-to-the-u-s-court-of-appeals-for-the-district-of-columbia-circuit>. For example, Rao claimed the Yale Bisexual, Gay, and Lesbian Co-op was “spreading myths about AIDS and ‘raising awareness’ about homophobia/heterosexism. If you didn’t know better, you’d think that Yale was the most difficult place in the world to be gay, rather than one of the easiest.” *Id.* at 5. She also wrote that:

The multiculturalists are not simply after political reform. Underneath their touchy-feely talk of tolerance, they seek to undermine American culture. They argue that culture, society and politics have been defined – and presumably defiled – by white, male heterosexuals hostile to their way of life. For example, homosexuals want to redefine marriage and parenthood; feminists in women’s studies programs want to replace so-called male rationality with more sensitive responses common to womyn.

Id. at 5–6. Rao also stated that “multiculturalism fans the flames of minority resentment against everybody else, including other minorities,” *id.* at 3. Rao also said a Yale environmental organization had a “dangerous orthodoxy” and that “[t]he three major environmental bogeymen, the greenhouse effect, the depleting ozone layer, and the dangers of acid rain, are all cited in [the organization’s] manual though all three theories have come under serious scientific attack.” *Id.* at 7 (alteration in original). She talked about “eco-insanity on college campuses.” *Id.*

Another nominee was disgraced, and his nomination withdrawn, after video footage of his inflammatory comments were made public. Jeffrey Mateer, nominee to the US District Court for the Eastern District of Texas, formerly served as general counsel to the First Liberty Institute prior to his position in the Texas Attorney General's office. While giving a speech, Mateer said that transgender children were evidence of "Satan's plan."¹⁴⁰ He also expressed regret about the passage of laws prohibiting dangerous and dehumanizing conversion therapy.¹⁴¹ After these speeches were covered by media outlets, the Trump administration and the Senate did not proceed with Mateer's nomination.¹⁴²

A colleague of Mateer's from the First Liberty Institute, Matthew Kacsmaryk, however, was confirmed to the US District Court for the Northern District of Texas. With a similar background to Mateer, Kacsmaryk's career is dedicated to anti-reproductive rights and anti-LGBTQ equality causes. He wrote about the "Long War Ahead" that needed to be waged against LGBTQ persons.¹⁴³ He lamented the Supreme Court's recognition of marriage equality, saying that it has been "weaponize[d]" by a bill, the Equality Act, which would prohibit discrimination on the basis of sex in housing, employment, credit, education, and other areas that enable people to fully engage in public life.¹⁴⁴

Trump's nominees possess disturbing, extreme records reflective of a far-right ideology. Their statements and work demonstrate hostility toward reproductive rights, racial justice, health care, disability rights, immigrant rights, rights of working people, voting rights, LGBTQ equality rights, and environmental protections. Even though civil and human rights organizations have repeatedly sounded the alarm, most of these nominees have been confirmed. The concerns raised during the nominations process have, unfortunately, been realized as those judges issue devastating rulings in their new positions.¹⁴⁵

140. Chris Massie & Andrew Kaczynski, *Trump Judicial Nominee Said Transgender Children are Part of "Satan's Plan", Defended "Conversion Therapy,"* CNN (Sept. 20, 2017), <https://www.cnn.com/2017/09/20/politics/kfile-jeff-mateer-lgbt-remarks/index.html>.

141. *Id.*

142. Josh Gerstein & Seung Min Kim, *Two Trump Judge Nominees Out After Criticism*, POLITICO (Dec. 13, 2017), <https://www.politico.com/story/2017/12/13/brett-talley-trump-nominee-withdraws-295322>.

143. Matthew Kacsmaryk, *The Inequality Act: Weaponizing Same-Sex Marriage*, PUB. DISCOURSE (Sept. 4, 2015), <https://www.thepublicdiscourse.com/2015/09/15612>.

144. *Id.*

145. *See, e.g.,* People For the American Way, *Confirmed Judges, Confirmed Fears: The Continued Harm Done by Trump Federal Judges* (2019), <http://files.pfaw.org/uploads/2019/04/Confirmed-Judges-Confirmed-Fears-summary.pdf>.

