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# Nominate Judge Koh to the Ninth Circuit Again

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# NOMINATE JUDGE KOH TO THE NINTH CIRCUIT AGAIN

Carl Tobias\*

## *Abstract*

*During February 2016, President Barack Obama nominated United States District Judge Lucy Haeran Koh to a “judicial emergency” vacancy on the United States Court of Appeals for the Ninth Circuit. She has capably served over multiple years in the Northern District of California competently deciding numerous high-profile lawsuits, specifically regarding intellectual property. Accordingly, the President’s efforts to confirm her were unsurprising. However, 2016 was a presidential election year when judicial nominations traditionally slow and ultimately halt. This difficulty was exacerbated when Republicans consistently refused to implement any confirmation process for United States Court of Appeals for the District of Columbia Circuit Chief Judge Merrick Garland, the experienced and mainstream nominee whom the chief executive had chosen to fill Justice Antonin Scalia’s Supreme Court vacancy during March 2016.*

*Notwithstanding Judge Koh’s manifold talents, the Senate Judiciary Committee did not arrange a hearing for the jurist until five protracted months subsequent to her nomination. That hearing proceeded rather smoothly, although the Grand Old Party (GOP) only conducted the nominee’s discussion and vote eight weeks later when Koh earned a thirteen to seven approval ballot. Republicans had plentiful weeks over which they could have scheduled a Senate debate and up or down vote yet refused the candidate those*

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*procedures and her nomination expired when senators adjourned in early January 2017. Because Koh is a strong and moderate jurist who received nomination for the appellate court, which experiences critical needs for all of its twenty-nine circuit judges to expeditiously, inexpensively, and equitably resolve appeals, California Democratic Senators Dianne Feinstein and Kamala Harris must champion her renomination and President Donald Trump ought to seriously evaluate nominating the jurist again.*

*This piece initially analyzes (1) the comprehensive record assembled by Judge Koh; (2) federal judicial appointments in President Obama's administration, emphasizing 2016 when he selected Koh; and (3) the Ninth Circuit. The paper determines that she was a highly competent and mainstream nominee, while the court of appeals, which confronts four emergency openings, must have its complete contingent to promptly, economically and fairly resolve the United States' most substantial, complex docket. Nevertheless, Republicans would not cooperate, especially after they had won a majority in the 114th Senate, a complication that the 2016 presidential election year magnified, and the GOP furnished Koh no upper chamber debate and vote. The final segment, therefore, provides suggestions for nominating the jurist again and for rapidly confirming her.*

### *I. Introduction*

In February 2016, President Barack Obama tapped United States District Court Judge Lucy Haeran Koh for a “judicial emergency” vacancy on the United States Court of Appeals for the Ninth Circuit.<sup>1</sup> The jurist has professionally served across many years in the United States District Court for the Northern District of California, ably resolving major disputes, especially related to intellectual property.<sup>2</sup> Thus, the chief executive's initiatives to

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1. See White House, Office of the Press Sec'y, President Obama Nominates Judge Lucy Haeran Koh to the United States Court of Appeals (Feb. 25, 2016) (“Today, President Obama nominated Judge Lucy Haeran Koh to serve on the United States Court of Appeals for the Ninth Circuit.”) (on file with Washington and Lee Law Review).

2. See generally *In re Google Inc. Gmail Litig.*, 2013 WL 542398 (N.D. Cal. Mar. 18, 2014). For questions regarding Judge Koh's resolution of the Google

appoint her were not surprising. Yet, 2016 was a presidential election year when much delay suffused nominations.<sup>3</sup> That problem was compounded, as Republicans continually declined to assess United States Court of Appeals for the District of Columbia Circuit Chief Judge Merrick Garland, the accomplished and centrist jurist whom President Obama had nominated to replace Justice Antonin Scalia in March 2016.<sup>4</sup>

Despite Koh's powerful abilities, the Judiciary Committee only scheduled a hearing for Judge Koh twenty prolonged weeks after nomination.<sup>5</sup> This session progressed comparatively well, although Republicans only convened her discussion and ballot two months thereafter when Koh received approval by a margin of thirteen to seven.<sup>6</sup> The Grand Old Party had numerous weeks in which to conduct a Senate vote but denied the nominee that ballot and her candidacy expired with Congress' January 3, 2017 adjournment.<sup>7</sup> Because Judge Koh is an excellent and mainstream

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Gmail litigation that Sen. Cornyn raised in the hearing and committee discussion, see *infra* notes 53-55, 60 and accompanying text.

3. See Jonathan H. Adler, *In Election Years, a (Spotty) History of Confirming Court Nominees*, WASH. POST (Feb. 17, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/17/in-election-years-a-spotty-history-of-confirming-court-nominees/?utm\\_term=.8e9b168c5ede](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/17/in-election-years-a-spotty-history-of-confirming-court-nominees/?utm_term=.8e9b168c5ede) (last visited July 8, 2017) ("For more than three decades, it has been traditional for the Senate to slow-walk appellate nominees made in an election year.") (on file with the Washington and Lee Law Review).

4. See *infra* note 67 and accompanying text (providing an explanation).

5. See *infra* note 49 and accompanying text (documenting that Sen. Grassley only scheduled a July committee hearing nearly five months after Judge Koh's nomination).

6. See *infra* notes 50-61 and accompanying text (describing Judge Koh's hearing which progressed comparatively well, even though Republicans only conducted her discussion and vote two months thereafter when she captured thirteen to seven approval).

7. 162 CONG. REC. S7,183-84 (daily ed. Jan. 3, 2017) (documenting Senate adjournment and the expiration of the candidacies of all of President Obama's judicial nominees); *infra* notes 62-67 and accompanying text (showing that Republicans had substantial time in which to conduct a Senate vote but denied Judge Koh that ballot and her nomination expired with Congress' January 3, 2017 adjournment).

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choice who realized nomination for the tribunal, which desperately requires all twenty-nine of its jurists when providing justice, California Democratic Senators Dianne Feinstein and Kamala Harris must urge her renomination and President Donald Trump should carefully analyze tendering Koh.

This paper assesses (1) her comprehensive record;<sup>8</sup> (2) federal judicial selection throughout President Obama's administration, stressing 2016 when the White House designated Judge Koh;<sup>9</sup> and (3) the Ninth Circuit.<sup>10</sup> The piece ascertains that she was a capable and moderate nominee and that the appellate court, which addresses four emergency vacancies, must possess its entire judicial complement to swiftly, inexpensively, and equitably resolve the nation's largest court of appeals docket. However, the GOP refused to collaborate, particularly after capturing a majority in the 114th Senate,<sup>11</sup> a difficulty that the 2016 presidential election year intensified, and extended Judge Koh no final ballot. The last section, therefore, proffers recommendations for marshaling her appointment.<sup>12</sup>

### II. Judge Koh's Record

Judge Koh is exceptionally qualified for the appellate bench. She was a talented Central District of California prosecutor and strong partner for a well-regarded law firm.<sup>13</sup> In 2008, California Governor Arnold Schwarzenegger (R) placed her on the

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8. See *infra* Part II (providing Judge Koh's record).

