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## Comments on McGahn "A Brief History of Judicial Appointments From the Last 50 Years Through the Trump Administration"

Russell Wheeler

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COMMENTS ON MCGAHN "A BRIEF HISTORY OF JUDICIAL  
APPOINTMENTS FROM THE LAST 50 YEARS THROUGH THE  
TRUMP ADMINISTRATION"

RUSSELL WHEELER\*

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INTRODUCTION<sup>1</sup>

Donald McGahn is a respected member of the Washington D.C. legal community, known especially for his expertise in election law. He served as White House counsel in the Trump administration until October 2018 and was a key player in the Trump administration's judicial appointments process.<sup>2</sup> His article is witty, sometimes revealing, but above all a description, as he sees it, of the decades-long deterioration of the process for Senate confirmation of federal judicial nominees, with some blame assigning.<sup>3</sup> He also provides a few behind-the-scenes looks at Trump administration confirmation battles, and some recommendations for easing contentiousness in—or at least, speeding up—the process. While he does not hide his

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1. Data for this Article come primarily from my own data sets on federal judicial nominations and appointments from the Reagan administration through the present. In building the data sets, and researching for this Article, I drew on publicly available data from the Congressional Record; the Library of Congress's presidential nominations website; the Federal Judicial Center's Biographical Directory of Article III Federal Judges (including the downloadable Excel spreadsheet, which contains information not displayed at the link embedded in the following citation); vacancy data from a website maintained by the Administrative Office of the U.S. Courts; and U.S. Senate party control as tracked on a United States Senate website. See *Nominations*, CONGRESS.GOV, <https://www.congress.gov/search?q={%22source%22:%22nominations%22}&searchResultViewType=expanded&KWICView=false> [<https://perma.cc/PR8V-DT3H>] (conducting an advanced search by staying within the category of “nominations” from the 97th-116th Congress (1981-2020)) [hereinafter *Nominations*]; *Biographical Directory of Article III Federal Judges, 1789-Present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges> [<https://perma.cc/7XTV-LJFA>] [hereinafter *Biographical Directory of Art. III Federal Judges*]; *Judicial Vacancies*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies> [<https://perma.cc/9QWF-TP89>] (tracking current and future judicial vacancies) [hereinafter *Judicial Vacancies*]; *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/P2NS-EFZ8>] (analyzing Senate party control over the period in question) [hereinafter *Party Division, Senate*].

2. See, e.g., Joel Achenbach, *A Look at the List Helping Trump Reshape the Supreme Court*, CHICAGO TRIB. (July 7, 2018), <https://www.chicagotribune.com/nation-world/ct-trump-supreme-court-list-20180708-story.html> [<https://perma.cc/U375-WKQV>] (describing McGahn's importance to the Trump administration's judicial appointment process).

3. See e.g., Donald F. McGahn II, *A Brief History of Judicial Appointments from the Last 50 Years Through the Trump Administration*, 60 WM. & MARY L. REV. ONLINE 105, 122-24 (2019) (contrasting how there were not any “personal assaults” during the nomination process for Elena Kagan, and arguing that the concurrent use of the “so-called nuclear option” by Senate Democrats made the process “more and more contentious” whereas the Garland nomination did not result in any “personal attacks on Garland” due to the credit of the Senate Republicans).

Republican leanings—e.g., “President Carter made no Supreme Court appointments ... thankfully”<sup>4</sup>—this is in no way a slash-and-burn propaganda piece.

His article stands for two propositions—first, the process has deteriorated and, second, although, there is blame to go around, Democrats deserve more of it than Republicans.<sup>5</sup> The article also vindicates the always timely aphorism that the plural of “anecdote” is not “data.” McGahn argues primarily from example. Those he cites are illustrative and help flesh out his arguments, but they are less dispositive than they might appear on first blush. Of course, examples are one staple of most any argument—this commentary included—but McGahn relies on them largely to the exclusion of aggregate data.

To be sure, the article is a lightly edited revision of a conversational law school lecture and does not purport to be an academic article weighed down by dense scholarly apparatus.<sup>6</sup> That in some ways is one of its virtues. But even an informal narrative can seek various types of data to illuminate its subject—or acknowledge the limitations of the examples it uses.

In Part I of this commentary, I summarize the judicial appointment developments of the last forty or fifty years more fully than does McGahn; in Part II, I unpack what might be charitably called creative history by McGahn and other defenders of the Senate’s shutting down the 2016 Merrick Garland Supreme Court nomination; in Part III, I consider McGahn’s and others’ proposals to help change the nomination and confirmation process; and in Part IV, I summarize briefly what appear to be underlying causes of that broken process and possible consequences of a judiciary populated in no small part by judges who gained office with a minimal popular mandate for their selection.

#### I. A PROCESS IN “SIGNIFICANT DECLINE”

Few would dispute that the process of filling federal judicial vacancies is, as McGahn puts it, “in significant decline ... a mess,

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4. *Id.* at 107.

5. *Id.* at 122-25, 134.

6. *Id.* at 105 n. 1.

and ... the mess has spread.”<sup>7</sup> In fact, McGahn could have made this claim of decline even stronger by mining information embraced by his title’s time span. “[T]he last 50 years” suggests an examination of confirmation politics since 1969, the first year of the Richard M. Nixon administration.<sup>8</sup> Nixon, though, makes only a cameo appearance,<sup>9</sup> even though confirmation patterns under Nixon and his immediate predecessor, Lyndon B. Johnson, are instructive. Both presidents’ terms were more than tumultuous—both were forced from office, one by the threat of electoral defeat, the other by the certainty of legislative removal.<sup>10</sup> Nevertheless, as seen in Table 1, their judicial appointment successes—measured by confirmation rates around ninety percent, and median days from nomination to confirmation in the teens and twenties—suggest a different planet from the one on which we now seat federal judges.<sup>11</sup> Compare the Johnson and Nixon data in Table 1 with those of presidents Reagan through Trump, shown in Table 2.<sup>12</sup>

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7. *Id.* at 108.

8. *Id.* at 105 (referencing the title of the piece by Donald F. McGahn II to which this commentary is a response).

9. *See id.* at 107 (noting Nixon’s various judicial appointments).

10. *See, e.g.,* Clay Risen, *The Unmaking of the President*, SMITHSONIAN MAG. (Apr. 2008), <https://www.smithsonianmag.com/history/the-unmaking-of-the-president-31577203/> [<https://perma.cc/5U3G-7SJC>] (examining the reasons for Johnson’s decision not to run for re-election, including that “his political capital was gone”); *see also* Carroll Kilpatrick, *Nixon Resigns*, WASH. POST, Aug. 9, 1974, at A01, <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/080974-3.htm> [<https://perma.cc/LQJ9-7KNQ>] (explaining that Nixon’s resignation was expected by many a few days before it was announced, given that “his support on Capitol Hill was disappearing at dizzying speed” and additionally, “[t]here were demands from some of his staunchest supporters that he should resign at once”).

11. Confirmation rate data is from Congressional Research Service, *Judicial Nomination Statistics, 1945-76* (RL 32122). Median days were calculated from the Federal Judicial Center data base. *See Biographical Directory of Art. III Federal Judges*, *supra* note 1.

12. *See infra* note 13 and accompanying text (referring to Table 1).

Table 1. Median Days, Nomination to Confirmation, and Percent of Nominations Confirmed During Johnson and Nixon Presidencies<sup>13</sup>

|         | District Judges |      | Circuit Judges |      |
|---------|-----------------|------|----------------|------|
|         | Median days     | Rate | Median days    | Rate |
| Johnson | 24              | 91%  | 26             | 93%  |
| Nixon   | 17              | 99%  | 17             | 94%  |

Going further back—from mid- to early twentieth century—reveals not simply a different planet, but a different universe. Republican President Warren Harding nominated former Republican president William Howard Taft to be Chief Justice on June 30, 1921.<sup>14</sup> The Senate confirmed him the same day, by a voice vote<sup>15</sup>—at a time of vigorous Progressive opposition to federal courts' invalidating social and economic legislation. (To illustrate the difference, imagine a President Hillary Clinton nominating former President Barack Obama to become a justice; no one would dream of a voice-vote confirmation, or any confirmation short of a lengthy knock-down, drag-out battle.)