B. Astonishing Lack of Representation and Diversity

Our courts rely on the public's trust, and for this reason, representation matters greatly. As Oregon Supreme Court Justice Virginia L. Linder stated,

Diversity on the bench matters. It matters to real people, with real disputes, who need our court system to resolve those disputes. A diverse bench matters . . . because it helps ensure that—win, lose or draw—all who walk through the courthouse doors will be treated with dignity and will be fully and fairly heard. Diversity on the bench, in short, is fundamental to the promise of equal justice for all.¹⁴⁶

The numbers speak for themselves: more than 85 percent of Trump's nominees are white, and nearly 70 percent are white men.¹⁴⁷ Only three (2 percent) nominees are women of color, and none are Latina.¹⁴⁸ Not a single African American or Latinx nominee has been confirmed to the circuit courts.¹⁴⁹ Only one LGBTQ Trump nominee has been confirmed by the Senate.¹⁵⁰ The Trump administration's default nominee is young, white, and male—and this is not a coincidence. Instead, it is a manifestation of the far-right legal community from which these nominees are selected.

This lack of representation in the judicial nominees from the current presidential administration starkly contrasts previous administrations. President Jimmy Carter was the first president to address the significant lack of diversity on the federal courts. Carter made representation a priority because he understood that the integrity of the courts depends on having judges reflective and representative of the communities they serve. He encouraged the creation of selection commissions, which would move away from a system where senators themselves picked nominees. He noted that senators selected nominees who looked like them—overwhelmingly white and male.¹⁵¹ Carter advocated for commissions comprised of members from various communities, gender identities, races, ethnicities, and professional

146. Virginia L. Linder, *Forward to Diversity Counts: Why States Should Measure the Diversity of Their Judges and How They Can Do It*, 4–5 (2017), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/20170607_diversity-counts.pdf.

147. *See Diversity on the Bench*, FED. JUD. CTR., <https://www.fjc.gov/node/7491> (last visited Oct. 26, 2019).

148. One of the three women, Karen Scholer (N.D. Tex.), was originally nominated by President Obama on March 15, 2016 but her nomination expired and Trump re-nominated her on September 7, 2017. *See id.*

149. *See id.*

150. Chris Johnson, *Mary Rowland is First LGBT Trump Judicial Nominee Confirmed by Senate*, WASH. BLADE (Aug. 5, 2019), <https://www.washingtonblade.com/2019/08/05/mary-rowland-is-first-lgbt-trump-judicial-nominee-confirmed-by-senate>.

151. Mark Joseph Stern, *Carter's Quiet Revolution*, SLATE (July 14, 2019, 7:00 PM), <https://slate.com/news-and-politics/2019/07/jimmy-carter-diversity-judges-donald-trump-court-nominees.html>.

backgrounds.¹⁵² Most presidents since Carter have nominated more diverse individuals. President Obama made great strides to diversify the bench—demographically and professionally.¹⁵³

Certainly, prior to Trump's presidency, there was still great progress to be made. This is especially acute in the circuit courts where there are only six active judges who are women of color out of 179 active total judge-ships.¹⁵⁴ The cumulative impact of the Trump administration has been to de-diversify the federal bench.¹⁵⁵ For example, the Eighth Circuit has eleven active judges—only one of these judges is a woman and only one is a person of color.¹⁵⁶ Of the eleven judges, four judges were appointed by Trump and all were white men. Obama nominated Jennifer Puhl to one of these seats, but the Senate failed to move on her nomination. Trump then nominated, and the Senate confirmed, Ralph Erickson to that seat.¹⁵⁷ The US Court of Appeals for the Seventh Circuit now has no active judges of color.¹⁵⁸ Out of the eleven active judges on the bench, Trump appointed four of them, again all white.¹⁵⁹ Similarly, the US Court of Appeals for the Third Circuit has fourteen active judges, and only two are women. Obama nominated Rebecca Haywood to a Pennsylvania seat in the Third Circuit. Had she been confirmed, she would have been the first African American woman to serve on the court.¹⁶⁰ Instead, Trump nominated and the Senate confirmed four white men to the Third Circuit. Additionally, the Fifth Circuit, has seventeen active judges, but, even as a jurisdiction with a significant Latinx population, there is not a single active Latinx judge on the court.¹⁶¹

152. *Id.*

153. For example, President Obama nominated more African American women than any other president. Out of the sixty-two African Americans confirmed to lifetime positions, twenty-six were women. Donna Owens, *Obama's Legacy on Judicial Appointments, By the Numbers*, NBC NEWS (Jan. 19, 2017), <https://www.nbcnews.com/storyline/president-obama-the-legacy/obama-s-legacy-judicial-appointments-numbers-n709306>.