9. See *infra* Part III (describing the federal judicial selections of President Obama).

10. See *infra* Part IV (evaluating the needs of the 9th Circuit).

11. See S.A. Miller & Stephen Dinan, *Obama, Democrats Clash With New GOP Majority as 114th Congress Convenes*, WASH. TIMES (Jan. 6, 2015), <http://www.washingtontimes.com/news/2015/jan/6/obama-democrats-clash-with-new-republican-majority/> (last visited July 8, 2017) ("Republicans now control 54 seats in the Senate, a net gain of nine from the previous Congress.") (on file with the Washington and Lee Law Review).

12. See *infra* Part V (providing recommendations).

13. I depend substantially in this section on White House, Press Release, *supra* note 1; Jonathan Jew-Lim, *A Brief Overview of President Obama's Asian American Judicial Nominees in 2010*, 17 AS. AMER. L. J. 224, 233–37 (2010).

Superior Court for Santa Clara County.<sup>14</sup> Two years after that, Obama proposed Judge Koh, who attained a ninety to zero vote for the district bench,<sup>15</sup> where she has compiled an estimable record.<sup>16</sup> When picking Koh last year, Obama described her as “a first-rate jurist [of] unflagging integrity and evenhandedness.”<sup>17</sup> Judge Koh was the initial Asian-American member to serve on the Northern District of California.<sup>18</sup> The jurist has effectively reviewed multiple particularly significant lawsuits. Notable was her masterful disposition of Apple’s patent infringement case against Samsung.<sup>19</sup>

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14. For Governor Schwarzenegger’s 2008 appointment of Judge Koh as a Superior Court judge for San Jose County, see White House Press Release, *supra* note 1; Press Release, Office of the Governor, Governor Schwarzenegger Appoints Lucy Koh to Santa Clara County Superior Court (Jan. 25, 2008), <https://web.archive.org/web/20080128175850/http://gov.ca.gov/press-release/8613/> (last visited July 10, 2017) (on file with the Washington and Lee Law Review).

15. For President Obama’s nomination of Judge Koh to the Northern District of California, see White House Press Release, *supra* note 1; White House, Office of the Press Sec’y, President Obama Nominates Five to Serve on the U.S. District Courts (Jan. 20, 2010) (on file with the Washington and Lee Law Review). For Judge Koh’s confirmation to the Northern District of California, see 156 CONG. REC. S4,587 (daily ed. June 7, 2010).

16. For Judge Koh’s estimable record, see White House Press Release, *supra* note 1; *infra* notes 17–22 and accompanying text.

17. White House Press Release, *supra* note 1; see Bob Egelko, *Lucy Koh Nominated for U.S. Court of Appeals in S.F.*, SAN FRANCISCO CHRON. (Feb. 25, 2016), <http://www.sfgate.com/bayarea/article/Obama-nominates-local-judge-to-federal-appeals-6855113.php> (last updated Feb. 25, 2016) (last visited June 30, 2017) (describing Judge Koh and her extensive record) (on file with the Washington and Lee Law Review).

18. See Egelko, *supra* note 17 (describing Judge Koh’s pathbreaking Northern District of California appointment); Howard Mintz, *San Jose Judge Koh Nominated to Federal Appeals Court*, SAN JOSE MERCURY NEWS (Feb. 25, 2016), <http://mercurynews.com/2016/02/25/san-jose-lucy-koh-nominated-to-federal-appeals-court/> (last visited June 30, 2017) (discussing Judge Koh’s comprehensive record) (on file with the Washington and Lee Law Review).

19. See generally *Apple, Inc. v. Samsung Electronics Co.*, 2011 WL 7036077 (N.D. Cal. Dec. 2, 2011), *aff’d in part, vacated in part, remanded*, 678 F.3d 1314 (Fed. Cir. 2012); Kristen Brown, *In Silicon Valley, Lucy Koh is the Law*, SAN FRANCISCO CHRON. (Aug. 10, 2014), <http://www.sfgate.com/bayarea/article/In-Silicon-Valley-Lucy-Koh-is-the-law-5679303.php> (last updated Aug. 10, 2014) (last visited June 30, 2017) (describing Judge Koh’s astute resolution of the case)

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Koh also felicitously resolved claims pursued by thousands of employees who argued that high-tech businesses directly conspired to limit salaries by pledging they would not hire any others' workers.<sup>20</sup> Judge Koh rejected a settlement offer as it was too low; the companies ultimately agreed to pay a \$ 415 million settlement.<sup>21</sup> The American Bar Association (ABA) evaluation group ranked her well qualified.<sup>22</sup>

Judge Koh surely deserved prompt approval. She resembles numerous other impressive and diverse Obama confirmees who provide manifold benefits.<sup>23</sup> Tribunals with all of their jurists can more quickly, economically, and fairly review numbers of complicated filings.<sup>24</sup> Improved ethnic, gender, and sexual preference diversity increases comprehension and equitable resolution of critical issues, which appeals courts decide.<sup>25</sup> Ethnic

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(on file with the Washington and Lee Law Review).

20. See generally *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012); Davey Alba, *The Meme-Worthy Judge of Silicon Valley*, WIRED.COM (Apr. 21, 2015), <https://www.wired.com/2015/04/lucy-koh/> (last visited June 30, 2017) (noting Judge Koh's careful resolution of a lawsuit that myriad observers watched very closely because the litigation had the potential to dramatically alter the "global smartphone business") (on file with the Washington and Lee Law Review).

21. See generally Order on Attorney's Fees, *High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012) (No. 11-CV-02509-LHK); *supra* notes 18, 20 (providing additional analysis of how Judge Koh resolved the critical litigation).

22. See generally ABA STANDING COMM. ON THE FEDERAL JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES (2016), <http://www.americanbar.org/content/dam/aba/uncategorized/GAO/WebRatingChart114.suthcheckdam.pdf>.

23. Carl Tobias, *Confirm Judge Koh for the Ninth Circuit*, 73 WASH. & LEE L. REV. ONLINE 449, 451 (2016).

24. See 160 CONG. REC. S5,364 (daily ed. Sept. 8, 2014) (statement of Sen. Leahy) (contending that federal courts which possess all of their judges will relatively promptly, economically, and fairly resolve large, complex dockets); Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2239–40, 2254 (2013) (discussing that appellate courts which possess their complete judicial contingents will comparatively swiftly, inexpensively, and equitably address substantial, complex dockets).

