2014

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FILLING THE DISTRICT OF ARIZONA VACANCIES

Carl Tobias*

President Barack Obama nominated four well-qualified, diverse candidates to the United States District Court for the District of Arizona, on September 19, 2013, sixteen days after Chief Judge Roslyn O. Silver assumed senior status. The federal bench experiences 80 vacancies of the 677 district court active judgeships authorized by Congress nationwide. The District of Arizona encounters six openings out of thirteen positions. All six District of Arizona unfilled posts satisfy the Administrative Office of the United States Court’s criteria for “judicial emergencies” due to the heavy case and workloads tribunal judges carry and the vacancies’ protracted length. Indeed, three years ago, Chief Judge Silver instituted the exceptionally rare step of designating the whole Arizona federal district a judicial emergency because of the court’s substantial, increasing criminal docket, inadequate resources, and empty judgeships. These vacancies—which are more than eleven percent nationally and surpass forty-five percent in the

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District of Arizona—undermine speedy, economical, and fair dispute resolution.\(^5\) Accordingly, President Barack Obama must swiftly nominate candidates to fill all of the openings throughout the country. For its part, the Senate ought to expeditiously process all nominees whom Obama has tapped, especially the six Arizona District nominees.

The judicial vacancy crisis must end. The federal bench has experienced nearly a ten percent vacancy rate over an unprecedented four and a half-year period.\(^6\) The substantial number and protracted character of those openings have imposed numerous detrimental effects.\(^7\) These phenomena have delayed the scheduling of jury trials in many civil cases and even propelled termination of some litigation because the Speedy Trial Act requires that criminal matters have precedence.\(^8\) Indeed, the emergency designation has meant that some criminal proceedings were delayed in the Arizona District.\(^9\) The vacancy crisis places additional pressure on sitting judges, particularly the eight senior judges in the Arizona District who have commendably helped address the voluminous docket, but who are also reasonably expected to carry smaller caseloads once they assume senior status.\(^10\)

For district court nominations, Presidents normally seek recommendations of highly qualified candidates from the home state senators. Once the White House receives those suggestions, the Federal Bureau of Investigation (FBI) conducts background checks, while the American Bar Association (ABA) evaluates and ranks the candidates proposed. After negotiations with the senators, the administration nominates. The Senate next conducts hearings and panel votes on nominees. Those approved then receive Senate floor debates, if needed, and final votes.

President Obama has assiduously consulted Republican and Democratic elected officials in states where judicial vacancies materialize before tendering nominations. Obama earlier sought the guidance and support of Arizona Republican Senators John McCain and Jon Kyl (R) who championed Jennifer Guerin Zipp, a magistrate judge with chambers in Tucson, and the nominee easily


\(^{9}\) See supra note 4 and accompanying text.

secured District of Arizona confirmation in October 2011, fewer than four months after her nomination.11

To facilitate confirmation of previous nominees, President Obama has cooperated with Senator Patrick Leahy (D-Vt.), the Chair of the Senate Judiciary Committee who schedules panel hearings and votes; Senator Harry Reid (D-Nev.), the Majority Leader who arranges upper chamber floor debates and votes; and their Republican analogues—Senator Charles Grassley (Iowa), the Judiciary Committee Ranking Member, and Senator Mitch McConnell (Ky.), the Minority Leader.12 President Obama should continue working closely with both parties’ leadership to fill current and future vacancies.

In the past, Senator Leahy has rapidly arranged committee hearings and votes, reporting nominees who capture panel approval to the Senate floor where numbers have languished interminably.13 The essential bottleneck is the chamber floor.14 The GOP Leader has slowly entered agreements for debates and votes.15 Most problematic has been Republican unwillingness to promptly consider well-qualified, uncontroversial nominees, inaction that violates Senate customs.16 When


12. Tobias, supra note 7, at 2242.

tions%20wheeler/13_obama_judicial_wheeler.pdf.

