CONFIRMING JUDGE RESTREPO TO THE THIRD CIRCUIT

Carl Tobias*

From the moment that the Grand Old Party (GOP) won the Senate in November 2014, Republicans have directly and incessantly vowed to establish “regular order” in the upper chamber again. Lawmakers employed this phrase to depict the purported restoration of strictures that prevailed until Democrats subverted them. In January 2015, when the 114th Congress began, Senator Mitch McConnell (R-Ky.), the Majority Leader, proclaimed, “[w]e need to return to regular order,” while the legislator has dutifully recited that mantra ever since. Senator Charles Grassley (R-Iowa), the head of the Senate Judiciary Committee, espoused analogous concepts. Illustrative was his January 2015 pledge to duly exercise “regular order” in scrutinizing President Barack Obama’s excellent mainstream judicial nominees. Because senators have diligently completed practically both sessions of the 114th Congress throughout which the majority trumpeted “regular order,” its application to a daunting constitutional responsibility—providing advice and consent on nominees—deserves review. This survey ascertains that counterproductive partisanship suffuses appointments—particularly evidenced by slow panel consideration and the confirmation of eleven jurists all last year, the fewest since President Dwight Eisenhower occupied the White House, and merely nine thus far over 2016.

A striking example is Judge Luis Felipe Restrepo. This exceptional, consensus prospect waited seven months on a hearing after President Obama had initially designated him for the Third Circuit at the powerful suggestion of

* Williams Chair in Law, University of Richmond. I wish to thank Margaret Sanner and Katie Lehnen for exceptional suggestions, Leslee Stone for excellent processing, as well as Russell Williams and the Hunton Williams Summer Endowment Fund for generous, continuing support. Remaining errors are mine.


Pennsylvania Senators Robert Casey (D) and Pat Toomey (R). The committee only arranged a hearing on June 10, 2015 because the GOP lawmaker finally returned the “blue slip”—a custom which advances judicial nominees—on May 14, 2015, even though Casey proffered his during November 2014, immediately after Obama made Restrepo’s nomination. Toomey should have produced the blue slip long before then, while the chamber ought to have promptly evaluated Restrepo, as the Third Circuit needs all of its members to deliver justice, especially because the vacancy for which he was nominated had been classified as a “judicial emergency.”

President Obama has robustly consulted with applicable home-state politicians. Since 2011, Casey and Toomey have collaborated to fill two empty Pennsylvania Third Circuit seats and fourteen district court open positions. The senators invoke merit selection nominating commissions—which encompass distinguished practitioners—that solicit and review candidate applications, carefully interview dynamic persons, and specify the finest picks. Casey and Toomey correspondingly examine these submissions and develop proposals for White House consideration. The Republican legislator selects one in every four people and then both senators send names to President Obama, who next chooses among the possibilities. However, the GOP majority has failed to process swiftly the individuals once the chief executive tenders the persons.

Senator Grassley promptly scheduled the initial panel hearing on January 21, 2015, fourteen days after the Senate commenced, and promised that he would


7. Id. “Toomey bears much responsibility for [many] longstanding vacancies. Obama nominated candidates for three of the four Western District openings and an Eastern District vacancy in July 2015. The committee granted all four December 9 hearings and two Western District nominees January 28 voice vote approval. Nonetheless, ever since January, the two nominees reported have languished, while the other two have not received panel votes. Toomey has secured no further movement on any of the four. The two who lack committee votes are Casey choices, so panel inaction clearly violates the senators’ agreement, which allows Toomey to recommend one in four nominees.” Carl Tobias, Voting Toomey? Consider His Judicial Obstructionism, THE HILL (Nov. 4, 2016, 3:59 PM), http://thehill.com/blogs/pundits-blog/campaign/304383-voting-toomey-consider-his-judicial-obstructionism.

efficiently canvass able, moderate nominees using “regular order.” The chair asserted that citizens should anticipate no “discernible difference” between how the committee operates under Republican versus Democratic leadership, intimating he would provide hearings every several weeks, a regime that Senator Patrick Leahy (D-Vt.), who served as Grassley’s predecessor, maintained the last three Congresses with Grassley’s assistance. Nonetheless, salient disparities materialized. For instance, the panel only convened the next hearing seven weeks after the first with the third coming eight weeks later, and the committee had yet to arrange others—compellingly, for Judge Restrepo—until June. Merely a pair of nominees appeared for the March session, which contrasts with the five nominees Leahy usually had testify, a norm that Grassley had endorsed.