## II. WHOM TO BLAME?

Much of the blather about the current state of the confirmation looks for villains. The refrain most frequently heard is that the fight over Robert Bork's 1987 Supreme Court nomination effected a basic change.<sup>16</sup> Wyoming Senator John Barrasso wheeled out that chestnut in a 2016 floor speech: "undermining the way [judicial] appointments used to be made.... started in 1987, when Senate Democrats launched an all-out assault against the [Supreme Court]

13. Russell Wheeler, Data Sets of Presidential Judicial Nominees (unpublished) (on file with author). The author's data sets are drawn from publicly available sources. *See, e.g., Nominations, supra* note 1; *Biographical Directory of Art III. Federal Judges, supra* note 1; *Judicial Vacancies, supra* note 1; *Party Division, Senate, supra* note 1.

14. *Supreme Court Nominations (Present-1789)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/G5KN-L92F>].

15. *Id.*

16. *See, e.g., McGahn, supra* note 3, at 113 ("Some of the recent confirmation antics may seem normal, but in 1987 this was a new program.").

nomination of Judge Robert Bork.”<sup>17</sup> That claim ignores, just as to the Supreme Court, the bitter 1916 Brandeis confirmation (including a strain of anti-Semitism),<sup>18</sup> the gauntlets through which Southern Democrats ran some of President Eisenhower’s nominees after *Brown v. Board of Education* (1954), and those same interests’ efforts to derail, or at least embarrass, President Johnson’s Supreme Court nominee, Thurgood Marshall.<sup>19</sup> The Senate refused to confirm two of Johnson’s and two of President Nixon’s Supreme Court nominees.<sup>20</sup> I submit later that at bottom the confirmation mess is not a continuing tit-for-tat that began with the Bork fiasco, but rather a manifestation of the polarization that has infected our politics generally over approximately the last fifty years. But granting that does not negate the value of nailing down how the “mess” evolved.

#### A. Did “Things Change” During the George W. Bush Presidency?

McGahn holds neither side blameless for today’s “mess,” but he puts most of the onus on Democrats. He recounts relatively benign examples of noncontentious confirmations in the Carter administration—four confirmations to the U.S. Court of Appeals for the District of Columbia Circuit (CA-DC) that moved in two to three months and similar examples in the Reagan and Clinton administrations,<sup>21</sup> as well as the now jaw-dropping 98-0 vote to confirm Reagan nominee Antonin Scalia to the Supreme Court.<sup>22</sup>

The article then traces the contentious fights over the Bork and Clarence Thomas Supreme Court nominations, compared to the near unanimous confirmations of Clinton’s Ruth Bader Ginsburg and Stephen Breyer Supreme Court nominations, and similarly easy

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17. News Release, John Barrasso, *Barrasso: Democrats Created Precedent for Supreme Court Nominations* (Mar. 3, 2016), <https://www.barrasso.senate.gov/public/index.cfm/2016/3/barrasso-democrats-created-precedent-for-supreme-court-nominations> [<https://perma.cc/TJ3E-7JE3>].

18. See ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN’S LIFE* 465-508 (1946) (suggesting the role of Brandeis’s religion at pages 481, 491, and 507).

19. See BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* 65-76 (2006).

20. See *Supreme Court Nominations (Present-1789)*, *supra* note 14.

21. See McGahn, *supra* note 3, at 105, 108-09, 111, 118.

22. See *id.* at 112.

confirmations of the three judges the Senate let Clinton appoint to CA-DC.<sup>23</sup> The lecture then "[f]ast-forward[s] to President George W. Bush [and] suggest[s] that this is where things really seemed to really change."<sup>24</sup> McGahn bolsters this claim by comparing the one- and two-year confirmation fights over Clinton and W. Bush CA-DC nominees, especially John G. Roberts, Jr.<sup>25</sup> Roberts's 2001 nomination was pending when Vermont Senator James Jeffords switched parties, giving Democrats a majority.<sup>26</sup> "After two years," the lecture continues, Roberts "was confirmed by voice vote" on May 8, 2003.<sup>27</sup> McGahn's implied—and legitimate—question: what else explains the delay other than a change in party control of the Senate?<sup>28</sup>

There is a back story, however. Roberts's 2003 confirmation filled a vacancy created by Judge James Buckley's 1996 retirement. But the first nominee to fill that vacancy was not Roberts but rather Elena Kagan.<sup>29</sup> Clinton sent her name to the Senate in June 1999, but the lame-duck 1999-2000 Republican Senate refused to give her a Judiciary Committee hearing or a vote.<sup>30</sup> And Kagan was well-qualified—McGahn said of her 2010 Supreme Court nomination, "no one could criticize her abilities as a legal mind. She was impeccably qualified."<sup>31</sup> In sum, a nominee as superbly well-qualified as John Roberts deserved a speedy confirmation vote, but Democrats denied it.<sup>32</sup> By the same token, a nominee as equally well-qualified as Elena Kagan also deserved a speedy confirmation vote, but Republicans denied her any vote—speedy or otherwise.<sup>33</sup> (Overall, the Senate

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23. *See id.* at 113-18.

24. *Id.* at 118.

25. *See id.* at 118-19.

26. *See id.*

27. *Id.* at 119.

28. *Id.* at 118-20.

29. Bill Mears, *Papers Show Kagan's Effort to Get Hearing on Appeals Court Nomination*, CNN (June 11, 2010), <http://www.cnn.com/2010/POLITICS/06/11/scotus.kagan.first.nomination/index.html> [<https://perma.cc/4Y4B-YNHU>].

30. *See id.*

31. McGahn, *supra* note 3, at 122.

32. Marc A. Thiessen, *How Biden Killed John Roberts's Nomination in 1992*, WASH. POST (Feb. 25, 2016), [https://www.washingtonpost.com/opinions/how-biden-killed-john-robertss-nomination-in-92/2016/02/25/c17841be-dbd1-11e5-81ae-7491b9b9e7df\\_story.html](https://www.washingtonpost.com/opinions/how-biden-killed-john-robertss-nomination-in-92/2016/02/25/c17841be-dbd1-11e5-81ae-7491b9b9e7df_story.html) [<https://perma.cc/74VW-YW3K>].

33. *See* Mears, *supra* note 29.

confirmed three of Clinton's five CA-DC nominees and four of W. Bush's six.<sup>34</sup>

Of course, had McGahn taken note of Kagan's failed June 1999 nomination, he might also have noted Roberts's failed January 1992 nomination to the CA-DC seat that Clarence Thomas vacated.<sup>35</sup> Late term nominations, almost by definition, have a harder row. Still, the Democratic Senate confirmed twelve of the nineteen circuit nominees that Reagan submitted in June 1987 or later, but of the twenty circuit nominees (including Kagan) that Clinton submitted in June 1999 or later, the Senate confirmed only seven.<sup>36</sup>

### *B. When Did the Court of Appeals Confirmation Rate Start to Decline?*

So, examples pull both ways, but aggregate data are often more illuminating. Indeed, the article's near-exclusive reliance on CA-DC as a surrogate for confirmation politics nationwide has its pluses and minuses. It is, of course, a highly visible court given the out-sized share of blockbuster cases that come to it as a result of its location ("some call [it] the second most important court ... a court of unique emphasis."<sup>37</sup>) CA-DC is also, as the article notes, an object of perennial debate over whether it has an oversupply of judgeships—how to weigh CA-DC's small case-per-judgeship ratio (94 versus an all-circuit median of 284 in statistical year 2018<sup>38</sup>) against its heavier than average proportion of administrative agency appeals? (Such appeals were 17 percent of the court's filings in 2018 versus 12 percent nationally.<sup>39</sup> And 85 percent of agency appeals nationally in 2018 came from the Board of Immigration Appeals.<sup>40</sup>

34. Russell Wheeler, Data Sets (Feb. 28, 2020) (unpublished) (on file with author).

35. See, e.g., Thiessen, *supra* note 32.

36. Wheeler, *supra* note 34.

37. McGahn, *supra* note 3, at 109.

38. See *Table B, U.S. Courts of Appeals*, U.S. CRTS. (Sept. 30, 2018), [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_b\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_b_0930.2018.pdf) [<https://perma.cc/PH29-9J2Q>].