25. The judges resolve appeals, which implicate controversial issues that involve critical areas, such as criminal procedure, civil rights and abortion. See generally SALLY KENNEY, GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER (2013); FRANK WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE (2003). *But see* Stephen Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504, 505 (2011) (concluding that the scholars' empirical analysis revealed

minority judges also constrict biases that frequently undermine justice.<sup>26</sup> Nevertheless, treatment which the GOP accorded many of President Obama's nominees, suggested that Judge Koh would experience problems in receiving a 2016 appointment.<sup>27</sup>

### *III. Obama Administration Judicial Selection*

Selection proceeded efficaciously in President Obama's early years when Democrats commanded an upper chamber majority. The White House assertively consulted home state officials, in particular Republicans, soliciting and usually following proffers of superb, diverse nominees.<sup>28</sup> This promoted cooperation as officers from states, which experience open posts, realize much deference because they can stop the process with "blue slip" retention.<sup>29</sup> Even when President Obama assiduously consulted the home state politicians, some proposed few accomplished

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that there were "only insignificant gender-related differences" in substantive decisionmaking of female jurists who serve on state high courts).

26. See generally U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT, REPORT OF THE FIRST CIRCUIT GENDER, RACE AND ETHNIC BIAS TASK FORCES (1999). For this and other benefits of a diverse bench, see Sylvia Lazos, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L. J. 1423, 1442 (2008); Tobias, *supra* note 24, at 2249.

27. See Carl Tobias, *Confirming Circuit Judges in a Presidential Election Year*, 84 GEO. WASH. L. REV. ARGUENDO 160 (2016) (showing how treatment which Republicans accorded many of President Obama's appellate court nominees suggested that Judge Koh would experience difficulty in securing 2016 appointment).

28. See Tobias, *supra* note 24, at 2239–40, 2253 (describing how the Obama White House assertively consulted home state officials, especially Republicans, soliciting and usually following proffers of superb, diverse nominees); Sheldon Goldman et al., *Obama's First Term Judiciary*, 97 JUDICATURE 7, 8–17 (2013) (describing the judicial selection process in President Obama's initial administration).

29. See Ryan Owens et al., *Ideology, Qualifications, and Court Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347 (describing nominees' ideology and qualifications and their obstruction by senators generally and the deployment of blue slips specifically); see Tobias, *supra* note 24, at 2242 (assessing cooperation which involved judicial selection between the Obama White House and the Senate).



designees.<sup>30</sup>

The GOP coordinated with routine Senate hearings, yet the party “held over” discussions and committee ballots a week for all but one in sixty-five competent appellate picks.<sup>31</sup> Republicans slowly concurred on prospects’ final debates, when required, and votes, forcing strong centrists to languish ample weeks until Democrats pursued cloture.<sup>32</sup> Because Republicans also demanded numerous roll call ballots and debate minutes for consensus nominees, who readily secured appointment, this practice consumed scarce floor hours.<sup>33</sup> Those procedures stymied approvals, leaving essentially twenty circuit vacancies over practically the half decade after fall 2009.<sup>34</sup>

In the 2012 presidential election year, these machinations

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30. See Goldman et al., *supra* note 28, at 17; *John Cornyn and Ted Cruz’s Texas: A State of Judicial Emergency*, ALLIANCE FOR JUST., <http://www.afj.org/our-work/issues/judicial-selection/texas-epicenter-of-the-judicial-vacancy-crisis> (last updated Sept. 6, 2016) (last visited June 30, 2017) (asserting that the Texas Republican senators slowed their recommendations of candidates for the Obama White House’s consideration over protracted periods) (on file with the Washington and Lee Law Review); 161 CONG. REC. S6,151 (daily ed. July 30, 2015) (statement of Sen. Schumer) (contending that Republican obstruction was responsible for severely delayed Senate consideration of President Obama’s nominees in 2015).

31. See *Executive Business Meeting*, SENATE COMMITTEE ON THE JUDICIARY (Mar. 22, 2013), <http://www.judiciary.senate.gov/meetings/rescheduled-executive-business-meeting-2013-03-22> (last visited June 30, 2017) (documenting committee approval of Eighth Circuit Judge Jane Kelly, who was President Obama’s sole appellate court nominee whom the panel did not hold over) (on file with the Washington and Lee Law Review); Tobias, *supra* note 24, at 2242–43 (describing Republican actions in holding over all of President Obama’s appellate court nominees except Judge Kelly).

32. I depend substantially in this paragraph’s remainder on Goldman et al., *supra* note 28, at 26–29; Tobias, *supra* note 24, at 2243–46.

33. See Tobias, *supra* note 24, at 2244 (documenting Republicans’ demand for numerous roll call ballots and debate minutes for consensus nominees, who readily secured appointment, thus wasting scarce floor hours); Juan Williams, *The GOP’s Judicial Logjam*, THE HILL (July 27, 2015, 6:00 AM), <http://thehill.com/opinion/juan-williams/249196-juan-williams-the-gops-judicial-logjam> (last visited June 30, 2017) (describing judicial logjam that was created by Republican obstruction of President Obama’s nominees in 2015 and earlier) (on file with the Washington and Lee Law Review).

34. See *Archive of Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/judgeships/judicial-vacancies/archive-judicial-vacancies> [hereinafter *Judicial Vacancies*] (last visited June 30, 2017) (providing empirical data for years 2009–2014) (on file with the Washington and Lee Law Review).

grew; stalling prevailed while the GOP halted court of appeals nominees' Senate ballots on June 13 of that year.<sup>35</sup> With President Obama's reelection, Democrats fervently hoped for greater Republican collaboration, which failed to materialize, and obstruction persisted the following year when the White House offered three fine, centrist, diverse aspirants for the D.C. Circuit, the nation's second most important tribunal.<sup>36</sup> The GOP refused to grant any of the nominees confirmation votes, and protracted resistance forced Democrats to marshal the "nuclear option"<sup>37</sup> that confined filibuster use.<sup>38</sup>

Across 2015, once Republicans had captured a Senate majority,<sup>39</sup> the already negligible cooperation between the political parties additionally decreased. The GOP Senate leaders constantly

35. See Tobias, *supra* note 23, at 451 (documenting Republican obstruction which halted Senate ballots regarding appellate court nominees on June 13, 2012).

36. I depend substantially in this paragraph's remainder on Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L. J. 121 (2015); Jeffrey Toobin, *The Obama Brief*, NEW YORKER, Oct. 27, 2014, at 24.

37. See Alex Seitz-Wald, *The Nuclear Option: What It Is and Why It Matters*, NBC NEWS (Apr. 3, 2017, 2:06 PM), <http://www.nbcnews.com/politics/congress/nuclear-option-what-it-why-it-matters-n742076> (last updated Apr. 6, 2017) (last visited July 8, 2017) ("The 'nuclear option' is a last-resort, break-in-case-of-emergency way for the majority party in the Senate to overcome obstruction by the minority.") (on file with the Washington and Lee Law Review).