Despite abundant pledges, which the chair reiterated at the Senate Judiciary Committee’s February 12 Executive Business Meeting, the GOP held over nominee votes. This behavior continued a policy—systematically practiced throughout the Obama Administration—of suspending discussions and ballots for excellent, uncontroversial prospects listed at the initial time until the ensuing meeting. Selections postponed were five strong, noncontroversial United States


12. See January 21st Hearings, supra note 3 (Leahy claiming that the panel had never required a strong, consensus nominee to have a second hearing in his four-decade Senate career, but Grassley asserting that he considered this the first hearing under “regular order,” as the November 2014 hearing was improper and the GOP wanted regular order restored); Senate Judiciary Committee Agenda, C-SPAN.ORG (Apr. 27, 2015), http://www.c-span.org/video/?325608-1/senator-chuck-grassley-ria-remarks-senate-judiciary-committee-agenda (Grassley’s endorsement of that norm). Compare March 11th Hearings, supra note 11, with Hearings on Nominees Before the S. Judiciary Comm., 113th Cong. (Sept. 9, 2014), and January 28th Hearings, supra note 11.


Court of Federal Claims renominees whom the panel had approved in 2014 on unopposed voice votes and four equally talented consensus district renominees, including two designated for judicial emergencies, with support of their Republican Party home-state of Texas and Utah committee members. Equally problematic has been the continual delay related to nominees' Senate floor debates, if those debates are necessary, and final chamber ballots. Senator McConnell never entered prompt voting accords when he served as the minority leader in President Obama's first term and a half, provoking Democrats to seek cloture on plentiful nominees and cautiously reform filibusters. The senator promised more cooperation once he was named the majority leader, while setting floor debates and ballots created a valuable opportunity to respect this promise. Nonetheless, McConnell did not schedule votes regarding any of the five Court of Federal Claims or four district renominees, whom the panel dutifully reported on February 26, until a month thereafter when he arranged confirmation on a date nearly three weeks later for one of the trial level renominees. The senator made no public statement about ballots on the five Court of Federal Claims and three other district court renominees, yet duly permitted them for a second trial level renominee on April 20 with a pair more considered four weeks later; he denied votes to all but one circuit court aspirant until October and has yet to grant any of the five Court of Federal Claims nominees a ballot.

In short, notwithstanding Republicans' continuous dissemination of the “regular order” mantra, they helped approve eleven jurists over the course of the
whole year. The panel concomitantly staged only three judicial nominee hearings during the protracted time before June, and one session had merely two nominees while reporting only five Court of Federal Claims, and four district court renominees on February 26, and two additional picks. That dispiriting record compares unfavorably with Democratic success over the past six years and even during President George W. Bush’s administration.

The failure to schedule Judge Restrepo’s Senate Judiciary Committee hearing epitomizes GOP inaction. Senators Casey and Toomey had previously submitted Judge Restrepo, who easily secured Eastern District of Pennsylvania confirmation in a June 2013 voice vote. The lawmakers assumed credit for proposing the stellar nominee’s elevation with a press release voicing firm support in which Toomey declared that the prospect would “make a superb addition to the Third Circuit.” However, Restrepo was noticeably absent from the May panel hearing on four district court nominees—merely the third panel hearing the entire year—although Congress had been in session fifteen weeks and President Obama had tapped none of the four candidates who testified before Restrepo.