39. See *Table B-1, U.S. Courts of Appeals*, U.S. CRTS. (Sept. 30, 2018), [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_b1\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_b1_0930.2018.pdf) [<https://perma.cc/V62F-A8TJ>].

40. See *Table B-3-U.S. Courts of Appeals Judicial Business*, U.S. CRTS. (Sept. 30, 2018), [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_b3\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_b3_0930.2018.pdf) [<http://perma.cc/LK66-TV2T>] (reporting that out of the 6089 administrative agency appeals filed nationally in the 2018 statistical year, 5158 were from the BIA).

BIA appeals are generally much less complicated than CA-DC's agency appeals, which include none from the BIA.<sup>41</sup> Moreover, CA-DC appointees are often from outside the circuit, creating a different nomination and confirmation dynamic. So, the appellate court on which McGahn focuses much of his analysis is not a microcosm of the federal appellate judiciary.

Stepping away from that single court, what do national data tell us about changes in confirmation dynamics under recent presidents?

Table 2 shows the confirmation rate and median days—nomination-to-confirmation for nominees to all thirteen courts of appeals, starting with Reagan.<sup>42</sup> For Reagan and other two-term presidents, Table 2 also shows the separate records for the first and second four years.<sup>43</sup> To keep things relatively simple, the table doesn't control for periods of unified versus divided government.

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41. *See id.*

42. *See infra* note 44 and accompanying text (referring to Table 2).

43. *See infra* note 44 and accompanying text (referring to Table 2).

Table 2. Nominations, Confirmations, Confirmation Rate, and Nomination-to-Confirmation Median Days, Reagan to Trump, All Courts of Appeals<sup>44</sup>

|                  | Full Term |     |      | First Four Years |     |      | Second Four Years |     |      |
|------------------|-----------|-----|------|------------------|-----|------|-------------------|-----|------|
|                  | Rate      |     | Days | Rate             |     | Days | Rate              |     | Days |
| Reagan (81-88)   | 83/94     | 88% | 45   | 38/40            | 95% | 28   | 48/55             | 87% | 61   |
| Bush (89-92)     | 42/532    | 79% | 83   |                  |     |      |                   |     |      |
| Clinton (93-00)* | 66/89     | 74% | 139  | 36/39            | 92% | 111  | 30/50             | 60% | 175  |
| Bush (01-08)     | 60/84     | 71% | 219  | 41/50            | 82% | 260  | 18/338            | 55% | 144  |
| Obama (09-16)    | 55/68     | 81% | 229  | 36/42            | 86% | 248  | 19/26             | 73% | 218  |
| Trump (17-20)**  | 53/55     | 96% | 136  |                  |     |      |                   |     |      |

\* Counts Roger Gregory (CA-4) as Clinton, not W. Bush appointee.

\*\* Through mid-July 2020.

Viewing only the “Full Term” column, it might appear that the degradation of the process began, not with George W. Bush, as McGahn asserts, but with his father.<sup>45</sup> Over his eight years, Reagan got 88 percent of his ninety-four circuit nominees confirmed, and in median days of forty-five.<sup>46</sup> For the first Bush, the confirmation rate dropped by nine percentage points and median days for confirmation almost doubled.<sup>47</sup> But that is mainly because late in 1990, Congress enacted an omnibus (nationwide) judgeship-creation statute (Congress has enacted none such statutes since).<sup>48</sup> The 1990 statute immediately added eleven circuit vacancies to the seven then in place, and seventy-four additional district vacancies to the

44. Compare Russell Wheeler, Ronald Reagan (RR) Dist. and RR CA Data Sets (unpublished) (on file with author), and Russell Wheeler, Bush 1 Dist. and Bush 1 CA Data Sets (unpublished) (on file with author), and Russell Wheeler, William J. Clinton (WJC) Dist. and WJC CA Data Sets (unpublished) (on file with author), and Russell Wheeler, George W. Bush (GWB) Dist. Nominees and Summary and GWB CA Nominees and Summary (unpublished) (on file with author), with Russell Wheeler, Barack H. Obama (BHO) CA nominees and BHO DIST nominees Data Sets (unpublished) (on file with author), and Russell Wheeler, Donald J. Trump Dist. nominees and Trump CA nominees Data Sets (unpublished) (on file with author). The author’s data sets are drawn from publicly available sources. See, e.g., *Nominations*, supra note 1; *Biographical Directory of Art III. Federal Judges*, supra note 1; *Judicial Vacancies*, supra note 1; *Party Division, Senate*, supra note 1.

45. See supra note 44 and accompanying text (citing information in Table 2).

46. See supra note 44 and accompanying text (citing information in Table 2).

47. See supra note 44 and accompanying text (citing information in Table 2).

48. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

twenty-eight then in place.<sup>49</sup> To fill these vacancies and the additional vacancies created in 1991 and 1992 by judges leaving active status, Bush submitted many more nominees in his second two years, as Table 3 shows.<sup>50</sup>

Table 3. Nominations and Confirmations in H.W. Bush's First and Second Two Years<sup>51</sup>

|                  | 1989-90   |           | 1991-92   |           |
|------------------|-----------|-----------|-----------|-----------|
|                  | Nominated | Confirmed | Nominated | Confirmed |
| Court of Appeals | 23        | 22 (96%)  | 30        | 20 (66%)  |
| District Courts  | 51        | 50 (98%)  | 140       | 99 (71%)  |

The Senate, controlled by Democrats, increased the number of confirmations, but the district confirmation rates still fell from ninety-eight percent in the first two years to seventy-one percent in the second and, for circuit nominees, from ninety-six percent to sixty-six percent.<sup>52</sup> (As noted, John Roberts was one of ten 1991-92 circuit nominees whom the Senate did not confirm).<sup>53</sup> The drop is explained in part by the glut of nominees but also by Democrats' saving vacancies in anticipation of the 1992 presidential election.

Accordingly, George H.W. Bush's record is something of an aberration. In normal times, we might have expected the H.W. Bush circuit confirmation patterns to more or less follow those of Reagan. Thus, the drop for Clinton, down to 74 percent confirmed circuit nominees, suggests that it was with Clinton that "things," to use McGahn's words, "really seemed to really change."<sup>54</sup> In fact, the real change came in Clinton's second term. Confirmation rates in his first term were 92 percent, with median days of 111.<sup>55</sup> The rate

49. *See id.* §§ 202-203, 104 Stat. 5098-5100.

50. *See infra* note 51 and accompanying text (citing information found in Table 3).

51. *See* Wheeler, *supra* note 44. The author's data sets are drawn from publicly available sources. *See, e.g.,* *Nominations*, *supra* note 1; *Biographical Directory of Art III. Federal Judges*, *supra* note 1; *Judicial Vacancies*, *supra* note 1; *Party Division, Senate*, *supra* note 1.

52. *See supra* note 44 and accompanying text (citing information in Table 2).

53. *See* Wheeler, Bush 1 CA Data Set, *supra* note 44; *supra* note 51 and accompanying text (citing to Table 3).