38. The 113th Senate confirmed 130 judges. *Judicial Vacancies*, *supra* note 34 (providing empirical data for years 2013-14); 161 CONG. REC. S3,223 (daily ed. May 21, 2015) (statement of Sen. Leahy) (explaining that Republicans forced Democrats to invoke cloture on all circuit and district court nominees whom the Senate accorded final votes after the nuclear option's November 2013 explosion until 2015).

39. See Jerry Markon et al., *Republicans Win Senate Control as Polls Show Dissatisfaction With Obama*, WASH. POST (Nov. 4, 2014), [https://www.washingtonpost.com/politics/senate-control-at-stake-in-todays-midterm-elections/2014/11/04/e882353e-642c-11e4-bb14-4cfea1e742d5\\_story.html?utm\\_term=.33614ddf80c2](https://www.washingtonpost.com/politics/senate-control-at-stake-in-todays-midterm-elections/2014/11/04/e882353e-642c-11e4-bb14-4cfea1e742d5_story.html?utm_term=.33614ddf80c2) (last visited June 30, 2017) ("Republicans won control of the Senate Tuesday evening as GOP candidates across the country swept to victory in crucial midterms elections . . .") (on file with the Washington and Lee Law Review); Jonathan Weisman & Ashley Parker, *G.O.P. Takes Senate*, N.Y. TIMES, Nov. 5, 2014, at A1 (describing how Republicans captured a Senate majority in the 2014 midterm elections).

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promised that they would again bring to the chamber “regular order,” the approach which senators employed before Democrats putatively undercut it. Senator Mitch McConnell (R-Ky.), the new Majority Leader, powerfully stated: “We need to return to regular order.”<sup>40</sup> Senator Chuck Grassley (R-Iowa), the Chair of the Judiciary Committee, vowed that the panel would similarly analyze the President’s submissions.<sup>41</sup> Despite copious pledges, Republicans slowly afforded possibilities for Obama’s consideration, while the GOP delayed hearings, committee votes, chamber debates, and up or down ballots for nominees whom the President had selected.<sup>42</sup>

Upon 2015’s close, this meant that eight of nine appellate court openings which lacked any nominees—that the U.S. Courts identified as emergencies—plagued jurisdictions which GOP senators represented.<sup>43</sup> Merely *two* jurists won circuit appointment

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40. For Senator McConnell’s recitation of this regular order mantra ever since Republicans secured an upper chamber majority in the 2014 midterm elections, see 161 CONG. REC. S27 (daily ed. Jan. 7, 2015); 161 CONG. REC. S2,767 (daily ed. May 12, 2015). *But see* 161 CONG. REC. S2,949 (daily ed. May 18, 2015) (statement of Sen. Reid) (criticizing Republicans for neglecting to follow regular order when the GOP trumpeted the party’s intention to reinstitute that order after capturing the Senate); Leahy statement, *supra* note 24 (criticizing Republicans for their “senseless obstruction” of Jill Pryor, President Obama’s very qualified Eleventh Circuit nominee, for two and a half years).

41. *See Hearing on Nominees*, SENATE COMMITTEE ON THE JUDICIARY (Jan. 21, 2015), <http://www.judiciary.senate.gov/meetings/nominations-2015-01-21> (last visited June 30, 2017) (providing Sen. Grassley’s pledge that the Judiciary Committee would follow regular order when processing judicial nominees) (on file with the Washington and Lee Law Review); David Catanese, *Chuck Grassley’s Gavel Year*, U.S. NEWS & WORLD REP. (Jan. 28, 2015, 12:01 AM), <https://www.usnews.com/news/articles/2015/01/28/chuck-grassleys-gavel-year> (last visited June 30, 2017) (discussing Sen. Grassley’s promise that the committee would follow regular order in processing nominees) (on file with the Washington and Lee Law Review).

42. Tobias, *supra* note 23, at 454.

43. Republican senators cooperated little throughout 2015, so President Obama decided to nominate no appellate candidate that year and chose to nominate seven candidates in 2016. Four of those individuals never received committee hearings because home state politicians refused to deliver blue slips for the nominees. The Administrative Office of the United States Courts premises judicial emergency vacancies on the substantial magnitude of dockets and the protracted length of vacancies. *See Judicial Vacancies*, *supra* note 34 (providing empirical data for years 2015-16).

throughout President Obama's last half term.<sup>44</sup> There was virtually no precedent for this; the Democratic chamber majority rapidly approved ten of President George W. Bush's choices during his final two years and six candidates whom President Ronald Reagan nominated and Supreme Court Justice Anthony Kennedy in 1988.<sup>45</sup>

Selection and election year politics undermined Judge Koh's full review, as concerted 2016 jousting about the High Court vacancy attested. She had been a District Judge, which often facilitates confirmation, and the jurist's investigations merely required updating because Judge Koh had enjoyed appointment, compiling a distinguished and accessible record.<sup>46</sup> The panel carefully assessed her by collaborating with the Federal Bureau of Investigation (FBI) and the Justice Department.<sup>47</sup>

The Chair of the Judiciary Committee should have efficiently arranged a panel hearing because Judge Koh is very astute, the Ninth Circuit must have every position filled, and Senator Grassley ought to have reciprocated for Democrats' collegially approving ten court of appeals judges in 2007-08.<sup>48</sup> The Chair only scheduled a July panel hearing nearly five months after

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44. Tobias, *supra* note 23, at 455–56 (describing the appointments processes for the two circuit jurists who captured confirmation in 2015).

45. See *Judicial Vacancies*, *supra* note 34 (providing empirical data for years 1988, 2007, and 2008); Christopher Kang, *Republican Obstruction of Courts Could Be Worst Since 1800's*, HUFFINGTONPOST (Apr. 20, 2016, 3:31 PM), [http://www.huffingtonpost.com/Christopher-kang/republican-obstruction-of\\_b\\_9741446.html](http://www.huffingtonpost.com/Christopher-kang/republican-obstruction-of_b_9741446.html) (last updated Apr. 21, 2017) (last visited June 30, 2017) (making a prediction that circuit appointments in 2016 would be the fewest since the 1800s when the courts had only 25 judges, prognostication which proved accurate) (on file with the Washington and Lee Law Review).

46. See Tobias, *supra* note 24, at 2258 (describing how the nomination of sitting district judges for the appellate bench can facilitate their confirmation); *supra* notes 13–22 and accompanying text (noting Judge Koh's impressive record).

47. Judge Koh had enjoyed thorough assessment in 2010 when President Obama nominated her for the Northern District of California, which meant that the jurist's 2016 evaluation could be relatively brief. See Tobias, *supra* note 23, at 461 (describing Judge Koh's assessment); *supra* note 17 and accompanying text (discussing Judge Koh's record).