On April 30, Senator Leahy asked that Grassley designate Restrepo for the May hearing, a plea to which the chair did not respond. Six days later, the press queried Toomey, who answered that he supported Restrepo, was confident about 2015 confirmation, and deemed vetting confidential, thus eschewing more comment—particularly as to the blue slip—over the nomination’s pendency. Grassley said that he would mount a hearing once Toomey proffered the blue slip, which the press claimed Toomey neglected to supply. A panel staffer asserted that the committee was analyzing the choice’s “background

---


24. 159 *Cong. Rec.* S4,515–16 (daily ed. June 17, 2013); Saranac Hale Spencer, *Political Maneuvers Holding Up Nominee for Third Circuit*, LEGAL INTELLIGENCE, May 6, 2015. He was serving as a Magistrate Judge in the Eastern District. *Id.* Elevation is a venerable tool that all modern Presidents invoke. See Tobias, supra note 14, at 2258.


27.  *Exec. Business Mtg.*, supra note 22. Leahy is now ranking member. See *id.*


29. Bendery, supra note 28; Mauriello, supra note 28.
information, following the regular process,” and politicians often hold blue slips until panel evaluation concludes, as concerns do surface in this process. 

On May 6, before the afternoon Senate Judiciary Committee hearing, Senator Harry Reid (D-Nev.), the Minority Leader, detailed Toomey’s earlier praise for Restrepo, while he speculated that Pennsylvania citizens “[a]re . . . left wondering why the qualified judicial candidate is not moving,” and Toomey declined to explain why the GOP had stymied Restrepo. That day, Grassley posted a statement putatively showing that the Republican party’s 2015 confirmations resembled numbers that the Democratic majority in the Senate realized when assessing President Bush picks in the comparable (2007) year.

The subsequent day, Toomey passionately “rejected the allegation” that he created delay for Restrepo with no mention of the blue slip question. The lawmaker argued that the panel was diligently canvassing Restrepo and would conduct a hearing after the endeavor’s completion, while he distinctly repeated support and confidence in approval “certainly this year,” adding there was “nothing [he] could have done at this point” that would have made Restrepo’s circumstances better. Democrats found that Toomey’s approach was unconventional, especially for home-state officers, who clearly and persuasively recommend choices, while Democrats immediately finished their examination, as the committee had fully investigated the nominee with his 2013 appointment.

A May 10 Pittsburgh newspaper editorial castigated Senator Toomey for Restrepo’s delay, asserted that the politician had yet to return his blue slip, which “is a tired ploy that advances no one’s agenda,” and championed quick

30. Spencer, supra note 24 (emphasis added). The panel staffer claimed that nominees are processed in the order received. See also Olson, supra note 5 (Senate Judiciary Committee spokesperson commenting that committee works through the nominations in the order they are received); Tamari, supra note 5 (spokesperson for Senator Grassley commenting that Restrepo's hearing would not occur before an ongoing background check concluded). But see infra notes 47, 57–58 and accompanying text for an illustration of the difficulties in Restrepo's nomination process compared to other nominees.

31. Mauriello, supra note 28; Olson, supra note 5; accord Jennifer Bendery, Pat Toomey Insists He's Not Holding up a Judicial Nominee He's Holding Up, HUFFINGTON POST (May 13, 2015), http://www.huffingtonpost.com/2015/05/13/pat-toomey-judge-restrepo_n_7277332.html (asserting the same idea the next week); Tamari, supra note 5 (asserting the same idea the next day).

32. May 6th Hearings, supra note 11; see also Tamari, supra note 5 (quoting Senator Reid’s criticism of the GOP for delaying Restrepo’s and other nominees’ confirmation processes). See supra notes 2 and 11 for additional statements from Senator Reid reiterating his criticism of the GOP for delaying Restrepo and other nominees in the committee and on the floor.