54. McGahn, *supra* note 3, at 118; *supra* note 44 and accompanying text (citing to Table 2).

55. *See supra* note 44 and accompanying text (citing to Table 2).

dropped to 60 percent in his second term, and the time to achieve those confirmations jumped to 175 median days.<sup>56</sup> Confirmation rates generally decline in a two-term president's second term, but of the four shown in Table 2, the decline in Clinton's second term was the sharpest.<sup>57</sup> Digging deeper into aggregate data reminds us, as Einstein reportedly said, "Everything should be made as simple as possible, but no simpler."<sup>58</sup>

Table 2 suggests that, starting with Clinton's second term experience, things have gone downhill more or less steadily, at least for those who believe that judicial confirmations should be relatively routine and expeditious, as once they were.<sup>59</sup> Clinton's two Supreme Court nominees—both confirmed in his first two years—got only token opposition, but Bush's two nominees—Roberts and Alito—got twenty-two and forty-two negative votes respectively, and Obama's two got thirty-one and thirty-seven.<sup>60</sup>

W. Bush's circuit nominees were confirmed at a lower rate than Clinton's and took longer.<sup>61</sup> Senate Democrats denied some Bush nominees votes for reasons unrelated to the needs of the appellate judiciary.<sup>62</sup> The best example, which McGahn describes more benignly than one might expect,<sup>63</sup> was the treatment of CA-DC nominee Miguel Estrada—what my colleague Benjamin Wittes called "fight[ing] dirty."<sup>64</sup> Democrats opposed Estrada largely on pretext.<sup>65</sup> In fact, they feared that a place on CA-DC could be a launching pad for the first Hispanic Supreme Court Justice.<sup>66</sup>

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56. See *supra* note 44 and accompanying text (citing to Table 2).

57. See *supra* note 44 and accompanying text (citing to Table 2).

58. *In Honor of Albert Einstein's Birthday-Everything Should Be Made as Simple as Possible, But No Simpler*, CHAMPIONING SCI., <https://championingscience.com/2019/03/15/everything-should-be-made-as-simple-as-possible-but-no-simpler/> [https://perma.cc/CC7Z-43QT].

59. See *supra* note 44 and accompanying text (citing information in Table 2).

60. See McGahn, *supra* note 3, at 117, 120-22.

61. See *supra* note 44 and accompanying text (citing information in Table 2). Compare Wheeler, *GWB CA Nominees and Summary Data Set*, *supra* note 44, with Wheeler, *WJC CA Data Set*, *supra* note 44. The author's data sets are drawn from publicly available sources. See, e.g., *Nominations*, *supra* note 1; *Biographical Directory of Art III. Federal Judges*, *supra* note 1; *Judicial Vacancies*, *supra* note 1; *Party Division, Senate*, *supra* note 1.

62. See McGahn, *supra* note 3, at 119.

63. See *id.*

64. BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES 44 (2006).

65. See McGahn, *supra* note 3, at 119.

66. See *id.*

Table 2 shows that Obama's appointees took even longer to confirm.<sup>67</sup> Their confirmation *rate* was slightly higher, but Obama submitted fewer nominees than his previous two predecessors.<sup>68</sup> One reason, we can surmise, is that home-state Republican senators wielded their "blue-slip veto" vigorously, making nominations pointless. For at least the last half-century, home-state senators of either party could effectively kill a nomination to a judgeship in that state by using the Senate Judiciary Committee Chair's blue-paper inquiry to indicate disapproval of the nominee.<sup>69</sup> The threat of a negative blue-slip encouraged White House-home-state senator bargaining.<sup>70</sup> Obama, for a vivid example, submitted no nominees for two Texas-based CA-5 vacancies announced in February 2012 (Emilio Garza) and October 2013 (Carolyn King).<sup>71</sup> One can be fairly sure it was because the two Texas senators declined to approve any nominee Obama would propose, not because Obama did not want to change the party-of-appointing-President balance on that very conservative court.

### *C. The Increase Under Trump of Confirmation Rates and Speedier Court of Appeals Confirmation Times*

Table 2 shows that Trump's circuit appointees have moved to confirmation much more quickly than did those of his two immediate predecessors.<sup>72</sup> That is partly because the Democratic Senate

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67. See *supra* note 44 and accompanying text (citing information in Table 2).

68. See *supra* note 44 and accompanying text (citing information in Table 2).

69. See, e.g., BARRY J. McMILLION, CONG. RESEARCH SERV., R44975, THE BLUE SLIP PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: FREQUENTLY ASKED QUESTIONS 8 (2017).

70. See Laila Robbins, *Blue Slip Blues: 5 Corrections to the Ongoing Debate*, BRENNAN CTR. FOR JUST. (Sept. 15, 2017), <https://www.brennancenter.org/our-work/analysis-opinion/blue-slip-blues-5-corrections-ongoing-debate> [<https://perma.cc/A8BE-5Y6P>] (explaining that the blue slip practice was "established to ensure the White House consulted with home state senators in selecting nominees").

71. Cf. Ian Millhiser, *What Trump Has Done to the Courts, Explained*, VOX (Feb. 4, 2020, 6:58 PM), <https://www.vox.com/policy-and-politics/2019/12/9/20962980/trump-supreme-court-federal-judges> [<https://perma.cc/C99G-6V9N>] ("Obama 'did not even make a nomination' to two seats on the Fifth Circuit because the blue slip would have doomed anyone he named.").

72. See *supra* note 44 and accompanying text (citing information in Table 2).

abolished the filibuster for non-Supreme Court nominees in November 2013.<sup>73</sup> (McGahn suggests that may have been an unwise “tactical move,”<sup>74</sup> but Republicans probably would have done the same thing once they gained control of the White House and the Senate.) Quicker Trump circuit confirmations are also due partly to the Republican Senate leadership’s abolishing the blue-slip veto for circuit nominees in 2017.<sup>75</sup> Senator Patrick Leahy, as Judiciary Committee Chair from 2001-2003 and 2007-2015,<sup>76</sup> honored it institutionally and religiously—some Democrats say naively.<sup>77</sup> The confirmation rate also reflects the admirable bulldozer efficiency with which McGahn and Senate allies pushed through circuit nominees.

Despite the administration’s relative success in getting circuit judges in place, McGahn notes correctly the high number of negative votes those nominees have garnered—he gives the example of forty-eight “no” votes for Trump’s well-qualified CA-DC appointee Greg Katsas.<sup>78</sup> Consulting aggregate data would have bolstered the point. Table 4 shows that opposition senators mustered over forty no votes for about a tenth of Bush’s and Obama’s circuit appointees, but did so for more than two-thirds of Trump’s appointees.<sup>79</sup> (Negative votes almost never exceed fifty—nominees almost never lose a floor vote.<sup>80</sup> Those who might almost never get one.<sup>81</sup> Bork was an exception, as was Ronnie White, a Clinton district nominee from Missouri who lost a floor vote in October 1999—the most recent such loss—but was confirmed after his 2014 renomination.<sup>82</sup>)

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73. See Paul Kane, *Reid, Democrats Trigger ‘Nuclear’ Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), [https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c\\_story.html](https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html) [<https://perma.cc/G5NE-CLVM>].

74. McGahn, *supra* note 3, at 124.

75. See Joseph P. Williams, *McConnell to End Senate’s ‘Blue Slip’ Tradition*, U.S. NEWS (Oct. 11, 2017), <https://www.usnews.com/news/politics/articles/2017-10-11/mcconnell-to-end-senates-blue-slip-tradition> [<https://perma.cc/97L4-MX7R>].

76. See *Previous Committee Chairmen*, U.S. SENATE: COMMITTEE ON THE JUDICIARY, <https://www.judiciary.senate.gov/about/chairman/previous> [<https://perma.cc/J24T-KPHU>].