48. Tobias, *supra* note 18, at 461.

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Koh's nomination.<sup>49</sup> Senators Barbara Boxer (D-Cal.) and Feinstein enthusiastically introduced Koh, praising her as the consummate "American success story" while emphasizing the profoundly troubled circuit straits and Koh's powerful bipartisan support from preeminent Republicans,<sup>50</sup> who included Schwarzenegger, and ex-Tenth Circuit Judge and Stanford Law Professor, Michael McConnell.<sup>51</sup>

Senators then questioned Judge Koh, who answered clearly and diligently. Senator John Cornyn (R-Tex.) aggressively pressed the nominee regarding the opinion that she wrote in the Google Gmail litigation, which the legislator forcefully declared "effectively invalidated the Electronic Privacy Act."<sup>52</sup> The jurist contended that when she originally ruled, and today, the Ninth Circuit lacked any precedent; thus, the nominee consulted other significant precedent that yielded a split of authority.<sup>53</sup> Judge Koh thoroughly explicated the analytical process deployed.<sup>54</sup> Senator Thom Tillis (R-N.C.) criticized her book review, which he argued urged minority judges to be wiser than 60-year old caucasian jurists when addressing lawsuits that involve people of color.<sup>55</sup> The nominee sharply disputed this, protesting that she had penned the

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49. *See Hearing on Nominees*, SENATE COMMITTEE ON THE JUDICIARY (July 13, 2016), <http://www.judiciary.senate.gov/meetings/07/13/2016/nominations> (providing a recording of Judge Koh's hearing for confirmation) (last visited June 30, 2017) (on file with the Washington and Lee Law Review); *see supra* note 1 and accompanying text (documenting President Obama's February 25, 2016 nomination of Judge Koh).

50. *See Hearing, supra* note 49 (providing footage of the statements of Senators Feinstein and Boxer) (on file with the Washington and Lee Law Review).

51. *Id.*

52. *Id. See generally In re Google Inc. Gmail Litig.*, 2013 WL 542398 (N.D. Cal. Mar. 18, 2014) (providing Judge Koh's judicial opinion in the *Google* Gmail litigation about which Senator Cornyn questioned her); Electronic Privacy Act, 18 U.S.C. § 2510 (2006).

53. Judge Koh thoroughly canvassed numerous federal and state court opinions which had treated similar issues. *See Hearing, supra* note 49 (supplying footage of the statements of Judge Koh) .

54. *Id.*

55. *Id.*; *see also* Michelle Anglade, Stefanie Balandis, Lucy Koh & Peggie Smith, *Yearning: Race, Gender and Cultural Politics*, 14 HARV. WOMEN'S L. J. 255, 259–60 (1991) (providing Judge Koh's book review co-authored when she was a law student).

review while a law student.<sup>56</sup> Most on the panel did appear satisfied. A few next posed written queries to which Koh deftly responded.<sup>57</sup>

Senator Grassley set a panel debate for September when the prolonged “August” recess ended, but the GOP held over Judge Koh for seven days like myriad additional prospects.<sup>58</sup> A week later, the committee rigorously discussed her, and Senator Cornyn articulated his opposition premised on the *Google* case.<sup>59</sup> Nonetheless, Grassley and three other members favored Koh, who secured approval.<sup>60</sup>

Plentiful ideas show that Judge Koh warranted a rapid floor debate and Senate vote. The GOP needed to effectuate the

56. Judge Koh remarked that her judicial record showed she has worked to be “extremely impartial.” *Hearing, supra* note 49.

57. *See id.* (stating that the record would be open one week for members to submit their queries). Most of the senators’ written questions were not particularly controversial, and Judge Koh’s answers were expeditious, careful, and responsive. SENATOR CHUCK GRASSLEY, QUESTIONS FOR THE RECORD (2016), <https://www.judiciary.senate.gov/imo/media/doc/Koh%20Responses%20to%20QFRs.pdf>. (last visited July 10, 2017) (on file with the Washington and Lee Law Review).

58. *See Executive Business Meeting*, SENATE COMMITTEE ON THE JUDICIARY (Sept. 8, 2016), <http://www.judiciary.senate.gov/meetings/09/08/2016/executive-business-meeting-09/08/16> (last visited June 30, 2017) (supplying the agenda for September 8, 2016) (on file with the Washington and Lee Law Review); *supra* note 14 and accompanying text (documenting that Republicans had held over all except a minuscule percentage of President Obama’s circuit court nominees).

59. *See Executive Business Meeting*, SENATE COMMITTEE ON THE JUDICIARY (Sept. 15, 2016), <http://www.judiciary.senate.gov/meetings/09/15/2016/executive-business-meeting-09/15/16> (furnishing the rigorous committee discussion of Judge Koh and Sen. Cornyn’s articulation of his opposition premised on the *Google* case) (last visited June 30, 2017) (on file with the Washington and Lee Law Review); *see supra* notes 53–55 and accompanying text (assessing the exchange involving the *Google* case between Judge Koh and Sen. Cornyn).

60. *See Executive Business Meeting, supra* note 59. Obama elevated jurists—illustrated by Ninth Circuit Judge Jacqueline Nguyen—have easily secured votes, as they had won unanimous reports with similar appointments. *See Tobias, supra* note 23, at 462 n.71 (asserting that Obama elevated jurists illustrated by Judge Nguyen easily secured votes); Tobias, *supra* note 24, at 2258 (describing the efficacy of elevation for confirming district judges to the appellate courts).

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regular order that it continually lauds while honoring directly relevant 2008 precedent.<sup>61</sup> There was considerable time for staging the nominee's final debate and ballot over 2016's remainder, yet Senator McConnell decided to reject them. Koh's advocates could have aggressively pursued cloture<sup>62</sup> but duly refrained, as the Majority Leader would definitely have opposed that.<sup>63</sup> Once Judge Koh reached the floor, McConnell should have arranged a dignified, respectful debate, which robustly ventilated pertinent questions, while the chamber ought to have speedily voted.

The year 2016 was a presidential election year in which appointments conventionally slow and can ultimately halt.<sup>64</sup> This phenomena was exacerbated by GOP denial of any process to Circuit Judge Garland, President Obama's impressive Supreme Court pick.<sup>65</sup> Those aspects complicated approval for Judge Koh and fifty remaining Obama circuit and district court nominees,

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61. See Tobias, *supra* note 23, at 454 n.22, 455 n.29 (providing examples of Sen. McConnell urging regular order and recommending expeditious approval of President Bush's 2008 appellate nominees). President Obama's Seventh Circuit nominee Donald Schott and Eighth Circuit nominee Jennifer Klemetsrud Puhl captured 2016 panel reports. See Tobias, *supra* note 27, at 173 (supplying the 2016 panel reports).

62. See *supra* note 38 and accompanying text (documenting that competent, mainstream nominees customarily secure cloture).

