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CONFIRMING JUDGES IN THE 2016 SENATE LAME DUCK SESSION

Carl Tobias*

In this piece, Professor Carl Tobias descriptively scrutinizes the nomination and confirmation regimes throughout the administration of President Barack Obama. The article critically evaluates selection finding that persistent Republican Senate obstruction resulted in the greatest number of unoccupied posts for the longest duration, briefly moderated by the 2013 detonation of the “nuclear option,” which constricted filibusters. Nevertheless, the article contends when the Grand Old Party (GOP) attained a chamber majority, Republicans dramatically slowed the nomination and confirmation processes after January 2015. Therefore, openings surpassed ninety before Congress is scheduled to reassemble. Because this dilemma erodes rapid, inexpensive, and equitable disposition, the article suggests how the Senate should promptly reduce the multitude of unfilled judgeship once the lame duck session commences.

Following the prolonged summer recess and Congress’ truncated appearance on Capitol Hill, the politicians departed Washington in September until November. The protracted absence of Senators permitted merely one judge’s confirmation after June, leaving the bench with ninety-four empty seats when members convene in November. Moreover, presidential and Senate election results will provoke numerous circuit and district judges to assume senior status or retire, which means that the courts will probably face 110 vacancies out of 842 lower court judgeships at the 2017 Inauguration Day. Regardless of who captured the presidency and the upper chamber, Democratic and Republican Senators need to cooperate and fill the positions over the lame duck session. Tribunals require their entire complement of judges for delivering justice, yet presently attempt to resolve massive caseloads with ninety-four vacancies. Appointments in the congressional session which begins after the elections merit consideration.

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* Williams Chair in Law, University of Richmond. I wish to thank Margaret Sanner for valuable suggestions, Katie Lehnen for exceptional research, the University of Pennsylvania Journal of Constitutional Law editors for careful editing, 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.
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I. OBAMA ADMINISTRATION JUDICIAL SELECTION

At President Obama’s inauguration, the lower federal courts encountered fifty-four vacancies.¹ The administration swiftly ensured careful nomination for able, centrist, diverse prospects.² The White House consulted home state elected officers and aggressively pursued their recommendations of superb, consensus individuals, especially minority, female and lesbian, gay, bisexual and transgender (LGBT) picks.³ Numerous lawmakers concomitantly adopted special initiatives which could detect, examine and propose talented, mainstream submissions, notably persons of color, women and LGBT selections.⁴ The White House correspondingly assembled ideas from conventional outlets, particularly the American Bar Association (ABA), and less customary sources, encompassing minority, women’s and LGBT bar groups and politicians familiar with strong candidates.⁵ They helped aspirants navigate the pre-nomination system while tendering multiple fine possibilities. Officials then sent choices and Obama canvassed them, nominating many.

The Obama White House significantly improved the appointments procedures,⁶ comprehensively seeking aid from both parties.⁷ Obama engaged

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² Carl Tobias, Judicial Selection in Congress’ Lame Duck Session, 90 IND. L.J. SUPP. 52, 53 (2015) citing Carl Tobias, Senate Gridlock and Federal Judicial Selection, 88 NOTRE DAME L. REV. 2233, 2239–40 (2013); see also Sheldon Goldman et al., Obama’s Judiciary at Midterm, 94 JUDICATURE 262 (2011) (explaining that Obama’s nominees were among the most diverse in history).
³ Tobias, supra note 2, at 53, citing 160 CONG. REC. S5364 (daily ed. Sept. 8, 2014) (statement of Sen. Leahy); Sheldon Goldman et al., Obama’s First Term Judiciary, 97 JUDICATURE 7, 18 (2013) (emphasizing Obama’s excellent record of nominating “nontraditional” candidates, such as women and racial and ethnic minorities); Tobias, supra note 2, at 2239–40.
⁴ Goldman et al., supra note 3, at 7, 18; Carl Tobias, Postpartisan Federal Judicial Selection, 51 B.C. L. REV. 769, 777 (2010).
⁵ Tobias, supra note 2, at 53. I also rely in this and in the next two sentences on Goldman et al., supra note 3; sources supra note 2.
⁶ Jeffrey Toobin, The Obama Brief, NEW YORKER, Oct. 27, 2014, at 24; see sources supra note 2.
⁷ Tobias, supra note 2, at 2239 (finding that Obama improved the appointments process by assiduously consulting and by emphasizing competence, ethics and diversity, rather than ideology); Peter Baker & Adam Nagourney, Tight Lid Defined Process in Selecting a New Justice: Using Past
Senators Patrick Leahy (D-Vt.), the Judiciary Committee Chair, who speedily instituted nominee panel hearings and votes; Harry Reid (D-Nev.), the Majority Leader, who directly controlled the floor; and Chuck Grassley (Iowa) and Mitch McConnell (Ky.), their Republican analogues. Despite concerted Democratic endeavors, the GOP failed to reciprocate. After nominations, Leahy swiftly initiated hearings, but the minority party held over ballots seven days without reasons for excellent prospects whom the committee unanimously approved the next week. McConnell collaborated little to set final votes, and his colleagues duly placed anonymous holds, or those with no substantiation, on capable, moderate nominees; this frustrated appointments, mandating cloture. Republicans assertively demanded plentiful, unwarranted roll call ballots and debate time and this wasted scarce floor hours. Therefore, by fall 2009, circuits wrestled with twenty, and district courts seventy-five, open positions, which effectively remained constant over the succeeding half decade, comprising the highest rate for an unprecedented period. This situation worsened in 2013 when Obama picked competent, mainstream, diverse aspirants for three D.C. Circuit vacancies. After the GOP rejected yes or no votes for each, the machinations forced Democrats to cautiously invoke the nuclear option.
They marshaled fifty-one, not sixty-seven, ballots when amending the filibuster rule to require a majority vote for cloture. Detonating the nuclear option essentially allowed Senate majorities to confirm all three D.C. Circuit possibilities and many other circuit and district court nominees.17 In 2014, Reid emphasized appellate court candidates, arranging cloture and Senate votes most weeks that the chamber operated.18 Those actions, especially the nuclear mechanism’s release, permitted the courts of appeals to confront seven openings, although the districts had thirty-two, when Congress adjourned near 2014’s close.19