77. See McGahn, *supra* note 3, at 127.

78. See *id.* at 105-10.

79. See *infra* note 83 and accompanying text.

80. See, e.g., *infra* note 83 and accompanying text.

81. See, e.g., *infra* note 83 and accompanying text.

82. See, e.g., Wheeler, *supra* note 13. The author’s data sets are drawn from publicly

Table 4. "No" Votes for Court of Appeals Nominees, W. Bush Through Trump<sup>83</sup>

| "No" votes   | W. Bush (N=60)* | Obama (N=55) | Trump (N=53)** |
|--------------|-----------------|--------------|----------------|
| 50           | 0               | 0            | 1              |
| 40-49        | 6               | 6            | 35             |
| 30-39        | 5               | 4            | 5              |
| 20-29        | 3               | 3            | 5              |
| Less than 20 | 46              | 42           | 7              |

\* Excludes Roger Gregory, whom Clinton put in office by a January 2000 recess appointment. (Bush renominated him on the advice of Virginia's two Republican senators.<sup>84</sup>)

\*\* Through mid-July 2020.

McGahn expresses some surprise at the Trump circuit nominees' relatively high number of "no" votes compared to circuit nominees of previous presidents.<sup>85</sup> And, as to the Supreme Court, after noting the thirty-one and thirty-seven "no" votes for Justices Sotomayor and Kagan,<sup>86</sup> McGahn finds the 45 votes against Justice Gorsuch to be "amazing."<sup>87</sup>

That characterization must have been a bit tongue-in-cheek. The votes against Gorsuch, well-credentialed as he is, obviously reflected anger over Senate Majority Leader Mitch McConnell's refusal to let the Senate even consider, much less vote on, Obama's March 2016

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available sources. See, e.g., *Nominations*, *supra* note 1; *Biographical Directory of Art III. Federal Judges*, *supra* note 1; *Judicial Vacancies*, *supra* note 1; *Party Division, Senate*, *supra* note 1.

83. Compare Wheeler, GWB Dist. Nominees and Summary and GWB CA Nominees and Summary Data Sets, *supra* note 44, with Wheeler, BHO CA Nominees and BHO Dist. Nominees, *supra* note 44, and Wheeler, Trump Dist. Nominees and Trump CA Nominees, *supra* note 44. The author's data sets are drawn from publicly available sources. See, e.g., *Nominations*, *supra* note 1; *Biographical Directory of Art III. Federal Judges*, *supra* note 1; *Judicial Vacancies*, *supra* note 1; *Party Division, Senate*, *supra* note 1.

84. *Confirmation Hearings on Federal Appointments: Hearings before the S. Comm. on the Judiciary*, 107th Cong. (2001) (statement of Hon. Patrick J. Leahy, a U.S. Senator from the State of Vermont) (explaining that "with the continued strong support of Senator Warner and Senator Allen," who were the two Senators from Virginia, "President Bush re-nominated Judge Gregory").

85. See McGahn, *supra* note 3, at 110-11.

86. See *id.* at 121.

87. *Id.* at 122, 125.

nomination of CA-DC Chief Judge Merrick Garland to fill the vacancy created by Justice Scalia's death a month earlier.<sup>88</sup>

### III. WAS "GARLAND 1.0" CONSISTENT WITH "LONG-STANDING TRADITION?"

McGahn argues that not processing Garland's nomination was justified because "it had been over a hundred years since a Supreme Court Justice was confirmed in an election year, which is a fact"—except that it is not.<sup>89</sup> Table 5 makes clear that it is not: there were four election-year appointments in three election years from 1916 to 1956.<sup>90</sup> McGahn's source, a 2019 Orrin Hatch article, stated "[i]t had been 100 years since a Supreme court nominee had been confirmed in a presidential election year *after voting in the election had started*" (emphasis added).<sup>91</sup> The italicized qualifier probably tries to distinguish confirmations in the early twentieth century from those in the modern era of year-long presidential primary seasons—a distinction without a real difference.<sup>92</sup>

Senate Majority Leader Mitch McConnell made an even bolder claim. According to news reports, in 2019 "McConnell was asked by an attendee during a speech ... in Kentucky what his position would be on filling a Supreme Court seat during 2020 if a Justice died. 'Oh, we'd fill it,' McConnell said to laughter from the audience."<sup>93</sup> In a 2016 interview, he referred to "a longstanding tradition of not filling vacancies on the Supreme Court in the middle of a presidential election year."<sup>94</sup> On several occasions he said, "You have to go back to 1880 to find the last time ... a Senate of a different party from the

88. See McGahn, *supra* note 3, at 118.

89. *Id.* at 122-23.

90. See *id.* at 123; see *infra* note 97 and accompanying text (referring to Table 5).

91. Orrin G. Hatch, *The Descent of Advice and Consent: Perspectives from a 42-Year Tour of Duty* 2, HERITAGE FOUND. (Oct. 24, 2018), <https://www.heritage.org/sites/default/files/2019-01/HL1303.pdf> [<https://perma.cc/3RKQ-D2ZW>].

92. See *id.*

93. Jordain Carney, *McConnell Says Republicans Would Fill 2020 Supreme Court Vacancy*, THE HILL (May 28, 2019), <https://thehill.com/homenews/senate/445866-mcconnell-senate-gop-would-fill-2020-supreme-court-vacancy> [<https://perma.cc/YY2F-3EAF>].

94. Amy Sherman, *What Mitch McConnell Said About Supreme Court Confirmations in Election Years*, POLITIFACT (July 2, 2018), <https://www.politifact.com/truth-o-meter/article/2018/jul/02/what-mitch-mcconnell-said-about-supreme-court-conf/> [<https://perma.cc/NJ28-SAFW>].

president filled a Supreme Court vacancy created in the middle of a presidential election.”<sup>95</sup> McConnell’s “long-standing tradition” formulation leaves the inference that Supreme Court vacancies have been a regular occurrence in presidential election years, but that presidents and Senates have eschewed filling these vacancies in deference to some unwritten but hoary presumption against acting on Supreme Court nominations in those years. Table 5 provides a clearer picture: at least since the late nineteenth century, presidential-election-year vacancies have been rare, but when they occurred, most often for health reasons, the Senate and President almost always filled them promptly and with little rancor, contrary to what one would expect if “a long-standing tradition” were on the line.<sup>96</sup> Table 5 also shows, to paraphrase McConnell, you have to go back to 1888 to find the last time that a different party than the president’s controlled the Senate when a vacancy occurred during an election year.

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95. Jordain Carney, *McConnell: GOP Would ‘absolutely’ Fill Supreme Court Seat Next Year*, THE HILL (Sept. 3, 2019, 11:01 AM), <https://thehill.com/homenews/senate/459715-mcconnell-gop-would-absolutely-fill-supreme-court-seat-next-year> [<https://perma.cc/2622-HHGW>].

96. See *infra* note 97 and accompanying text (citing information in Table 5).

Table 5. Post-Civil War Supreme Court Vacancies in Place During Presidential Election Years—Cause, Nomination and Confirmation Dates, Confirmation Vote, Unified or Divided White House-Senate Party Control<sup>97</sup>

| Vacancy*   | Date     | Cause       | Nominee & Date       | Conf. Date | Vote        | WH-Senate Party Control |
|------------|----------|-------------|----------------------|------------|-------------|-------------------------|
| Woods      | 5/14/87  | Death       | Lamar, L.<br>12/6/87 | 1/16/88    | 32-28       | D 39-37                 |
| Waite      | 3/23/88  | Death       | Fuller<br>4/30/88    | 7/20/88    | 41-20       | D 39-37                 |
| Bradley    | 1/22/92  | Death       | Shiras<br>7/19/92    | 7/26/92    | Voice       | U 47-39-2               |
| Harlan     | 10/14/11 | Death       | Pitney<br>2/19/12    | 3/13/12    | 50-26       | U 52-44                 |
| Lamar, Jr. | 1/2/16   | Death       | Brandeis<br>1/28/16  | 6/1/16     | 47-22       | U 56-40                 |
| Hughes     | 6/10/16  | Pres. Cand. | Clarke<br>7/14/16    | 7/24/16    | Voice       | U 56-40                 |
| Holmes     | 1/12/32  | Health      | Cardozo<br>2/15/32   | 2/24/32    | Voice       | U 48-47-1               |
| Minton     | 10/15/56 | Health      | Brennan<br>10/15/56  | 10/15/56   | Recess App. | U 48-47-1               |
| Warren**   |          |             | Fortas<br>6/28/68    | None       | None        | U 64-36                 |
| Fortas**   |          |             | Thornberry (same)    | None       | None        | Same                    |
| Scalia     | 2/13/16  | Death       | Garland<br>3/16/16   | None       | None        | D 54-44                 |

\* Excludes 1872 and 1880 vacancies created by deaths that occurred after election day.