63. See 162 CONG. REC. S5,312 (daily ed. Sept. 7, 2016) (giving an example of unanimous consent denial). Senator Feinstein expressed hope that the Senate would accord Judge Koh a final vote in the 2016 lame duck session, which Republicans neglected to provide. See Michael Doyle, *What's Ahead for West's Liberal Appeals Court?*, SACRAMENTO BEE (Nov. 23, 2016, 2:11 PM), <http://www.sacbee.com/news/article116777848.html> (last visited July 10, 2017) ("It's been nine months since Judge Lucy Koh was nominated to the 9th Circuit Court of Appeals and it's time she received an up-or-down vote. Her nomination doesn't need to wait until next year.") (on file with the Washington and Lee Law Review).

64. See Adler, *supra* note 3 (providing an explanation).

65. See Russell Wheeler, *The Thurmond Rule and Other Advice and Consent Myths*, BROOKINGS INST. (May 25, 2016), <https://www.brookings.edu/blog/fixgov/2016/05/25/the-thurmond-rule-and-other-advice-and-consent-myths/> (last visited June 30, 2017) ("Like a bad penny, the 'Thurmond Rule' is surfacing again in Senate debates over judicial confirmations.") (on file with the Washington and Lee Law Review); Michael Shear, *Obama Pick Opens Court Battle*, N.Y. TIMES, Mar. 17, 2016, at A1 (describing President Obama's nomination of Judge Garland and predicting that Republicans would precipitate a Supreme Court battle).

even though custom has allowed court of appeals choices to secure votes after May in each contemporary presidency.<sup>66</sup>

#### *IV. Explanations For And Consequences Of Problematic Judicial Selection*

The reasons why selection is problematic are complex.<sup>67</sup> Numerous observers do ascribe the modern “confirmation wars” to D.C. Circuit Judge Robert Bork’s attempted Supreme Court approval.<sup>68</sup> Some explain that the process has cratered, as seen through corrosive partisanship, serial paybacks, and striking divisiveness in which both parties constantly ratchet down the system, witnessed by persistent refusal to even assess Judge

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66. See Wheeler, *supra* note 65 (assessing the applicable customs); Tobias, *supra* note 27, at 170 (documenting numerous post-May votes during presidential election years of modern administrations for many appellate court nominees). When Republicans refused to consider Judge Garland, that obstruction slowed Judge Koh and many other Obama nominees. See *generally Executive Business Meeting*, SENATE COMMITTEE ON THE JUDICIARY (Mar. 17, 2016), <https://www.judiciary.senate.gov/meetings/03/17/2016/executive-business-meeting-03/17/2016> (last visited July 10, 2017) (providing statements of Sens. Leahy & Grassley) (on file with the Washington and Lee Law Review); *Executive Business Meeting*, SENATE COMMITTEE ON THE JUDICIARY (May 19, 2016), <http://www.judiciary.senate.gov/meetings/05/19/2016/executive-business-meeting-05/19/16> (last visited July 10, 2017) (providing statements by Sen. Grassley and Sen. Leahy regarding how Republicans refused to consider Judge Garland and how that obstruction slowed Judge Koh and many other Obama nominees) (on file with the Washington and Lee Law Review).

67. Scholars and senators vigorously debate whether the judicial selection process has always been as controversial as it has become today. See *generally* Michael Gerhardt & Michael Stein, *The Politics of Early Justice*, 100 IOWA L. REV. 551 (2014); Orrin Hatch, *The Constitution as Playbook for Judicial Selection*, 32 HARV. J. L. & PUB. POL’Y 1035 (2009).

68. For more analysis of Judge Bork’s attempted Supreme Court confirmation, see *generally* ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989); MARK GITENSTEIN, *MATTERS OF PRINCIPLE: AN INSIDER’S ACCOUNT OF AMERICA’S REJECTION OF ROBERT BORK’S NOMINATION TO THE SUPREME COURT* (1992). *But see* LAURA KALMAN, *THE LONG REACH OF THE SIXTIES: LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT* (2017) (tracing the contemporary confirmation wars to Supreme Court confirmation processes in the 1960s).



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Garland, President Obama's High Court nominee.<sup>69</sup>

The implications are bleak. The constricted approvals since 2015 mean that the judiciary currently experiences twenty-one circuit and fifty-three emergency, unfilled posts.<sup>70</sup> The bench could have merely seven openings in 2014 *after* Democrats exploded the “nuclear option” that cabined filibusters.<sup>71</sup> However, recent inaction multiplied vacancies and emergencies, which increased Ninth Circuit emergencies to four.<sup>72</sup> Delayed appointments impose crucial adverse consequences.<sup>73</sup> They make nominees actually put careers on hold and saliently prevent excellent candidates from thinking about court service.<sup>74</sup> Protracted reviews deprive the

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69. The latest dispute seemingly began with Democrats' alleged slowing of President Bush's nominees and with purportedly worse GOP obstruction throughout Obama's administration. Democrats then detonated the nuclear option ostensibly to approve numerous circuit and district court judges. The GOP next putatively slowed all of President Obama's nominees, especially by demanding that Democrats seek cloture on every candidate. *See Tobias, supra* note 23, at 458 n.44 (describing how the latest judicial confirmation dispute began and how Republicans and Democrats ratcheted up the stakes in the confirmation process).

70. Judicial vacancies quadrupled from twelve when the GOP became the Senate majority to fifty-three. *See Judicial Vacancies, supra* note 34 (supplying empirical data for years 2015, 2017); Eric Lipton & Jeremy W. Peters, *Conservatives Press Overhaul in the Judiciary*, N.Y. TIMES, Mar. 19, 2017, at A1 (assessing how Republican obstruction, especially during President Obama's final two years, afforded President Trump the opportunity to fill more than 100 circuit and district court vacancies).

71. *See Judicial Vacancies, supra* note 34 (providing empirical data for year 2014); *supra* notes 36–38 and accompanying text (describing the developments involving Republican recalcitrance in the confirmation process for three D.C. Circuit nominees that forced Democrats to explode the nuclear option).

72. *See Judicial Vacancies, supra* note 34 (furnishing empirical data for emergency vacancies throughout 2016, including four Ninth Circuit emergencies, three of which materialized in late 2016).

73. *See Tobias, supra* note 24, at 2253 (assessing many critical adverse effects that delayed appointments impose); Leahy statement, *supra* note 24 (criticizing “some Senate Republicans [who] continued their “senseless obstruction” of President Obama's highly qualified Eleventh Circuit nominee by making Jill Pryor wait more than two years on a confirmation vote).