154. *See Diversity on the Bench, supra* note 147.

155. Hailey Fuchs, *Democrats Question Absence of Black or Hispanic Nominees Among Trump's 41 Circuit Court Judges*, WASH. POST (July 9, 2019, 5:17 PM), https://www.washingtonpost.com/politics/democrats-question-absence-of-black-or-hispanic-nominee-among-trumps-41-circuit-court-judges/2019/07/08/e8a50d06-98e9-11e9-a027-c571fd3d394d_story.html.

156. *See Diversity on the Bench, supra* note 147.

157. Patrick Springer, *U.S. Senate Confirms Fargo Trial Judge to Federal Appeals Court*, WEST FARGO PIONEER (Sept. 28, 2017), <https://www.westfargopioneer.com/news/4335200-us-senate-confirms-fargo-trial-judge-federal-appeals-court>.

158. *See Diversity on the Bench, supra* note 147.

159. *See id.*

160. Hailey Fuchs, *Democrats Question Absence of Black or Hispanic Nominees Among Trump's 41 Circuit Court Judges*, WASH. POST (July 8, 2019, 5:17 PM), https://www.washingtonpost.com/politics/democrats-question-absence-of-black-or-hispanic-nominee-among-trumps-41-circuit-court-judges/2019/07/08/e8a50d06-98e9-11e9-a027-c571fd3d394d_story.html.

161. *See Biographical Directory of Article III Federal Judges, 1789-present*, FED. JUD. CTR., <https://www.fjc.gov/node/7491> (last visited Oct. 18, 2019).

Given that these judges will serve for decades to come, the impact not only immediately changes the representation of communities on the bench but does so for future generations as well. The disturbing lack of diversity is compounded by concerns of the kinds of nominees who have been nominated as some, for example, have written support for the KKK¹⁶² and dozens have refused to state that the Supreme Court's unanimous landmark civil rights decision, *Brown v. Board of Education*, was correctly decided.¹⁶³

C. *Incompetence*

There are many ways in which Trump nominees are not qualified for a lifetime position. Perhaps the most basic threshold, however, is professional competence, which encompasses legal experience, judicial temperament, and bias, all of which are explored in this subsection.

1. *Lack of Experience*

The Trump administration places little value on experience, especially for district court nominees—as many lack trial experience. This was in the spotlight at the hearing for Matthew Petersen, nominated by President Trump in September 2017 to serve in the US District Court for the District of Columbia. Under questioning by Senator John Kennedy, Petersen acknowledged he had never handled a trial case, civil or criminal, in any court; he had never argued a motion; and he could not answer basic questions about standards and procedures frequently involved in trials.¹⁶⁴ After a video of this embarrassing exchange spread on the internet, he withdrew from consideration.¹⁶⁵

Brett Talley, who was thirty-six at the time of his nomination to the US District Court for the Middle District of Alabama, had only been a member of the federal bar for ten years and his experience was unrelated to what would be required of a federal judge.¹⁶⁶ Much of his post-law school

162. Mark Joseph Stern, *Trump Judicial Nominee Brett Talley Appears to Have Defended "the First KKK" in Message Board Post*, SLATE (Nov. 15, 2017, 3:34 PM), <https://slate.com/news-and-politics/2017/11/trump-nominee-brett-talley-appears-to-have-defended-the-first-kkk.html>.

163. Laura Meckler & Robert Barnes, *Trump Judicial Nominees Decline to Endorse Brown v. Board Under Senate Questioning*, WASH. POST (May 16, 2019, 6:28 PM), https://www.washingtonpost.com/local/education/trump-judicial-nominees-decline-to-endorse-brown-v-board-under-senate-questioning/2019/05/16/d5409d58-7732-11e9-b7ae-390de4259661_story.html.

164. Jonah Engel Bromwich & Niraj Chokshi, *Trump Judicial Nominee Attracts Scorn After Flopping in Hearing*, N.Y. TIMES, Dec. 16, 2017, at A13.