\*\* See text.

Table 5 shows, for example, that Justice William Woods died on May 14, 1887.<sup>98</sup> To succeed him, Democratic President Grover

97. See, e.g., *Party Division*, *supra* note 1; *Supreme Court Nominations (Present-1789)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/G5KN-L92F>].

98. See *supra* note 97 and accompanying text (citing information in Table 5); *Woods, William Burnham*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/woods-william-burnham> [<https://perma.cc/3UUN-WT68>].

Cleveland nominated Lucius Lamar—a former Confederate officer and office holder—on December 6, 1887, and the Republican-controlled Senate confirmed him by a 32-28 vote on January 16, 1888.<sup>99</sup>

Unpacking McConnell's claim, note first that Supreme Court vacancies rarely occur in election years, probably because justices want to avoid election-year skirmishes over their replacements. For whatever reason, since the Civil War the only vacancies in place in presidential election years are those in Table 5.<sup>100</sup> Until the 1960s and beyond, death or poor health accounted for all such vacancies except for Charles Evans Hughes's 1916 resignation to run for president.<sup>101</sup> (In 1968, technically there were no vacancies because Chief Justice Warren, in an somewhat unseemly power play to try to deny would-be President Nixon an appointment, essentially conditioned his retirement on the confirmation of his successor.)<sup>102</sup> President Johnson withdrew his nominations of Justice Abe Fortas as Chief Justice and Fifth Circuit Judge Homer Thornberry to replace Fortas after it seemed likely that the Democratic Senate would reject the nominations.<sup>103</sup>

Furthermore, most of the election-year confirmations did in fact occur, as McConnell said, during unified White House-Senate party control.<sup>104</sup> Nevertheless, were McConnell's conjured-up venerable tradition a fact, one would expect strong minority party votes against the nominee to protest the tradition's violation. Yet three of the vacancies were filled by voice vote.<sup>105</sup> In 1892, with the soon-to-be-defeated Benjamin Harrison in the White House, forty-one opposition senators participated in a voice vote to confirm George Shiras to replace the deceased Joseph Bradley.<sup>106</sup> In 1932, the

99. See *Lamar, Lucius Quintus Cincinnatus*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/lamar-lucius-quintus-cincinnatus> [<https://perma.cc/RN57-3YXP>].

100. See *supra* note 97 and accompanying text (citing information in Table 5).

101. See *supra* note 97 and accompanying text (citing to Table 5).

102. Anthony Lewis, *Warren Firm on Retiring; Leaves Date Up to Nixon*, N.Y. TIMES, Nov. 15, 1968, at 1.

103. See *id.* at 1, 33; *Unsuccessful Nominations and Recess Appointments*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/unsuccessful-nominations-and-recess-appointments> [<https://perma.cc/Q22F-RX58>].

104. See *supra* note 97 and accompanying text (citing to Table 5).

105. See *supra* note 97 and accompanying text (citing to Table 5).

106. Scott Bomboy, *Why the Current Supreme Court Nomination Situation Isn't That Unique*, NAT'L CONST. CTR., (Feb. 14, 2016), <https://constitutioncenter.org/blog/why-the-current-supreme-court-nomination-situation-isnt-that-unique/> [<https://perma.cc/JR4X-TZR4>].

Senate was essentially equally divided when it approved by voice vote the unpopular Herbert Hoover's nomination of Benjamin Cardozo to replace the ailing Oliver Wendell Holmes Jr.<sup>107</sup>

Furthermore, when there were roll-call votes, the minority party was never unified in opposition; that is, not all minority party senators voted against the nominations, hardly what one would expect were there really a "long-standing tradition" against such nominations.<sup>108</sup>

With McConnell's fabricated history and cavalier promise to fill any 2020 vacancy—the Garland precedent notwithstanding—no wonder cynicism surrounds the process.

#### A. *Why the Contentiousness over Trump's Court of Appeals Nominees—"Garland 2.0?"*

The same anger that explains Democratic senators' no votes against Justice Gorsuch helps explain the "no" votes against Trump's circuit nominees (that and the outsized role granted the Federalist Society and other conservative legal groups in vetting candidates).<sup>109</sup> Republicans, once they gained a Senate majority in 2015, confirmed only two of Obama's circuit nominees—obstructionism that might be labelled "Merrick Garland 2.0."<sup>110</sup> By contrast, opposition-party Senates in the final two (lame-duck) years of the Reagan, Clinton, and George W. Bush administration, confirmed seventeen, sixteen, and ten circuit judges, respectively.<sup>111</sup>

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107. Bridget Flynn, *On this Day in Supreme Court History—February 15, 1932: Benjamin Cardozo Nominated to the Supreme Court*, ISCOTUS NOW, (Feb. 15, 2019), <http://blogs.kentlaw.iit.edu/iscotus/day-supreme-court-history-february-15-1932-benjamin-cardozo-nominated-supreme-court/> [<https://perma.cc/2AXL-3RG4>].

108. *See id.*

109. *See* David Montgomery, *Conquers of the Courts*, WASH. POST MAG., (Jan. 10, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/> [<https://perma.cc/6R5U-W5PF>]; Charlie 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> [<https://perma.cc/33BS-J9Q5>].

110. Russell Wheeler, *Senate Obstructionism Handed a Raft of Judicial Vacancies to Trump—What Has He Done With Them?*, BROOKINGS, (June 4, 2018), <https://www.brookings.edu/blog/fixgov/2018/06/04/senate-obstructionism-handed-judicial-vacancies-to-trump/> [<https://perma.cc/VSV2-GF4C>].

111. *See id.*

That 2015-2016 unprecedentedly meager confirmation record helps explain the many vacancies Trump inherited and his ability to fill roughly a fourth of the 179 statutorily created appellate judgeships.<sup>112</sup> In that light, McGahn's claim that "vacancies aren't driven by the President" does not tell the whole story.<sup>113</sup> Here, the vacancies were driven by Republican Senate leadership in hopes that a Republican would soon occupy the White House. Late-term confirmation slowdowns are one thing—justified on the basis of the semifictional "Thurmond rule," for example—but 2015-2016 was something else.<sup>114</sup> Thus, McGahn's call for the Senate to "take a step back from the brink, and not repeat what we have seen over the past several years and decades" has something of a hollow ring.<sup>115</sup> The 2015-2016 Senate's Merrick Garland 1.0 and 2.0 has ratcheted contentiousness—already supercharged—to a new level. We may have reached the point that the only way to get a Supreme Court vacancy filled is to ensure the same political party controls the White House and the Senate. The same thing for court of appeals nominees could be on the horizon.

### *B. Trump's District Confirmations*

As of mid-July 2020, the Senate has confirmed fifty-three (or ninety-six percent) of Trump's fifty-five circuit nominees, with median of 136 days from nomination to confirmation, much faster, as Table 2 shows than nominees of his recent predecessors.<sup>116</sup> As of the same date, however, it has confirmed only 143 (77 percent) of his 185 district nominees, in median days of 250, longer than confirmations under his immediate predecessors (215 for Obama, 142 for W. Bush).<sup>117</sup> From Inauguration Day to mid-July 2020, circuit vacancies

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112. Russell Wheeler, *Appellate Court Vacancies May Be Scarce in Coming Years, Limiting Trump's Impact*, BROOKINGS (Dec. 6, 2018), <https://www.brookings.edu/blog/fixgov/2018/12/06/trump-impact-on-appellate-courts/> [https://perma.cc/D5L2-TE9G].