14. A clear example of this is Senate failure to consider packages of nominees as the Senate recesses, particularly at year’s end, a practice followed as recently as President George W. Bush’s Administration. See, e.g., 159 CONG. REC. S5520 (daily ed. July 8, 2013) (statement of Sen. Leahy); id. at S3599 (daily ed. May 20, 2013) (statement of Sen. Leahy). But see id. at S3704–05 (daily ed. May 22, 2013) (statement of Sen. McConnell).

15. See, e.g., 156 CONG. REC. S904 (daily ed. Mar. 2, 2012); Tobias, supra note 7, at 2243, 2246.

senators have eventually voted, they overwhelmingly confirmed many nominees like Judge Zipps. Senator Leahy has asserted that Democrats accorded President George W. Bush’s nominees considerably more solicitous treatment, although Republican leaders dispute that contention. Therefore, both parties, and especially the GOP, must cooperate better.

On June 23, 2011, President Obama nominated Tucson lawyer Rosemary Marquez for one of the District of Arizona vacancies. Rosemary Marquez has served as a federal and state public defender, state prosecutor, and private practitioner, and she earned a unanimous qualified American Bar Association rating. From the day President Obama nominated Rosemary Marquez until early 2013, Senators McCain and Kyl exercised their prerogatives as home state senators to halt the nominee’s Senate consideration. On January 2, 2013, the Marquez nomination expired when the 112th Congress adjourned.

On January 3, 2013, President Obama re-nominated Marquez as well as 32 additional extremely well qualified circuit and district nominees whose nominations had expired. The chief executive encouraged the “Senate to consider and confirm these nominees without delay, so all Americans can have equal and timely access to justice.” Shortly after newly elected Arizona Senator Jeff Flake assumed office as Senator Kyl’s replacement, on January 3, 2013, Senator Flake decided to meet with Marquez. In early February 2013, after the meeting, Senator Flake remarked: “I’m not sitting on her, I’m waiting to receive the material” that


17. See supra note 11 and accompanying text.
20. President Obama Nominates Two to the United States District Court Bench, supra note 11.
25. President Obama Re-Nominates Thirty-Three to Federal Judgeships, supra note 24; see supra notes 3-6 and accompanying text.
26. See Radnovich, supra note 22.
she has written.\textsuperscript{27} He elaborated: “After I see the material I’ll decide whether [the
writing] is something I agree with or not.”\textsuperscript{28} Nevertheless, the Judiciary Committee
failed to conduct a 2013 hearing for Marquez, while both legislators’ staff “offered
only a ‘no comment’ [in late June] when asked about Marquez.”\textsuperscript{29} On September
19, Senator McCain signaled his support for Marquez by issuing a statement: the
President’s “four nominees join Rosemary Marquez of Tucson for Senate
consideration . . . I urge the Senate Judiciary Committee to consider these five very
capable nominees as soon as possible and allow the full Senate to swiftly confirm
them.”\textsuperscript{30} Until September 19, the Obama Administration had not proposed any
nominations for five of the six openings in the District of Arizona.\textsuperscript{31} The White
House then sought qualified, consensus recommendations for the one remaining
district vacancy from Senator McCain and Senator Flake, who deployed a process
similar to that which yielded the four recent nominations. On December 19, the
President nominated Judge Alan Soto to the sixth vacancy.\textsuperscript{32} On January 21, 2014,
the Judiciary Committee conducted a hearing for all six Arizona District
nominees.\textsuperscript{33} Senator McCain warmly introduced the nominees, praising them as
well qualified, consensus individuals, while Senator Flake, who was the only GOP
member to ask questions, lauded the nominees and appeared satisfied with their
answers to his questions.\textsuperscript{34}