165. Charlie Savage, *Poor Vetting Sinks Trump's Nominees for Federal Judge*, N.Y. TIMES, Dec. 19, 2017, at A1.

166. Questionnaire from Brett Joseph Talley, Deputy Assistant Attorney General, U.S. Dep't of Justice, to U.S. Senate Comm. on the Judiciary (2017), <https://www.judiciary.senate.gov/imo/media/doc/Talley%20SJQ.pdf>.

career was as a ghost hunter.¹⁶⁷ His ghost hunting experience likely also helped inform his many horror novels.¹⁶⁸ He also served as a political speechwriter¹⁶⁹ and wrote politically motivated articles, such as “Democrats, the Party Who Cried Racist.”¹⁷⁰ The ABA Standing Committee on the Federal Judiciary¹⁷¹ noted in their letter defending Talley’s “not qualified” rating that “he does not have the requisite trial experience or its equivalent.”¹⁷² Ultimately, his nomination failed—though likely for other reasons as will be discussed below.¹⁷³ Holly Teeter’s nomination to the US

167. See Robert O’Harrow Jr., *Law Clerk by Day, Ghost Hunter by Night, Now Trump’s Judiciary Nominee*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/investigations/law-clerk-by-day-ghost-hunter-by-night-now-trumps-judiciary-nominee/2017/11/17/518b66a8-ca51-11e7-b244-2d22ac912500_story.html.

168. E.g., BRETT J. TALLEY, *THAT WHICH SHOULD NOT BE* (Elizabeth Reuter ed. 2011); BRETT J. TALLEY, *HE WHO WALKS IN SHADOW* (Michael R. Collings ed. 2015); BRETT J. TALLEY, *THE FIDDLE IS THE DEVIL’S INSTRUMENT: AND OTHER FORBIDDEN KNOWLEDGE* (Aaron J. French ed. 2017).

169. Questionnaire from Brett Joseph Talley, Deputy Assistant Attorney General, U.S. Dep’t of Justice, to U.S. Senate Comm. on the Judiciary (2017), <https://www.judiciary.senate.gov/imo/media/doc/Talley%20SJQ.pdf>.

170. Brett Talley, *Democrats, the Party Who Cried Racist*, CNN (Nov. 24, 2016, 6:49 AM), <https://www.cnn.com/2016/12/01/opinions/democrats-the-party-who-cried-racist-talley/index.html>.

171. See *About Us: The American Bar Association’s Standing Committee on the Federal Judiciary*, AM. BAR ASS’N (Oct. 9, 2018), https://www.americanbar.org/groups/committees/federal_judiciary/about_us (following a confidential review of the nominee’s competence, temperament, and integrity, the Standing Committee rates Article III nominees); AM. BAR ASS’N, *STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 3* (2017), <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Backgrounder.pdf> (“The Committee believes that a nominee to the federal bench ordinarily should have at least twelve years’ experience in the practice of law.”); Maya Sen, *How Judicial Qualification Ratings May Disadvantage Minority and Female Candidates*, J.L. & CTS. 33 (2014) (criticizing the standard of needing twelve years’ experience as limiting lawyers, particularly women and people of color); AM. BAR ASS’N *STANDING COMM. ON THE FED. JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES: 115TH CONGRESS* (2018) (explaining that the Standing Committee’s ratings should provide some insight for the Senate to consider when evaluating a nomination. To date, Trump has nominated seven individuals who have received unanimous or majority “not qualified” ratings—three unanimously and four by a majority of the Committee); AM. BAR ASS’N *STANDING COMM. ON THE FED. JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES: 116TH CONGRESS* (2019). *But see* Patrick L. Gregory, *Trump Picks More “Not Qualified” Judges*, BLOOMBERG L. (Dec. 19, 2018, 12:11 PM), <https://news.bloomberglaw.com/us-law-week/trump-picks-more-not-qualified-judges-1> (explaining that four nominees were given this rating since at least the Reagan administration); Adam Liptak, *White House Ends Bar Association’s Role in Vetting Judges*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/us/politics/white-house-american-bar-association-judges.html> (arguing that this major deviation may be attributed to the fact that the Trump administration has broken from tradition and does not allow the Standing Committee to conduct their confidential review while the administration is vetting potential nominees).

172. Letter from Pamela A. Bresnahan, Chair, ABA Standing Comm. on the Fed. Judiciary, to Charles E. Grassley, Chairman, Senate Comm. on the Judiciary & Dianne Feinstein, Ranking Member, Senate Comm. on the Judiciary (Nov. 7, 2017), <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/TalleyratinglettertoGrassleyandFeinstein.pdf>.

173. Josh Gerstein & Seung Min Kim, *Two Trump Judge Nominees Out After Criticism*, POLITICO (Dec. 13, 2017), <https://www.politico.com/story/2017/12/13/brett-talley-trump-nominee-withdraws-295322>.