113. McGahn, *supra* note 3, at 107.

114. See Russell Wheeler, *The "Thurmond Rule" and Other Advice and Consent Myths*, BROOKINGS: FIXGOV (May 25, 2016), <https://www.brookings.edu/blog/fixgov/2016/05/25/the-thurmond-rule-and-other-advice-and-consent-myths/> [https://perma.cc/RG36-TNH8].

115. McGahn, *supra* note 3, at 134.

116. See *supra* note 44 and accompanying text (citing to Table 2).

117. Wheeler, *supra* note 13. The author's data sets are drawn from publicly available sources. See, e.g., *Nominations*, *supra* note 1; *Biographical Directory of Art III. Federal*

declined from seventeen to none, but district vacancies from eighty-six to only seventy-three (and were eighty-six in late 2019).<sup>118</sup> Given the likely paucity of circuit vacancies to fill in 2020, Trump's district court confirmation rate will likely increase and the time to confirmation decrease. But these figures, at the end of over three years in office, speak to the primacy that the Senate and the administration have given to appointing (conservative) court of appeals judges while letting vacancies fester in the courts where the vast majority of federal court litigation starts and ends. From the perspective of mid-2020 at least, it appears that the Senate became serious about filling district vacancies only when it had nearly depleted the circuit vacancies to fill.

#### IV. ARE THERE WAYS OUT OF "THE MESS?"<sup>119</sup>

McGahn recounts several process suggestions for easing the contentiousness or at least speeding up the process but seems skeptical that they would foster improvement. He recalls then-Judge Brett Kavanaugh's and others' suggestion for a time limit on the Senate to act on a nominee.<sup>120</sup> He notes the calls for more pre-nomination White House-senator consultation, although he says his efforts to promote such consultation on the Kavanaugh nomination met resistance from Democratic senators.<sup>121</sup> He says the Senate Judiciary Committee questionnaire that nominees must complete is "onerous" but might "help[] someone somewhere evaluate the nominee."<sup>122</sup> He hints around the possibility of doing away with nominee hearings before the Judiciary Committee but does not endorse it outright.<sup>123</sup>

In considering process changes, a better place to start is Michael Shenkman's 2012 article, which has received less attention than it

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*Judges*, *supra* note 1; *Judicial Vacancies*, *supra* note 1; *Party Division, Senate*, *supra* note 1.

118. See Russell Wheeler, *Judicial Appointments in Trump's First Three Years: Myths and Realities*, BROOKINGS: FIXGOV (January 28, 2020), <https://www.brookings.edu/blog/fixgov/2020/01/28/judicial-appointments-in-trumps-first-three-years-myths-and-realities/> [https://perma.cc/955G-WDXX]; *Judicial Vacancies*, *supra* note 1.

119. See McGahn, *supra* note 3, at 108.

120. *Id.* at 129.

121. *Id.* at 129-30.

122. *Id.* at 130-31.

123. *Id.* at 131.

deserves.<sup>124</sup> It does not propose to fix highly contentious Supreme Court and court of appeals processes but instead zeros in on the confirmation of district judges.<sup>125</sup> Although district judges are in many ways the backbone of the judiciary, reshaping their nomination and confirmation may be easier than reshaping the nomination and confirmation of court of appeals judges.

Vacancies among district judgeships were numerous when Shenkman wrote early in the decade,<sup>126</sup> and are numerous now at the end of the decade; there were eighty-six district vacancies in January 2017 and eighty-eight vacancies in late November 2019.<sup>127</sup> District vacancies create problems for litigants, especially civil litigants, given the statutory priority that judges must give to criminal cases. District nominees under recent administrations have waited on median roughly nine months for confirmation.<sup>128</sup> This cannot help but discourage prospective nominees—especially those in private practice—from having their names submitted.

Shenkman suggests administrations try to increase peer pressure on senators by:

- publishing the status of negotiations over prospective nominees;<sup>129</sup> as noted above, although the Senate has killed home-state senators' blue-slip prerogatives for court of appeals nominees, it appears that the Senate continues to negotiate with senators, of both parties, regarding nominees for district court vacancies.
- streamlining the Judiciary Committee questionnaire for district judges by eliminating some of the requirements for information; for example, Shenkman suggests that administrations could eliminate questions about "long lists of court

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124. Michael L. Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217 (2012).

125. See, e.g., Shenkman, *supra* note 124.

126. *Id.* at 230.

127. See *Vacancy Summary for January 2017*, U.S. CTS. (Jan. 6, 2017), <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/01/summary> [<https://perma.cc/W7DB-7RMG>]; *Vacancy Summary for November 2019*, U.S. CTS. (Nov. 1, 2019), <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2019/11/summary> [<https://perma.cc/YG3K-P4ME>].

128. See *supra* note 13 and accompanying text (citing to Table 1); *supra* note 44 and accompanying text (citing to Table 2).

129. See Shenkman, *supra* note 124, at 299.

admissions” and activities many years back, such as some college newspaper articles, the inadvertent omission of which can prompt a charge of hiding things.<sup>130</sup>

- largely eliminating hearings for district judges, which are mostly pro forma affairs; Shenkman notes that hearings for circuit nominees “can be an opportunity to focus public attention on ideological issues. District judges are not of the same type ... [and] [t]he rationale of ideological evaluation is inappropriate to the jobs for which they are headed.”<sup>131</sup> and
- finding various ways to expedite floor consideration for district nominees,<sup>132</sup> who, even under Trump, have not faced the same floor opposition as circuit nominees.<sup>133</sup>

Although these recommendations are reasonable, one cannot hold out much hope that they will get the attention they deserve, much less any action. Formal changes to the courts and the processes surrounding them rarely get effected absent crises, and, like the frog in a pot of water who is unaware that it is now boiling, few are willing to take concrete steps to improve the condition of the nomination and confirmation process.

#### V. THE BIGGER PICTURE: POLARIZATION AND ITS JUDICIAL BRANCH RAMIFICATIONS

One reason that proposed changes to the confirmation process seem futile is that the contention and delay are less a function of rules than a manifestation of the polarization that gridlocks much of American politics.<sup>134</sup> “Polarization ... limit[s] the national government’s ability to deal with big problems and even to perform once-routine tasks, like funding the government without games of

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130. *Id.* at 304-05.

131. *Id.* at 306-07.

132. *Id.* at 308-09.

133. While two thirds of Trump circuit nominees received forty or more no votes, only a fifth of his district nominees did so. *Compare* Wheeler, Trump Dist. Nominees, *supra* note 44, with Wheeler, Trump CA Nominees, *supra* note 44. The author’s data sets are drawn from publicly available sources. *See, e.g.,* *Nominations*, *supra* note 1; *Biographical Directory of Art III. Federal Judges*, *supra* note 1; *Judicial Vacancies*, *supra* note 1; *Party Division, Senate*, *supra* note 1.

134. For the most recent recounting, *see generally* EZRA KLEIN, *WHY WE’RE POLARIZED* (2020).

budgetary chicken."<sup>135</sup> Polarization has, not surprisingly, corrupted the once near-ministerial task of filling district and circuit vacancies.<sup>136</sup> Opposition party senators (Democrats and Republicans) are less likely to acknowledge a president's prerogative to appoint judges who meet basic tests of acceptability, acknowledgements that in earlier times encouraged reciprocal behavior from the other party as it contemplated someday regaining control of the White House.<sup>137</sup> Nor is either party likely to ratchet back the contentiousness with a magnanimous "let-by-gones-be-by-gones" effort to wipe the slate clean.