The 677 district court judgeships, 80 of which remain unoccupied,\textsuperscript{35} are
critical because district judges resolve the overwhelming majority of cases pursued
and find the facts in prosecutions and civil lawsuits which result in trials, serving
as the federal judiciary’s “workhorses.”\textsuperscript{36} President Obama has nominated 46
highly qualified, consensus individuals and must quickly nominate similar

\begin{itemize}
\item \textsuperscript{27} See id.; Bell, supra note 3; Vote on Judicial Nominees, supra note 4.
\item \textsuperscript{28} See Radnovich, supra note 22.
\item \textsuperscript{29} See Bell, supra note 3; Vote on Judicial Nominees, supra note 4.
\item \textsuperscript{30} Press Release, U.S. Sen. John McCain, Statement by Senator John McCain
on Nominations to the United States District Court for the District of Arizona, (Sept. 19,
2013), available at
ontentRecord_id=3849419c-fc3d-de3f-694e-a9d78ed75685&Region_id=&Issue_id=.
\item \textsuperscript{31} See Federal Judiciary, Current Vacancies, supra note 1.
\item \textsuperscript{32} Press Release, White House, Office of the Press Sec’y, President Obama
Nominates Eight to Serve on the U.S. District Courts (Dec. 19, 2013)
http://www.whitehouse.gov/the-press-office/2013/12/19/president-obama-nominates-eight
serve-united-states-district-courts.
\item \textsuperscript{33} Hearing on Judicial Nominations Before the S. Judiciary Comm.; Jan. 21,
2014.
\item \textsuperscript{34} See id. See also Statement by Senator John McCain on Arizona District
Court Nominees, JOHN MCCAIN, U.S. SENATOR – ARIZONA (Jan. 28, 2014)
http://www.mccain.senate.gov/public/index.cfm/floor-statements?ID=2575c049-ea78-4e00-
b5f8-870fa827ca1f.
\item \textsuperscript{35} See supra note 2 and accompanying text.
\item \textsuperscript{36} BANNON, supra note 13, at 1; Nina Totenberg, Obama’s Nominees Face
http://www.npr.org/blogs/thetwo-way/2012/07/21/157169538/obamas-judicial-nominees-
face-slowed-confirmation-process.
prospects for the other 34 vacancies. President Obama consulted with Arizona Republican Senators John McCain and Jeff Flake prior to making the September 19 and December 19 nominations. President Obama has proposed nominees of balanced temperament, who are intelligent, ethical, hardworking, independent and diverse vis-à-vis ethnicity, gender, sexual preference, and ideology.

Senators McCain and Flake should encourage Senators Leahy and Grassley to promptly arrange thorough discussions and swift votes for all six District of Arizona nominees. Senators McCain and Flake must concomitantly urge Senator McConnell to schedule expeditious floor debates and votes for the Arizona nominees.

After the current vacancies in the District of Arizona are filled, Congress must seriously consider authorizing new judgeships for the District of Arizona, so that the court will be able to more felicitously address its crushing docket. Indeed, last spring, the United States Judicial Conference recommended that Congress approve six permanent and five temporary additional judgeships for the District of Arizona based on conservative estimates of cases and workloads. This recommendation is embodied in a comprehensive judgeships bill that received a Senate Judiciary Subcommittee hearing on September 10, 2013. If Congress does not pass this measure, both houses at least ought to consider adopting statutes that resemble bills introduced during the last Congress, which could relieve pressure on the overburdened border districts.

In sum, the 80 district court vacancies nationwide and the six District of Arizona openings undermine federal courts’ efforts to promptly, inexpensively, and equitably decide cases. Accordingly, President Obama must swiftly nominate, and the Senate expeditiously process, highly qualified, uncontroversial candidates. To facilitate this process, the White House should consult home state senators across the country and speedily nominate exceptional people for all vacancies. The Senate must in turn quickly process these prospects.

38. Yvonne Wingett Sanchez & Dan Nowicki, Obama Nominates 4 Arizonans to Fill U.S. District Court Vacancies, ARIZ. REPUB., Sept. 19, 2013, at B1; see Federal Judiciary, Current Vacancies, supra note 1; see also Sheldon Goldman et al., Obama’s Judiciary at Midterm: The Confirmation Drama Continues, 94 JUDICATURE 262, 266–67 (2011); Tobias, supra note 7, at 2233, 2239–40.
39. Goldman et al., supra note 38, at 301; Tobias, supra note 7.
40. JUDICIAL CONFER. OF THE U.S., REPORT OF THE PROCEEDINGS, 18–19 (Mar. 12, 2013); see also Tobias, supra note 7, at 2257; Radnovich, supra note 22.