Over 2015, after Republicans had captured a Senate majority,20 already negligible coordination further diminished. GOP leaders incessantly pledged they would again bring to the chamber “regular order,” a phase employed to describe the approach which Republicans claimed governed before Democrats ostensibly eroded it. Early in January, McConnell, the new Majority Leader, urged: “We need to return to regular order.”21 Grassley, the new Judiciary Chair, vowed he would treat nominations analogously.22 Despite many promises, Republicans slowly designated choices for Obama to review, planned nominee hearings and committee ballots, and scheduled chamber debates and votes. This meant that, by 2015’s conclu-


19 Jeffrey Toobin, Bench Press, NEW YORKER, Sept. 21, 2009, at 42. Appellate court openings were at their lowest point since 1990. This is particularly striking, because 1990 judgeships legislation approved 11 new judgeships, bringing the total to 179. Pub. L. No. 101-650, Tit. II, § 206, 104 Stat. 5098 (1990). Partisanship that was formerly confined to Justices has now infected all levels of the federal judiciary. Goldman et al., supra note 3, at 12-14; Tobias, supra note 2, at 2234-38.


sion, eight of nine appellate vacancies lacking nominees - which the Administrative Office of the U.S. Courts identified as emergencies - plagued states that GOP members represented.23 One circuit and ten district jurists won confirmation last year.

2016 is a presidential election year when judicial appointments conventionally stall and ultimately halt, complications intensified by GOP refusal to process U.S. Court of Appeals for the District of Columbia Circuit Chief Judge Merrick Garland, Obama’s accomplished, mainstream High Court nominee.24 The Senate approved one circuit and eight trial court jurists before departing to campaign in late September, yet Republicans averaged only a lone confirmation per month since January 2015 and there could be 110 empty posts on the next Inauguration Day.25

II. CRITICAL ANALYSIS

A. Difficulties

Striking obstruction and rampant partisanship impose harmful effects. Making superb, moderate nominees wait prolonged times leaves robust careers on hold and dissuades many stellar prospects from contemplating the


25 JUDICIAL VACANCIES (2015-16), supra note 1; Russell Wheeler, Recess is Over: Time To Confirm Judges, BROOKINGS INST. (Sept.6, 2016), https://www.brookings.edu/blog/fixgov/2016/09/06/recess-is-over-time-to-confirm-judges/.
This resistance deprives tribunals of necessary judicial resources and myriad litigants of civil and criminal justice, while it undermines swift, economical and fair case disposition, and public regard for the confirmation system and the coequal branches.

B. Benefits

Notwithstanding these problems, Obama’s impressive work and diligent efforts by lawmakers who cooperated with the White House realized considerable success when they approved numbers of very qualified, moderate, diverse candidates at 2014’s close. For instance, Obama tripled the Asian American circuit jurists, named the first gay appellate judge, expanded the number of female choices’ represented to more than 40 percent and increased experiential diversity. This White House reduced openings to thirty-nine by the end of 2014; however, in November, the bench will have thirteen circuit, and eighty-one district, vacancies when Congress reconvenes for the lame duck session.