74. *See Andrew Cohen, In Pennsylvania, the Human Costs of Judicial Confirmation Delays*, ATLANTIC (Sept. 9, 2012), <http://www.theatlantic.com/politics/archive/2012/09/in-pennsylvania-the-human-costs-of-judicial-confirmation-delays/261862/> (last visited June 30, 2017) (discussing the difficulty of being a judge in the Middle District of Pennsylvania

bench of judicial resources and many litigants of justice.<sup>75</sup> These detrimental impacts severely undercut citizen regard for the process and the federal government's branches.<sup>76</sup> Few tribunals encounter challenges as confounding as the Ninth Circuit, which decides the most appeals that consume the greatest time.<sup>77</sup>

In sum, this analysis reveals the compelling exigency to place superb jurists in all four of the Ninth Circuit empty positions and muster Judge Koh's nomination again. The Senate had a constitutional duty to afford her a chamber ballot, which manifest precedent supported—a few of President Bill Clinton's unconfirmed aspirants were in President George W. Bush's first group of nominees.<sup>78</sup> Koh also would have made significant

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when there are protracted vacancies due to Senate delay) (on file with the Washington and Lee Law Review); Lipton & Peters, *supra* note 70 (describing how obstruction makes nominees place careers on hold and prevents excellent candidates from considering judicial service).

75. See JOHN G. ROBERTS, JR., YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2010) (prolonged openings deprive the courts of judicial resources that they require to deliver justice); Tobias, *supra* note 24, at 2253 (noting that protracted vacancies deprive the bench of judicial resources that courts need to deliver justice); Jennifer Bendery, *Federal Judges are Burned Out, Overworked and Wondering Where Congress Is*, HUFFINGTON POST (Sept. 30, 2015), [http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies\\_us\\_55d7721e4b0a40aaf14b](http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_us_55d7721e4b0a40aaf14b) (last visited June 30, 2107) (evaluating the increased pressures that protracted vacancies impose on sitting judges) (on file with the Washington and Lee Law Review).

76. See Goldman et al., *supra* note 28, at 15–17 (suggesting that the detrimental impacts imposed by prolonged vacancies can undermine public respect for the judicial selection process and the branches of the federal government); Tobias, *supra* note 24, at 2253 (asserting that the deleterious effects of protracted vacancies erode citizen regard for the appointments process and the federal government branches).

77. See JUDICIAL BUS. OF THE UNITED STATES COURTS, UNITED STATES COURTS OF APPEALS—MEDIAN TIME INTERVALS IN MONTHS FOR CASES TERMINATED ON THE MERITS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2016, Table B-4 (2017), [http://www.uscourts.gov/sites/default/files/data\\_tables/B04Sep15.pdf](http://www.uscourts.gov/sites/default/files/data_tables/B04Sep15.pdf) (providing data on the number of 9th Circuit appeals and the time required to resolve them).

78. Particularly notable precedents were the confirmations of ten circuit nominees whom President Bush had selected in 2007-08 and six nominees as well as Justice Kennedy whom President Reagan had selected in 1988. See generally *supra* notes 45, 66. President Clinton had nominated Barrington Parker to the

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contributions and resembled nominees smoothly canvassed and elevated in presidential election years, so that denying a final vote bore little relationship to her candidacy's merits.<sup>79</sup> The jurist as well deserves renomination because it will conserve badly-needed time and funds that must be dedicated to restarting the process of selection, while Ninth Circuit litigants, members, and counsel have dire needs for an entire judicial contingent.<sup>80</sup> Nominating her again would permit President Trump to cultivate the Senate minority, whose active cooperation will be important when filling the openings. Further, renomination could persuade Democrats to eschew retaliation for the unprecedented GOP denial of any review to Judge Garland or floor ballots to Koh or six additional court of appeals prospects whom Obama named last year.<sup>81</sup>

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Second Circuit and recess appointed Roger Gregory to the Fourth Circuit. *See* Neil Lewis, *Bush Appeals for Peace on His Picks for the Bench*, N.Y. TIMES, May 10, 2001 (discussing President Bush's renomination of Barrington Parker and Roger Gregory whom President Clinton had nominated but the Senate failed to confirm).

79. *See supra* note 40 (assessing the technique of elevating sitting district judges to the appellate courts which all modern Presidents have practiced); *supra* notes 18, 24–26 and accompanying text (recounting Judge Koh's numerous contributions); *supra* notes 13–22, 46–66 and accompanying text (finding that Judge Koh's comprehensive experience, her committee approval, and factors unrelated to the merits of Koh's candidacy, namely the presidential election year and Republican obstruction that denied her final vote, suggest that ideology did not drive Koh's nomination or confirmation).

80. *See supra* note 56 and accompanying text (explaining why the Ninth Circuit needs a complete complement); *infra* note 84 (renominating Judge Koh would conserve scarce resources, because she had already received thorough FBI, ABA and committee review, a hearing and panel vote). The state of California also deserves full representation on the Ninth Circuit.

81. *See supra* note 27 and accompanying text (describing the unprecedented Republican denial of any consideration to Judge Garland or of final votes to Judge Koh or any of six other Obama 2016 appellate nominees); Lipton & Peters, *supra* note 70 (describing how Republican obstruction of President Obama's nominees afforded President Trump the opportunity to fill more than 100 circuit and district court vacancies and how that obstruction might discourage Democrats from cooperating with Republicans to fill all of those openings); Curtis Tate, *Every Democrat Votes to Block Trump's Federal Court Nominee. Looks Like Payback*, MCCLATCHYDC (May 24, 2017, 7:13 PM), <http://www.mcclatchydc.com/news/politics-government/congress/article152486909.html> (last visited June 30, 2017) (suggesting that the appointments processes for Justice Neil Gorsuch and Sixth Circuit Judge Amul Thapar, President Trump's first appointees, reflected Democratic

## V. *Suggestions For The Nomination And Confirmation Processes*

### A. *Nomination Process*

President Trump should coordinate with Senators Feinstein and Harris.<sup>82</sup> In January, Feinstein, Vice President Mike Pence, and White House Counsel Don McGahn caucused about lower court nominees, and Feinstein claimed that she would employ the identical measures applied when proffering candidates for home state vacancies to earlier Presidents.<sup>83</sup> Feinstein and Harris ought to collaborate with Trump by swiftly proposing that he seriously assess nominating Judge Koh again. The principal clear reasons for this are she is a highly capable, mainstream pick who deserves renomination now and that would speed confirmation because the designee has already enjoyed comprehensive FBI, ABA, and committee investigations; a promising hearing; and a thirteen to seven panel vote, so her renomination can efficaciously preserve declining resources.<sup>84</sup>

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paybacks for Republicans' treatment of Judge Garland and many other Obama nominees) (on file with the Washington and Lee Law Review).

82. I depend substantially in this paragraph on Zoe Tillman, *Why Trump Will Have to Work With the Senate to Get His Judges Confirmed*, BUZZFEED NEWS (Mar. 31, 2017, 3:05 PM), [https://www.buzzfeed.com/zoetillman/why-trump-will-have-to-work-with-democrats-to-get-his?utm\\_term=.jf7OQBWzkD#.mpQO5ZIEx2](https://www.buzzfeed.com/zoetillman/why-trump-will-have-to-work-with-democrats-to-get-his?utm_term=.jf7OQBWzkD#.mpQO5ZIEx2) (last visited June 30, 2017) (on file with the Washington and Lee Law Review).