Polarization has had another effect on the federal judiciary. Polarization has thrived in part because of a dearth of democracy. Our federal republic, to state the obvious, was designed to frustrate pure democracy, partly through the so-called checks-and-balances but also through a federalism that gives disproportionate power to the states as political units—in the Senate and the electoral college.<sup>138</sup> That disproportion has grown considerably. In 1790, the population of the largest state was thirteen times that of the smallest; today it is seventy times,<sup>139</sup> giving some voters an outsized say in national policy determinations.

This "GOP[] geographic advantage"<sup>140</sup> bears on the federal judiciary because of a fact cited by observers as diverse as the late Chief Justice William Rehnquist and the late Yale political scientist, Professor Robert Dahl, a leading democratic theorist.<sup>141</sup> Dahl's

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135. Russell Wheeler, *Selecting Federal Judges in an Era of Political Polarization*, 42 HUMAN RIGHTS 3, 1 (2016).

136. See, e.g., Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J.L. & PUB. POLY 521, 525 (2018).

137. See generally *id.*

138. See, e.g., Hans Noel, *The Senate Represents States, Not People. That's the Problem.*, VOX (Oct. 13, 2018 11:34 AM), <https://www.vox.com/2018/10/13/17971340/the-senate-represents-states-not-people-constitution-kavanaugh-supreme-court> [<https://perma.cc/KE3A-QTPC>].

139. In 1790, Virginia's population was 747,610 and Delaware's population was 59,094, compared to present day California's population of 39,747,267 and present-day Wyoming's population of 572,381. Compare Thomas Jefferson, *Schedule of the Whole Number of Persons Within the Several Districts of the United States*, 3 (1790), [https://www2.census.gov/library/publications/decennial/1790/number\\_of\\_persons/1790a-02.pdf?#](https://www2.census.gov/library/publications/decennial/1790/number_of_persons/1790a-02.pdf?#) [<https://perma.cc/FA5U-48GE>], with WORLD POPULATION REVIEW, <http://worldpopulationreview.com/states/> [<https://perma.cc/W4NZ-NRBJ>].

140. KLEIN, *supra* note 134, at 242.

141. See Russell Wheeler, *Pack the Court: Putting a Popular Imprint on the Judiciary*,

classic 1957 article, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, argued that popular will was expressed indirectly in the elections that select the presidents and senators who seat federal judges.<sup>142</sup> That made it “unrealistic to suppose that the Court would, for more than a few years at most, stand against any major alternatives sought by a lawmaking majority.”<sup>143</sup> In 1996, Chief Justice Rehnquist told a law school audience that despite the failure of Franklin Roosevelt’s court-packing plan, FDR achieved a New Deal-friendly nine-justice Court through filling vacancies that occurred in the regular order.<sup>144</sup> “[T]here is,” Rehnquist said, “a wrong way and a right way to go about putting a popular imprint on the federal judiciary.”<sup>145</sup> His “right way”: popularly elected presidents and senators reshaping the judiciary by the normal process of filling vacant judgeships.<sup>146</sup>

Today, four of the Supreme Court’s five normally conservative justices were appointed by presidents who gained office despite losing the popular vote.<sup>147</sup> President George W. Bush appointed Chief Justice Roberts and Justice Alito early in his second term, which he won with a narrow majority of votes;<sup>148</sup> but a necessary prelude to that second term was his first term, secured with an Electoral College victory despite a very narrow popular vote loss.<sup>149</sup> And President Trump, who lost the popular vote by nearly three million, has (so far) filled two vacancies.<sup>150</sup>

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BROOKINGS (Apr. 3, 2019), <https://www.brookings.edu/blog/fixgov/2019/04/03/pack-the-court-putting-a-popular-imprint-on-the-federal-judiciary/> [<https://perma.cc/8YJ5-QRBF>].

142. *See id.*

143. *See id.* (quoting Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957)).

144. *See* Symposium, *The Future of the Federal Courts*, 46 AM. U. L. REV. 263 at 273 (1996).

145. *Id.*

146. *See id.*

147. *See* Emily Bazelon, *How Will Trump’s Supreme Court Remake America?*, N.Y. TIMES (Feb. 27, 2020), <https://www.nytimes.com/2020/02/27/magazine/how-will-trumps-supreme-court-remake-america.html> [<https://perma.cc/YFK3-F8DS>]; David Smith, *How Trump Could Lose the Popular Vote Again-and Hold the White House*, GUARDIAN (Sept. 22, 2019), <https://www.theguardian.com/us-news/2019/sep/22/donald-trump-popular-vote-electoral-college-2020> [<https://perma.cc/ZG44-VG8C>].

148. *See* Smith, *supra* note 147; *Supreme Court Nominations, Present-1789*, *supra* note 14.

149. *See* Smith, *supra* note 147.

150. *See* Smith, *supra* note 147; *Supreme Court Nominations, Present-1789*, *supra* note 14.

Furthermore, until the 1960s, the Senate confirmed most Supreme Court nominees by voice vote.<sup>151</sup> And almost all recorded votes before and after the 1960s had sufficient aye votes to leave little doubt that the senators supporting the nomination represented a majority of the population.<sup>152</sup> The senators who voted to confirm Justices Thomas, Gorsuch, and Kavanaugh, however, represented less than 50 percent of the population.<sup>153</sup>

In normal times at least one of those seats would have been filled by Obama, a popular-vote majority president (who saw the Senate refuse to consider his March 2016 nominee, Merrick Garland).<sup>154</sup> Consider, beyond the Supreme Court to the second tier of the appellate judiciary, that eighty-seven—49 percent—of the circuit judges in active status as of mid-May 2020 are W. Bush or Trump appointees.<sup>155</sup> I know that many of them are fine people and able judges but that fact does not override the underlying dynamics at issue. It would be refreshing if those cheering on the Trump-McConnell judicial confirmation machine would acknowledge the lack of much of any popular mandate for the changes that machine is effecting.

Thus, the question: In 2020, voters may well give a popular and Electoral College victory to a candidate with at least a slightly left-of-center disposition, along with a Democratic Congress. That lawmaking majority would likely produce legislation about the environment, health care, agency regulations, legislative gerrymandering, civil rights and gender matters, and other areas. Will this Court, as presently constituted or with even a greater Republican majority, turn back constitutional challenges to that legislation? Or will its conservative majority—placed in office by presidents who lost the popular vote and helped by the constitutionally malapportioned Senate—invalidate those laws?

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151. See *Supreme Court Nominations, present-1789*, *supra* note 14.

152. See *id.*

153. See Wheeler, *supra* note 141.

154. See Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now> [<https://perma.cc/BR4K-XQDY>].

155. See Wheeler, *supra* note 13. The author's data sets are drawn from publicly available sources. See, e.g., *Nominations*, *supra* note 1; *Biographical Directory of Art III. Federal Judges*, *supra* note 1; *Judicial Vacancies*, *supra* note 1; *Party Division, Senate*, *supra* note 1.

If the latter, the Court may resemble the Court of Roosevelt's first term and thus provoke another challenge to the Court's legitimacy, unless judicial statesmanship can modulate the jurisprudential tendencies of the conservative majority. In 1937, Chief Justice Charles Evans Hughes defended the Court against FDR's charges that it was behind in its work and thus needed more members.<sup>156</sup> That same year, in several key cases, he and Justice Owen Roberts signaled—even before Roosevelt's first appointee—an end to the slim Court majority that had resisted state and national economic regulatory legislation.

#### CONCLUSION

Obviously, McGahn's article and this commentary on it are mere drops in a bucket overflowing with charges, defenses, boasts, statistical food fights, and some dispassionate analysis of the current way our politics fills federal judicial vacancies. Whether any of that cacophony will make the process "better"—however defined—is doubtful because what McGahn calls the "mess" is rooted in tectonic changes in United States politics.

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156. See JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010).