Assiduous efforts by President Obama and Senators who helped confirm a plethora of talented, diverse nominees, yield advantages. Many circuit and district courts with fewer openings comparatively quickly, inexpensively and equitably resolve immense, complex filings. Enlarged diversity also improves comprehension and review of essential questions, notably involving constitutional and criminal law, and experiential diversity can supply those and related benefits. People of color, women and

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28 Tobias, supra note 2, at 2253.
30 Todd Ruger, Obama Names Record Number of Gay Judges, NAT’L L. J., (July 21, 2014); Mark Joseph Stern, Obama’s Most Enduring Gay Rights Achievement, SLATE, (June 17, 2014); Toobin, supra note 6.
31 President Obama also appointed two female Justices, Sonia Sotomayor and Elena Kagan. Toobin, supra note 6; WHITE HOUSE.GOV, supra note 29.
33 When courts have full judicial complements, this relieves overworked judges. Leahy statement, supra note 3; Tobias, supra note 2, at 2254.
LGBT individuals could mitigate ethnic, gender and similar biases that impair justice.\textsuperscript{35} Courts that mirror America enhance public confidence.\textsuperscript{36}

In short, the advantages of confirming able, consensus, diverse jurists eclipse the adverse impacts which can result from politicization and obstruction. Thus, in the lame duck session, both sides need to maximize collaboration that will promote the appointment of numerous such choices and carefully minimize the detriments which partisanship and obstruction create.

\section*{III. SUGGESTIONS}

Republicans and Democrats should redouble their efforts to confirm the largest possible number of trial and circuit judges in the lame duck session.\textsuperscript{37} Approving remarkable, consensus, diverse persons affords multiple benefits. For example, these jurists invariably could help to speedily, economically, and fairly resolve courts’ huge dockets and furnish perceptive insights on complex fields of litigation.

The GOP may argue the Senate failed to confirm judges after Presidents captured election in 1988, 1992, 2000, and 2008.\textsuperscript{38} However, more telling was Stephen Breyer’s 1980 circuit appointment once Ronald Reagan defeated Jimmy Carter, a process eased by Strom Thurmond, who fashioned the “rule” providing that approvals can be delayed and stopped in presidential election years.\textsuperscript{39} Republicans also should remember that GOP home state politicians recommended a majority of the twenty well qualified, mainstream district nominees whom the Judiciary Committee approved by voice vote without dissent.\textsuperscript{40} Republicans as well should keep in mind the substantial waste entailed in failing to consider these nominees, the huge amount of time, money, and energy that the government must expend to

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\textsuperscript{37} Senate confirmation of appellate court nominees is critical, given Senate approval of two circuit judges in the last two years; three nominees have waited months on floor debates and votes. \textit{See supra} notes 23, 25.
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\textsuperscript{38} These were the final years of two-term Presidents (except for Bush \textit{père}), who confronted many fewer vacancies, and all elected but him were opposition party members. End of presidency legislative matters also assumed precedence. Kelsey Snell, \textit{Senate Considers Making a Short Pre-Election Session Even Shorter}, \textit{Wash. Post}, (Sept. 9, 2016) https://www.washingtonpost.com/news/powerpost/wp/2016/09/09/senate-considering-making-a-short-session-even-shorter/.
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\textsuperscript{39} Carl Tobias, \textit{The Transformation of the Thurmond Rule in 2016}, 66 \textit{Emory L. J.} 2001 (2016); \textit{see supra} note 24.
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restart the process and the judgeships could well remain vacant for more than a year, given numerous other higher priorities, such as creating a government as well as nominating and confirming a new Justice and sixteen circuit judges. These ideas demonstrate that Republicans should actively cooperate with Democrats. They ought to alternate final votes on candidates whom each party mustered while swiftly accordine them ballots. If the GOP eschews collaboration by, for instance, aggressively “cherry picking” nominees whom Republicans actually submitted, Democrats might protest unanimous consent or assertively recruit GOP centrists to filibuster nominees.

Activities effectively must begin immediately to facilitate endeavors when Congress does assemble. Obama should vigorously pursue creative ideas from resources knowledgeable about strong consensus prospects and keep assiduously cultivating home state politicians, asking that lawmakers support people he suggested. Until, and even after, Congress arrives, both parties’ Judiciary Committee staff may amply review the twenty nominees awaiting hearings. The panel concomitantly ought to set as many hearings and meetings as possible during the week politicians convene and conduct the maximum number practicable until adjournment.