District Court for the District of Nebraska was also questioned due to a lack of sufficient trial experience.¹⁷⁴ Regardless, the Senate confirmed Teeter to the seat.¹⁷⁵ Justin Walker, nominated to the US District Court for the Western District of Kentucky, is thirty-seven years old, has never tried a case, and has taken only one deposition for a state court case.¹⁷⁶

Another nominee, Jonathan Kobes, nominated to the US Court of Appeals for the Eighth Circuit, lacked the “requisite experience” and, per the ABA Standing Committee, possessed no “evidence of his ability to fulfill the scholarly writing required of a United States Circuit Court judge.”¹⁷⁷ Kobes was nominated to the seat to which President Obama nominated Jennifer Puhl, whose nomination expired. Kobes, who served as Senator Rounds’s chief counsel, replaced Puhl as the nominee. Kobes was the last nominee to be confirmed in the 115th Congress, and his nomination nearly failed. Vice President Pence was brought in to break the tie in both the cloture vote and the final vote.¹⁷⁸ This was the first time in history a judge was confirmed by such a tie-breaking vote.¹⁷⁹

Charles Goodwin, a nominee for and now judge of the US District Court for the Western District of Oklahoma, was questioned about his perceived “weak” work ethic.¹⁸⁰ Peers noted Goodwin’s “frequent absence from the courthouse until mid-afternoon,” and “[i]naccessibility issues” which “generated concerns about the timely and efficient administration of justice.”¹⁸¹

This lack of experience in nominees under any other administration would have been an anomaly. For the Trump administration, this is routine.

174. Letter from Pamela A. Bresnahan, Chair, ABA Standing Comm. on the Fed. Judiciary, to Charles E. Grassley, Chairman, Senate Comm. on the Judiciary & Dianne Feinstein, Ranking Member, Senate Comm. on the Judiciary (Nov. 7, 2017), <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/TeetereratingxplanatorylettertoGrassleyandFeinstein.pdf>.

175. 164 CONG. REC. S5590 (daily ed. Aug. 1, 2018) (executive nominations confirmed by the Senate August 1, 2018).

176. Letter from Paul T. Moxley, Chair, ABA Standing Comm. on the Fed. Judiciary, to Lindsey Graham, Chairman, Senate Comm. on the Judiciary & Dianne Feinstein, Ranking Member, Senate Comm. on the Judiciary (July 30, 2019), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/2019-07-30NQ-rating-Justin-R-Walker.pdf.

177. Letter from Paul T. Moxley, Chair, ABA Standing Comm. on the Fed. Judiciary, to Charles E. Grassley, Chairman, Senate Comm. on the Judiciary & Dianne Feinstein, Ranking Member, Senate Comm. on the Judiciary (Sept. 14, 2019), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/2019-07-30NQ-rating-Justin-R-Walker.pdf.

178. 164 CONG. REC. S7210 (2018) (Roll Vote No. 251); 164 CONG. REC. S7405 (2018) (Roll Vote No. 258).

179. Jason Silverstein, *Federal Judge Becomes First in U.S. History Confirmed by Tiebreaker in the Senate*, CBS NEWS (Dec. 11, 2018, 7:23 PM), <https://www.cbsnews.com/news/jonathan-kobes-becomes-first-federal-judge-in-u-s-history-confirmed-by-tiebreaker-in-the-senate>.

180. Letter from Pamela A. Bresnahan, Chair, ABA Standing Comm. on the Fed. Judiciary, to Charles E. Grassley, Chairman, Senate Comm. on the Judiciary & Dianne Feinstein, Ranking Member, Senate Comm. on the Judiciary (Dec. 12, 2017), <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Goodwinletterofexplanation12122017.pdf>.