83. "Democratic senators have their own process for recommending nominees. As Obama consulted [Republican senators,] we expect [President Trump] to do the same." *Id.*; see also Doyle, *supra* note 64 (discussing Sen. Feinstein's assumption of the critical role of Judiciary Committee Ranking Member in the 115th Congress and what that might portend for the Ninth Circuit).

84. Considerable precedent shows that Judge Koh may need only a floor debate and vote; however, several reasons suggest that another hearing would be advisable. See *supra* notes 38, 46–61, *infra* note 88 and accompanying text (showing that Judge Koh may only need a floor debate and vote); *infra* notes 89–90 and accompanying text (providing reasons, such as 2016 opposition to Judge Koh from Sen. Cornyn and other members, why another hearing may be advisable).

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The administration should keep in mind that Senators Feinstein and Harris could warrant deference, as they know a plethora of talented choices, who merit selection and would best represent California on the appellate court. The Executive also does need to remember that the politicians might duly retain blue slips for nominees whom they deem unacceptable while Feinstein occupies the influential post of Judiciary Committee Ranking Member. The lawmakers concomitantly ought to extend President Trump deference because administrations customarily assume the lead on tapping circuit nominees. In short, the legislators and the President should maintain open and effective lines of communication, negotiate in good faith, and concur on the best person.

### *B. Confirmation Process*

After President Trump renominates Judge Koh, the chief executive must assertively cooperate with the California senators and each of their colleagues to insure that the nominee has a prompt, systematic, and equitable process.<sup>85</sup> Koh has been a District Judge for seven years, which may promote accelerated confirmation, and her investigations only necessitate cursory updating as Koh had earlier reviews in which she had diligently assembled complete and accessible records.<sup>86</sup>

Major precedent can substantiate bypassing another hearing. For example, in the tenure of previous chief executives, including President Obama, nominees who marshaled uncontroversial sessions during the prior Congress faced no second hearing.<sup>87</sup> Yet, another panel session might be warranted for Judge

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85. See *supra* notes 46–66 and accompanying text (explaining the type of 2016 confirmation process that Republicans should have accorded Judge Koh).

86. See Tobias, *supra* note 24, at 2258 (describing why the nomination of district judges to appellate courts may smooth confirmation); *supra* notes 18–21, 46–47 and accompanying text (assessing Judge Koh's thorough record and comprehensive 2010 and 2016 panel analyses).

87. First Circuit Judge William Kayatta and Tenth Circuit Judge Robert Bacharach enjoyed 2012 hearings and captured 2013 appointments. See Tobias, *supra* note 27, at 170 n.60 (describing 2012 hearings and 2013 confirmations for Judge Kayatta and Judge Bacharach). Ninth Circuit Judge Randy Smith and Third Circuit Judge Thomas Hardiman concomitantly earned 2006 hearings and

Koh. The aspirant earned a cordial reception last year, although Senator Cornyn definitely and powerfully registered opposition that a few GOP colleagues shared.<sup>88</sup> The committee also has new members.<sup>89</sup> Accordingly, a 2017 hearing would be indicated.

The panel ought to expeditiously convene this session.<sup>90</sup> Senators Feinstein and Harris will introduce Judge Koh and praise her competence while stressing both parties' support of the nominee.<sup>91</sup> Panel members next must vigorously question the accomplished candidate, who should respond as Koh did the past year.<sup>92</sup> Some will then posit written queries, which she would promptly, fully and clearly answer.<sup>93</sup>

A couple of weeks following the hearing, Senator Grassley ought to effectuate a debate and committee ballot.<sup>94</sup> Nearly all members know Judge Koh; thus, few justifications require holding over the designee.<sup>95</sup> The panel will robustly discuss her and vote. Because it easily favored Koh last year and committee membership

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received 2007 confirmations. *See* 153 CONG. REC. S1,987 (daily ed. Feb 15, 2007) (discussing Smith's confirmation); *id.* at S3,192 (daily ed. Mar. 15, 2007) (describing Hardiman's confirmation).

88. *See supra* notes 50–61 and accompanying text (noting that the six Republican members who joined Sen. Cornyn in voting against Judge Koh suggest they shared his concerns).

89. The new Republican members of the Judiciary Committee are Mike Crapo (Idaho), John Kennedy (La.), and Ben Sasse (Neb.). *Committee Members*, SENATE COMMITTEE ON THE JUDICIARY, <https://www.judiciary.senate.gov/about/members> (last visited July 10, 2017) (providing the committee membership) (on file with the Washington and Lee Law Review).

90. *See supra* note 48 and accompanying text (evaluating the reasons why the committee should promptly arrange a hearing).

91. *See supra* notes 50–51 and accompanying text (assessing the California senators' 2016 introduction of Judge Koh and their praise for her qualifications).

92. *See supra* notes 52–56 and accompanying text (analyzing committee members' 2016 questioning of Judge Koh and her responses).

93. *See supra* notes 57 and accompanying text (evaluating panel members' submission of written questions for Judge Koh and her answers).

94. *See supra* notes 58–60 and accompanying text (assessing Sen. Grassley's scheduling of Judge Koh's 2016 panel discussion and vote).

95. *See supra* notes 31, 58, 89 and accompanying text (showing that many of the committee members know Judge Koh from her 2016 confirmation process).

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is analogous, the nominee should effortlessly capture a report.<sup>96</sup>

If Koh does win approval, Senator McConnell ought to provide a rigorous chamber debate and ballot for the reasons catalogued.<sup>97</sup> Should the Majority Leader eschew arranging these, Judge Koh's advocates need to petition for cloture.<sup>98</sup> Astute submissions conventionally attain final consideration; therefore, politicians who appreciate custom must swiftly agree to cloture.<sup>99</sup> After Koh is on the floor, the nominee does merit a robust discussion with an efficient chamber vote.

### VI. Conclusion

In February 2016, President Obama afforded Judge Koh for the Ninth Circuit. Last September, the panel mustered Koh's approval with bipartisan support; however, Republicans failed to conduct her final debate and ballot for purposes that were not related to Koh's abilities. Because she has much valuable experience while the tribunal desperately requires its full complement, President Trump should again nominate Koh and the chamber must expeditiously process her.

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96. *See supra* notes 60, 89 and accompanying text (predicting that the committee would comparatively easily approve Judge Koh because many of the panel members favored her last year and the committee composition remains very similar).

97. *See supra* notes 61–63 (evaluating numerous reasons why Sen. McConnell should promptly orchestrate a rigorous chamber debate and ballot—Judge Koh is highly experienced, the Ninth Circuit needs all of its jurists to deliver justice and regular order mandates that experienced and mainstream nominees have final debates and yes or no votes).

98. *See supra* note 38 (appraising relevant cloture precedent); *supra* note 43 (analyzing relevant unanimous consent denial).

99. *See supra* notes 62–66 (assessing relevant precedent).