When the session commences, legislators must probe nominees’ capability, ethics, and temperament with expeditious committee hearings and ballots speedily followed by complete, robust floor debates and votes. More particularly, lawmakers ought to seriously consider reinstituting numerous longstanding traditions. Most pertinent would be scrutinizing numbers of prominent, moderate, trial level aspirants throughout the lame duck session, a nuanced custom which modern Presidents and Senates conventionally respected.

41 For example, President Donald Trump must consult home state politicians, some of whom must create merit selection commissions or recalibrate existing ones to recommend candidates whom the politicians suggest to the White House, which must evaluate prospects and nominate. The Senate must investigate nominees, conduct panel hearings, discussions and votes, and convene floor debates and votes.

42 The process is considerably more extensive and time consuming for appellate nominees and even more so for Supreme Court nominees, whose confirmation processes can essentially suspend lower court efforts for months.

43 Examples are Susan Collins (Me.) and Mark Kirk (Ill.). A cherry picking example was Republicans’ offer to vote on three nominees whom they favored and one whom Democrats picked by skipping two African Americans whom Democrats favored. This provoked Democratic objections to unanimous consent. 162 CONG. REC. S5900 (daily ed. Sept. 20, 2016).

44 Obama also may ask home state politicians to swiftly proffer for the 37 district openings without nominees excellent consensus picks whom he analyzes expeditiously and nominates when Congress arrives, but they will lack time for 2016 approval, yet could have hearings then and 2017 approval, if re-nominated. JUDICIAL EMERGENCIES, supra note 1 available at http://www.uscourts.gov/judges-judgeships/judicial-vacancies.

45 Judith Schaeffer, What’s Good for One Lame Duck Ought to be Good for Another, HUFFINGTON POST (Nov. 11, 2010), http://www.huffingtonpost.com/judith-e-schaeffer/whats-good-for-one-
This year, the President and legislators should especially honor that custom. The district courts desperately need the open slots filled, and the vast majority of those possibilities received nomination because they are competent, uncontroversial, and diverse, rather than ideological.46

Another custom to which Senators must adhere would be permitting final ballots on quite a few of these excellent choices before recesses, namely during Thanksgiving.47 The politicians also should restore the convention of proffering abundant deference to home state colleagues and the President, who has meticulously consulted, indulged Senators’ preferences, and tapped numerous selections whom Republicans designated.48

The GOP must correspondingly revisit the determination to refuse many nominees’ floor votes, which has delayed even the most accomplished, noncontroversial, diverse candidates. If Republicans aggressively continue enforcing this approach, Democrats might again implement rather dramatic reforms, which occurred earlier when they cautiously jettisoned anonymous chamber holds placed on nominees and the sixty-vote cloture proviso.49 Democrats may even allow final ballots on a number of competent trial judge submissions proposed by GOP lawmakers in exchange for Republican agreements to have chamber votes on many whom Democrats favor.50

In the end, Republicans and Democrats should precisely balance the competing needs to thoroughly review suggestions and quickly fill myriad vacancies. Particularly with numerous fine, mainstream individuals availa-


47 Excellent, consensus Bush district nominees had expeditious approval, especially at recesses. Goldman et al., supra note 2, at 281; Michael L. Shenkman, Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track, 65 ARK. L. REV. 217, 292 (2012).


ble to fill the many vacancies, this balance should favor expeditious consideration and approval. The Constitution envisions that Senators will probe nominee ability, character, and temperament.51 Legislators should, as the chief executive deftly has, deemphasize ideology, which possesses minimal relevance for those criteria,52 and cabin speculation about how jurists would resolve legal issues, because that can erode judicial independence.53 The GOP also ought to cease delaying nominees essentially for political gain alone, as this could harm them, litigants, jurists, and selection procedures’ integrity. One salutary remedy for the difficulties would be a presumption that capable, moderate nominees merit rapid final ballots.54

CONCLUSION

Obama and Senators cooperating with the President enjoyed success when they appointed talented, centrist, diverse judges. If Republicans and Democrats recalibrate the process by cooperating again over the lame duck session, they can confirm numbers of these jurists, felicitously enabling the bench to more promptly, inexpensively, and fairly treat cases.

54 For instance, ten Republican Senators agreed to cloture on Judge David Hamilton, but nine voted against confirmation. 155 CONG. REC. S11,421 (daily ed. Nov. 17, 2009) (cloture); id. at S11,552 (daily ed. Nov. 19, 2009) (approval). For many other ideas for improvement, see Shenkman, supra note 47, at 298-311; Tobias, supra note 2, at 2255-65.