181. *Id.*

2. *Judicial Temperament and Bias*

Given Trump's own temperament, it might be unsurprising that poor judicial temperament and bias also manifest in several of his nominations. Kavanaugh's vindictive testimony in front of the Senate Judiciary Committee, after the courageous testimony of Dr. Christine Blasey Ford, demonstrated an astounding lack of judicial temperament.¹⁸² After lying to the committee and in interviews,¹⁸³ Kavanaugh lashed out and blamed those who opposed his nomination and personally attacked senators who questioned him.¹⁸⁴ But Kavanaugh does not stand alone amongst Trump nominees for lifetime positions who have concerning temperament and judgment. For example, John Bush, a nominee and now judge on the Sixth Circuit, used a pseudonym and wrote more than 400 posts on the blog, "Elephants in the Bluegrass."¹⁸⁵ His posts called to "gag" Speaker Pelosi—referencing her as "Mama Pelosi"¹⁸⁶—and writing that the "two greatest tragedies in our country—slavery and abortion—relied on similar reasoning and activist justices at the U.S. Supreme Court."¹⁸⁷ Bush also promoted fake news sources that President Obama was not born in the United States.¹⁸⁸ The revelation shocked some senators, but Bush was still narrowly confirmed in a party-line vote.¹⁸⁹

Brett Talley, mentioned earlier for his lack of legal experience, failed to disclose his more than 16,000 posts on a University of Alabama message board.¹⁹⁰ He wrote about controversial topics—even defending the early KKK.¹⁹¹ He also failed to disclose on his Senate Judiciary Committee Questionnaire that his wife was then serving as the chief of staff to the

182. Sheryl Gay Stolberg, *A New Front in the Kavanaugh Wars: Temperament and Honesty*, N.Y. TIMES, Oct. 2, 2018, at A1.

183. Mari Uyehara, *All of Brett Kavanaugh's Lies*, GQ (Oct. 1, 2018), <https://www.gq.com/story/all-of-brett-kavanaughs-lies>.

184. Erica Werner & Karoun Demirjian, *Kavanaugh's Temperament, Credibility Under Scrutiny as Senate Heads Toward Vote*, WASH. POST (Oct. 2, 2018), https://www.washingtonpost.com/politics/mcconnell-vows-kavanaugh-vote-here-on-this-floor-this-week/2018/10/02/d47f4ff4-c567-11e8-b1ed-1d2d65b86d0c_story.html.

185. Zoe Tillman, *One of Trump's Judicial Nominees Blogged Under a Pen Name that Ted Cruz was a "Sore Loser."* BUZZFEED NEWS (May 19, 2017), <https://www.buzzfeednews.com/article/zoetillman/one-of-trumps-judicial-nominees-blogged-under-a-pen-name>.

186. G. Morris, *Thanks, Mama Pelosi, for that 700 Point Stock Market Plunge!*, ELEPHANTS IN THE BLUEGRASS (Sept. 29, 2008, 3:51 PM), <https://elephantsinthebluegrass.blogspot.com/2008/09/thanks-mama-pelosi-for-that-700-point.html>.

187. G. Morris, *The Legacy from Dr. King's Dream that Liberals Ignore*, ELEPHANTS IN THE BLUEGRASS (Jan. 23, 2008, 1:13 PM), <https://elephantsinthebluegrass.blogspot.com/2008/01/legacy-from-dr-kings-dream-that.html>.

188. G. Morris, *"Brother's Keeper" – As In, Keep that Anti-Obama Reporter in Jail!*, ELEPHANTS IN THE BLUEGRASS BLOG (Oct. 7, 2008, 12:16 PM), <https://elephantsinthebluegrass.blogspot.com/2008/10/brothers-keeper-as-in-keep-that-anti.html>.

189. 163 CONG. REC. S4121 (2017) (Roll Vote No. 164).

190. Stern, *supra* note 162.

191. *Id.*

White House counsel—a potential conflict of interest.¹⁹² Though Talley was reported out of committee by a party-line vote,¹⁹³ his nomination failed when it ultimately became too embarrassing for the White House and Senate majority to proceed with Talley's candidacy.¹⁹⁴

L. Steven Grasz, a nominee and now judge on the US Court of Appeals for the Eighth Circuit, was questioned about his inability to separate his personal beliefs from his duties as a judge. The ABA Standing Committee noted that it would be hard for Grasz to relinquish his deeply held personal beliefs.¹⁹⁵ In an article he wrote, “Chief Justice Roberts will go down in history not as the disinterested umpire he promised to be, or the advocate of judicial restraint his supporters believed him to be, but rather as the one who ushered in the ultimate transfer of limitless power to the federal government.”¹⁹⁶ When questioned, “Grasz explained his exaggeration as a reaction to his sense of betrayal by a Supreme Court justice whom he had publicly supported.”¹⁹⁷ He also made statements about the “moral bankruptcy which is the legacy of *Roe v. Wade*,” which “raises questions of ability to assess issues neutrally and free of bias.”¹⁹⁸ The ABA Standing Committee also noted that his peers said, “Grasz had been inappropriately aggressive and that his conduct towards opposing counsel could be difficult, bordering on incivility.”¹⁹⁹ Due to this, many individuals refused to talk to the ABA Standing Committee for fear of retribution from Grasz and his allies.²⁰⁰ Further, Grasz omitted from his Senate Judiciary Committee questionnaire an incident where he used confidential information to improperly influence the selection of Nebraska's non-partisan Judicial Nominating Committee.²⁰¹ This “again substantiated peers’ concerns that Mr. Grasz’ judgment may be overcome by his political and ideological allegiances.”²⁰² Ultimately, Senate Republicans disregarded these various concerns and