34. Tamari, supra note 5; accord Bendery, supra note 28.

35. Tamari, supra note 5.

36. Id. See infra notes 46–47 and accompanying text for aspects of the unusually long judicial nominee investigation.
blue slip delivery and Restrepo’s prompt confirmation. 37 Three days later, the senator addressed these contentions and mounting criticism over Restrepo’s progress with adamant denial of the stalling charges and reiterating that the background check delayed the hearing and that he planned to “turn in [his] ‘blue slip’ . . . the day that investigation is completed, provided no issues of concern” arise. 38

On May 14, the legislator relented, tendering his blue slip, ostensibly due to the probe’s conclusion. 39 Nevertheless, the hearing for Restrepo was only held on June 10; in that session, Toomey dramatically proclaimed his support and Restrepo candidly and comprehensively answered committee members’ numerous questions. 40 Had the GOP adhered to the 2014 calendar, the hearing might have been conducted in July; 41 President Obama’s Third Circuit aspirants from Pennsylvania who captured appointment needed half the time Restrepo consumed simply pursuing a hearing. 42

Toomey summarized by asserting that criticism for his awaiting the evaluation “was a completely manufactured controversy,” as the politician consistently displayed support for Restrepo, and desired thorough inquiry regarding the nominee prior to blue slip production, a salutary procedure which he claimed “most . . . senators follow.” 43 Nonetheless, conspicuously absent from Toomey’s public comments was any suggestion that he requested a hearing, much less fast consideration.

The lawmaker’s protestations do not withstand analysis. 44 First, many

---

41. See supra notes 11, 22, and accompanying text for examples of how the Senate delayed multiple judicial hearings.
42. Judge Cheryl Krause waited thirty-four days and Judge Thomas Vanaskie waited ninety days, Bendery, supra note 31.
43. He said Republicans ended “chronic stalemates when Democrats were in charge.” Tom Fontaine, Toomey: Senate Finally in Gear Again, PITTSBURGH TRIBUNE-REVIEW, May 15, 2015.
44. For examples of articles analyzing Toomey’s inaction, see Spencer, supra note 24; Bendery, supra note 31; Paul Gordon, Toomey’s Explanation for Restrepo Delay Raises More Questions, HUFFINGTON POST (May 13, 2015, 1:37 PM), http://www.huffingtonpost.com/paulgordon/toomeys-
home-state officials, who constantly advocate candidates they propose, return blue slips quickly after nominations, particularly for court members being elevated. There also was insufficient explanation why the investigation necessitated six months—especially when the nominee had undergone a comprehensive 2013 inquiry and had been a prominent trial court judge ever since—which meant that the panel was not “starting from scratch.” Related was the committee’s deployment of less time examining, and convening hearings for, additional possibilities—mainly the U.S. Court of Appeals for the Federal Circuit designee, tapped simultaneously or later “but who had not” received previous full vetting. Third, Grassley’s admission that he would conduct the hearing “[w]hen [he] [g]ot the blue slips” and consequent failure to mention any ongoing investigation cast doubt upon Toomey’s excuse for procrastinating for over a half year. Finally, observers surmised that partisanship animated GOP slow walking of numerous prospects because only a few jurists realized 2015 confirmation as contrasted with Democrats’ helping marshal approval for twenty-nine lower court nominees at the same juncture of President Bush’s seventh year.

That inactivity leaves federal tribunals registering thirteen circuit, and eighty-three district court vacancies, while the Administrative Office of the U.S. Courts—the courts’ administrative arm—pinpoints thirty-eight comprising

---

45. See supra text accompanying notes 4–5, 24–25, which demonstrate that Restrepo had the qualifications necessary for swift blue slip action). But see supra text accompanying notes 31 and 43 for the assertion that blue slip delay can be common practice.

46. Schaeffer, supra note 44; see also Mauriello, supra note 39 (theorizing that prior vetting should speed nomination process). But see Bendery, supra note 31 (quoting Grassley aide claiming that vetting “starts from scratch”).

47. Schaeffer, supra note 44; see also Gordon, supra note 44 (criticizing the unnecessary delay on previously vetted nominees). See supra notes 24, 36 and accompanying text for a description of the expedited process of review for the elevation of sitting judges.

48. Gordon, supra note 44 (emphasis added). See supra text accompanying note 26 and infra notes 57–58 and accompanying text for references to five nominees, each nominated the same day as Restrepo or after, but considered for a vote before him.