192. Kristine Phillips, *The Judicial Nominee Who's Never Tried a Case is Also Married to a Trump Administration Lawyer*, WASH. POST (Nov. 13, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/11/13/that-judicial-nominee-whos-never-tried-a-case-is-also-married-to-a-trump-administration-lawyer>.

193. *Results of Executive Business Meeting*, SENATE JUDICIARY COMMITTEE (Nov. 9, 2017), <https://www.judiciary.senate.gov/imo/media/doc/11-9-17%20Results%20of%20Executive%20Business%20Meeting.pdf>.

194. Jennifer Bendery, *Controversial Judicial Nominee Brett Talley Withdraws Nomination*, HUFFPOST (Dec. 13, 2017), https://www.huffpost.com/entry/brett-talley-trump-withdraw-judicial-nominee_n_5a317b65e4b07ff75affd3c4.

195. See PAMELA A. BRESNAHAN ET AL., AM. B. ASS'N STANDING COMM. ON THE FED. JUDICIARY, SUPPLEMENTAL STATEMENT CONCERNING THE NOMINATION OF LEONARD STEVEN GRASZ FOR THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT 16 (2017), <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/GraszSupplementalStatement111317.pdf>.

196. *Id.* at 15.

197. *Id.*

198. *Id.* at 14.

199. *Id.* at 6.

200. *Id.* at 5.

201. PAMELA A. BRESNAHAN ET AL., *supra* note 195, at 13.

202. *Id.* at 17.

voted to confirm Grasz to the Nebraska seat on the Eighth Circuit in December 2017 by a narrow vote of fifty to forty-eight.²⁰³

3. *Hidden Records and Omissions*

The importance of thoroughly vetting lifetime nominees cannot be overstated. Once confirmed, the only recourse is impeachment, which is incredibly difficult and rare.²⁰⁴ The public and senators rely upon the White House counsel's office, the Department of Justice, and the senators' selection advisors and staff to review potential nominees' records and backgrounds to ascertain their truthfulness, experience, reputation, potential conflicts of interest, history with the justice system, temperament, and integrity. While this leaves some discretion, the ability for potential nominees to be forthright and truthful is a basic standard all individuals considering lifetime positions should meet.

Despite this, as the instances described above demonstrate, numerous nominees have failed to share information pertinent to their nomination.²⁰⁵ The most high-profile attempt to hide a nominee's record involved Justice Kavanaugh's nomination to the Supreme Court. Records from his time as staff secretary and in the White House counsel's office during the George W. Bush administration were obscured. The unprecedented jettisoning of the review and release of records by the non-partisan National Archives meant that the only records the Senate and the public saw were those vetted by President Bush's personal lawyer. That lawyer only released approximately 10 percent of the records to the Senate, a smaller percentage of which was available for review by the public.²⁰⁶ This obstruction prompted some senators to file a lawsuit to seek relevant documents.²⁰⁷

As mentioned earlier, Brett Talley, the failed nominee for the US District Court for the Middle District of Alabama, also failed to disclose information pertinent to service on the federal bench. He omitted from his questionnaire thousands of blog posts and comments he wrote on topics

203. 163 CONG. REC. S7978 (daily ed. Dec. 12, 2017) (executive nominations confirmed by the Senate December 12, 2017).

204. See generally, Jared P. Cole & Todd Garvey, CONG. RES. SERV., R44260, IMPEACHMENT AND REMOVAL 4 (2015) (removing a judge from office requires the House of Representatives to initiate impeachment proceedings against the judge and two-thirds of the Senate must vote to convict the judge. This is an exceedingly rare occurrence—the Senate has convicted only eight of the fifteen federal judges impeached by the House of Representatives).