49. Bendery, supra note 31. After Toomey’s media scrutiny, Grassley claimed the panel inquiry, not the blue slip, caused delay. Gordon, supra note 44. See supra notes 30–31 and accompanying text for an account of Grassley and his staff’s handling of the delay.

judicial emergencies, a figure that Republicans have allowed to more than triple since they regained a chamber majority. Delayed confirmations require that accomplished, uncontroversial nominees place careers on hold, discourage myriad accomplished lawyers from realistically envisioning bench service, deprive circuits (notably the Third) of judicial resources for which they have much need, and can make parties wait interminably on appellate disposition.

Judge Restrepo’s hearing was long overdue because his nomination to an emergency opening languished for seven months. This process vividly contrasts with that of an impressive U.S. Court of Appeals for the Federal Circuit aspirant, Kara Farnandez Stoll, proffered the same day Restrepo was; she deftly navigated a March 2015 hearing and the Senate panel easily reported her six weeks later. President Obama correspondingly proposed the four nominees with May 2015 hearings the same day as Restrepo or later.

Once Senator Toomey had seemingly ended delay of Judge Restrepo by providing the blue slip, the nominee deserved fast consideration. The jurist is an excellent centrist, whom Toomey powerfully asked President Obama to choose in mid-November 2014, effusively lauding him as a superior Third Circuit addition, while the tribunal must possess its entire complement for supplying justice. However, the chamber delayed processing of Restrepo. The panel needed to immediately convene Restrepo’s hearing, but waited until June 10, to


54. See JOHN ROBERTS, 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2010); Joe Palazzolo, In Federal Courts, Civil Cases Pile up, WALL ST. J., Mar. 6, 2015. See supra notes 52–53 for sources on the impact delays have on judicial resources.

55. See Schaeffer, supra note 44.

56. 161 CONG. REC. S6,693 (daily ed. Sept. 16, 2015). See supra note 4 and accompanying text for a brief account of Judge Restrepo’s nomination.


59. June 10th Hearings, supra note 11. See supra text accompanying notes 4, 25, and 32 for examples of Senator Toomey praising Judge Restrepo.

60. See supra notes 52, 54–56 and accompanying text for evaluation of the impact judicial vacancies have on courts.
quickly conduct a discussion and to vote—yet it refused the latter until June 25, which meant the vote only happened July 9.\footnote{Exec. Business Mtg. Before the S. Judiciary Comm., 114th Cong. (June 25, 2015).} McConnell should then have expeditiously calendared a rigorous floor debate and ballot. Nevertheless, on June 4, he intimated that Republicans could preclude up or down votes for additional appeals court nominees of President Obama.\footnote{Burgess Everett & Nick Gass, McConnell Vows to Slow Judicial Nominees, POLITICO (June 5, 2015, 1:06 PM), http://www.politico.com/story/2015/06/mitch-mcconnell-judicial-nominations-118674. But see Alexander Bolton, McConnell Backs Away from Shutdown Talk, THE HILL (June 6, 2015, 1:05 PM), http://thehill.com/homenews/senate/244196-mcconnell-backs-away-from-judicial-shutdown-talk.} Reid excoriated the majority leader for unprecedented obstruction—specifically, denying a yes or no ballot to any circuit recommendation—which ignored his explicit constitutional duty, by astutely parroting McConnell’s 2008 floor remarks that urged speedy confirmation of Bush appellate court nominees.\footnote{161 CONG. REC. S3,849–50 (daily ed. June 8, 2015) (statement of Sen. Reid); accord 161 CONG. REC. S4,591 (daily ed. June 24, 2015) (statement of Sen. Leahy); see also Russell Wheeler, With Senate Control, Will the GOP Stop Confirming Circuit Judges?, BROOKINGS INSTITUTION: FIXGOV (June 10, 2015, 3:00 PM), http://www.brookings.edu/blogs/fixgov/posts/2015/06/10-circuit-court-confirmations-wheeler (providing a comparison to judicial confirmations during the George W. Bush administration). But see supra note 33 for Grassley’s comparison of judicial confirmations between the majority Republican Senate in 2015 and the majority Democratic Senate in 2007.} The majority leader has neglected to clarify his June 2015 pronouncement about consideration of appellate court designees, but arrangement of the Stoll final vote in early July appeared to make possible Restrepo’s Senate floor ballot during the autumn.\footnote{161 CONG. REC. S4,678 (daily ed. July 7, 2015); see also id. at S8,443 (daily ed. Dec. 7, 2015) (conducting a December 7 final vote for a district nominee but not for Restrepo); id. at S4,591 (daily ed. June 24, 2015) (statement of Sen. Leahy) (his criticism of GOP obstruction apparently provoked the Stoll vote).}