205. See, Paul Gordon, *Trump's Judicial Nominees are Hiding Their Records*, PEOPLE FOR THE AMERICAN WAY BLOG (Mar. 15, 2018), <http://www.pfaw.org/blog-posts/trumps-judicial-nominees-are-hiding-their-records>.

206. Amanda Marcotte, *What's Brett Kavanaugh Hiding? Republicans are Clearly Worried About Nominee's Hidden Records*, SLATE (Sept. 4, 2018), <https://www.salon.com/2018/09/04/whats-brett-kavanaugh-hiding-republicans-are-clearly-worried-about-nominees-hidden-records>.

207. Rebecca Morin, *Democratic Senators File FOIA Lawsuit over Kavanaugh Records*, POLITICO (Sept. 17, 2018, 4:22 PM), <https://www.politico.com/story/2018/09/17/senators-lawsuit-kavanaugh-documents-826152>.

such as the KKK, immigration, abortion, and gun safety.²⁰⁸ Ironically, at the time of his nomination, and for months after, Talley worked in the Department of Justice's Office of Legal Policy vetting nominees with the purpose of ensuring a thorough review of their background and disclosure of such important information.²⁰⁹ Many others hid from the Senate Judiciary Committee their private Twitter accounts. This included prolific tweeter, US Court of Appeals for the Fifth Circuit nominee and current judge, Don Willett, whose distasteful tweets were the focus of his hearing.²¹⁰ Other nominees failed to list their private Twitter accounts, including Judges John Nalbandian, Jonathan Kobes, and Thomas Kleeh.²¹¹

V. CONCLUSION

The Trump administration and Senate Republican's efforts to accomplish through the courts what they cannot legislatively are not coincidental—indeed, they are part and parcel to the larger agenda to roll back decades of progress on civil and human rights.

Trump, himself, is fixated on the federal courts. Judges have frustrated his business and his political agenda. He clearly seeks to remake the courts with those judges he believes will advance his financial and political agenda. He barreled into the presidency while the Senate majority leader broke the rules to hold open a Supreme Court and more than one hundred lower court seats. It was the perfect storm: The small extreme conservative legal community could influence not only litigation strategy, but also the judges who would later decide the cases. It is not an accident that the attorney, Chad Readler, who argued that the Affordable Care Act is unconstitutional is now serving on a court one step below the Supreme Court. By confirming judges like Readler who have demonstrated records of hostility to many of our fundamental civil and human rights, Trump and Senate Republicans can achieve policy change through our courts.

But Trump did not do this alone. Senate Republicans had to fundamentally destroy the norms and guardrails that have long facilitated the nomination and confirmation processes to remake the courts. By disregarding the

208. Zoe Tillman, *A Trump Judicial Nominee Appears To Have Written About Politics On A Sports Website And Didn't Disclose It*, BUZZFEED NEWS (Nov. 13, 2017), <https://www.buzzfeednews.com/article/zoetillman/a-trump-judicial-nominee-appears-to-have-written-about>.

209. Press Release, Office of Senator Richard Blumenthal, *Senators File Suit for Hidden Kavanaugh Documents* (Sept. 17, 2018) (on file with author); Stephanie Mencimer, *Trump Judicial Pick Who Blogged Favorably About the KKK Had to Withdraw. Now He's at the Justice Department*, MOTHER JONES (July 2, 2018), <https://www.motherjones.com/politics/2018/07/trump-judicial-pick-who-blogged-favorably-about-the-kkk-had-to-withdraw-now-hes-at-the-justice-department>.

210. Zoe Tillman, *Some of Trump's Judicial Nominees Have Private Twitter Accounts They Aren't Sharing with the Public*, BUZZFEED NEWS (Oct. 19, 2018), <https://www.buzzfeednews.com/article/zoetillman/trump-judicial-nominees-private-twitter-accounts>.

211. *Id.*

role of home-state senators in the selection and confirmation of judges, packing hearings with multiple controversial nominees, scheduling hearings during recess, and limiting the amount of time the Senate can debate the nominations, Trump and the Senate Republicans have changed the rules to swing the outcome in their favor. With more than 150 lifetime judges confirmed in the Trump administration, the harmful impact on our civil and human rights will be felt for generations. While court decisions recognizing equal justice under law have been celebrated throughout our history, too many court decisions demonstrate just how fragile our hard-fought rights can be. The Trump administration, enabled by this Senate majority, is putting even more of our rights at risk.