However, that failed to occur. Indeed, when it seemed that the chamber would recess for the year without arranging a yes or no vote on Restrepo, Senator Toomey finally wrote the majority leader urging him to schedule an up or down ballot.\footnote{Letter from Sen. Pat Toomey to Sen. Mitch McConnell (Dec. 7, 2015); see Jonathan Tamari, Toomey Urges End to Delay on Restrepo Confirmation, PHILA. INQUIRER (Dec. 9, 2015), http://articles.philly.com/2015-12-09/news/68870246_1_toomey-voice-vote-judiciary-committee.} McConnell ultimately relented and chose on December 9 to schedule a vote for January 11, 2016.\footnote{Jonathan Tamari, Senate Schedules Vote on Long-Delayed Pa. Nominee Restrepo, PHILA. INQUIRER (Dec. 9, 2015, 9:22 PM), http://www.philly.com/philly/blogs/capitolinq/Senate-schedules-vote-on-long-delayed-PA-nominee-Restrepo.html; Agreement on Restrepo Nomination, U.S. SENATE DEMOCRATS (Dec. 9, 2015, 5:50 PM), http://democrats.senate.gov/2015/12/09/agreement-on-restrepo-nomination#.VjHHzwrLIU.} After Senators Casey and Toomey praised Restrepo, Senator Leahy castigated Republicans for delaying the excellent, consensus nominee, and no member criticized Restrepo, the chamber voted eighty-two to six to confirm the nominee on January 11.\footnote{162 CONG. REC. S21 (daily ed. Jan. 11, 2015); see Jonathan Tamari, After 4 Months, Senate Finally Approves Phila. Judge, PHILA. INQUIRER (Jan. 13, 2016), http://articles.philly.com/2016-01-...
In November 2014, President Obama nominated Judge Restrepo to the Third Circuit mainly at the Pennsylvania senators’ instigation, but Senator Toomey did not promptly transmit the blue slip. The chamber failed to rapidly process him and numerous other similarly talented, moderate nominees, particularly for emergencies. The Senate finally confirmed Restrepo fourteen months after his nomination. Restrepo’s severely delayed appointment is a stunning cautionary tale about the broken federal judicial selection process, which Republicans and Democrats must remedy for the good of the Senate, the courts, and the nation. If Casey and Toomey, Senate colleagues, and the chief executive learn from this story that they must assiduously collaborate, all participants in the selection process will fill the other Pennsylvania Third Circuit vacancy and ninety-five additional openings with judges who can swiftly, inexpensively and equitably decide cases.68


The chamber should have accorded them and the many other well qualified, consensus selections whom Obama has tapped better treatment than Judge Restrepo. The committee did grant Schott, Puhl and Koh hearings and approval, but the Senate has yet to grant any of them a final vote. Home state senators have refused to return blue slips on the remaining four. Carl Tobias, Confirming Circuit Judges in a Presidential Election Year, 84 GEO. WASH. L. REV. ARGUENDO 160, 173 (2016). Most important, the day after Obama nominated Haywood, who would be the first African American female Third Circuit judge, if confirmed, Toomey issued a press release announcing that he would retain her blue slip. Toomey Statement, supra note 50; see also Jonathan Tamari & Jeremy Roebuck, Obama’s Pick for Judgeship Here Draws Toomey’s Ire, PHILLY.COM (Mar. 15, 2016, 8:45 PM), http://www.philly.com/philly/news/politics/20160316_Obama_nominates_Pittsburgh_federal_prosecuto r_for_Third_Circuit_vacancy.html. Toomey premised retention on his dissatisfaction with Haywood’s answers to Toomey’s questions in a private meeting. However, it would have been preferable to have the full committee probe relevant issues in a public hearing.