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# Appellate Court Appointments in the Second Bush Administration

Carl W. Tobias

*University of Richmond*, [ctobias@richmond.edu](mailto:ctobias@richmond.edu)

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# SYMPOSIUM ESSAY

## APPELLATE COURT APPOINTMENTS IN THE SECOND BUSH ADMINISTRATION

*Carl Tobias* \*

On December 23, 2004, the White House announced that President George W. Bush would renominate twelve candidates for the United States courts of appeals, each of whom Democratic senators had opposed in the Bush Administration's first term, many with filibusters.<sup>1</sup> The *Statement on Judicial Nominations*, which the Office of the White House Press Secretary released, announced that the Chief Executive intended to nominate again the one dozen persons whom the United States Senate did not accord "up or down" votes during the President's initial term.<sup>2</sup>

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\* Williams Professor of Law, University of Richmond School of Law. B.A., 1968, Duke University; LL.B., 1972, University of Virginia School of Law. I wish to thank Peggy Sanner for valuable suggestions; Sean Roche for staging, coordinating, and shepherding the federal judicial selection symposium as well as for valuable suggestions on this piece; Carolyn Hill for processing the piece; and Russell Williams for generous, continuing support. Errors that remain are mine.

1. See Press Release, Office of the White House Press Secretary, Statement on Judicial Nominations (Dec. 23, 2004), available at <http://www.whitehouse.gov/news/releases/2004/12/20041223-1.html> (last visited Feb. 4, 2005) [hereinafter Statement on Judicial Nominations]. See generally Michael A. Fletcher & Helen Dewar, *Bush Will Renominate 20 Judges*, WASH. POST, Dec. 24, 2004, at A1; Neil A. Lewis, *Bush Tries Again on Court Choices Stalled in Senate*, N.Y. TIMES, Dec. 24, 2004, at A1.

2. The Chief Executive renominated to the United States Court of Appeals for the D.C. Circuit Janice Rogers Brown, who is a justice on the Supreme Court of California; Thomas Griffith, General Counsel to Brigham Young University and former Counsel to the United States Senate; and Brett Kavanaugh, a senior White House lawyer with major responsibility for judicial selection. See Statement on Judicial Nominations, *supra* note 1; see also Lewis, *supra* note 1, at A1. President Bush nominated again to the Fourth Circuit Terrence Boyle, who is the former chief judge of the Eastern District of North Carolina and was an aide to former Senator Jesse Helms (R-N.C.), and William J. Haynes, II, who is General Counsel of the Department of Defense. See Lewis, *supra* note 1, at A1. The

The *Statement on Judicial Nominations* first proclaimed that an effective and efficient federal judicial system is critical to guaranteeing justice for all of the American people.<sup>3</sup> The document asserted that the Chief Executive had nominated highly qualified persons to the federal courts during his initial term, yet the Senate had not voted on many of these individuals. The statement contended that this failure had only served to compound the judicial vacancies problem, increase the case backlog, and delay the delivery of justice. It also claimed that the Senate has a constitutional duty to vote on a president's nominees and remarked that the Chief Executive eagerly anticipated working with the 109th Senate to insure a well-functioning, independent judiciary.

The tone, setting, delivery, and timing of the December 2004 announcement sharply contrasted with how the President introduced his first appeals court nominees during the opening term.<sup>4</sup> On May 9, 2001, the Chief Executive had unveiled his initial package of designees for the federal intermediate appellate courts. Relying upon a White House ceremony that presidents have conventionally reserved for nominees to the Supreme Court of the United States, Mr. Bush presented eleven individuals whom he recommended for vacancies on the appeals courts.<sup>5</sup> The

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Chief Executive renominated to the Fifth Circuit Priscilla Owen, who is currently a justice on the Supreme Court of Texas. *Id.* The President nominated again to the Sixth Circuit Richard Griffin and Henry Saad, who are Michigan Court of Appeals judges; David McKeague, who is a judge on the Western District of Michigan, and Susan Bieke Neilson, who is a Wayne County Court judge. *Id.* The Chief Executive renominated William Myers, III, who served as the Solicitor at the U.S. Department of the Interior. President Bush nominated again to the Eleventh Circuit William Pryor, who was the attorney general of Alabama until he received a recess appointment to that court. *Id.*

3. I rely here and in the remainder of this paragraph on the *Statement on Judicial Nominations*, *supra* note 1.

4. See Press Release, Remarks by the President During Federal Judicial Appointees Announcement (May 9, 2001), available at <http://www.whitehouse.gov/news/releases/2001/05/20010509-3.html> (last visited Feb. 4, 2005) [hereinafter President's Remarks]; see also Carl Tobias, *The Bush Administration and Appeals Courts Nominees*, 10 WM. & MARY BILL RTS. J. 103 (2001); Neil A. Lewis, *Bush to Nominate 11 to Judgeships Today*, N.Y. TIMES, May 9, 2001, at A1.

5. The Chief Executive nominated to the D.C. Circuit John Roberts, who had been Deputy Solicitor General and a law clerk to Chief Justice Rehnquist, and Miguel Estrada, a former assistant to the Solicitor General, law clerk to Justice Anthony Kennedy, and the first Latino suggested for that court. Mr. Bush proposed the elevation to the Second Circuit of Barrington Parker, Jr., an African-American whom President Bill Clinton had named to the Southern District of New York. Mr. Bush selected for the Fourth Circuit Roger Gregory, an African-American whom Clinton had accorded a recess appointment to that court; then-Chief Judge Boyle; and Dennis Shedd, a judge on the District of South

candidates included five federal judges and two state Supreme Court justices; two African-Americans, one Latino and three women; and four experienced Supreme Court of the United States advocates.

President Bush delivered remarks when submitting these May 2001 nominees which offered insights on the Administration's perspectives regarding federal judicial selection.<sup>6</sup> The Chief Executive initially recognized the essential importance of the constitutional responsibility delegated to him because life-tenured federal judges exercise the substantial power of the state. Mr. Bush then asserted that his nominees possessed excellent credentials and satisfied the very highest standards for legal training, temperament and judgment, describing them as diverse persons of character and experience, who would enjoy wide, bipartisan support. The President concomitantly observed that he had sought and received counsel from Republican and Democratic senators, suggested the nominees in good faith, and trusted that the Senate would act similarly. The Chief Executive recognized that the confirmation process had previously been diverted from the merits of nominees' qualifications, characterized this as damaging to the Senate, the judiciary and the nation, and admonished senators to provide fair hearings and expeditious votes for all nominees because the more than 100 then-existing vacancies create backlogs, frustration, and delay.

The May 2001 presentation of the initial appellate nominees, therefore, strikingly differed from the recent announcement. The December 2004 determination to renominate the twelve controversial individuals, the event's understated character, its presentation in the form of a statement announced by the White House Press Secretary, the nominees submitted, and the delivery the afternoon before Christmas Eve in fact reveal much about contem-

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Carolina and a former aide to Senator Strom Thurmond (R-S.C.). The President nominated to the Fifth Circuit Edith Brown Clement, who was then a judge in the Eastern District of Louisiana and Justice Priscilla Owen. Mr. Bush chose for the Sixth Circuit Jeffrey Sutton, who had a national reputation for litigating on behalf of states' rights, and Deborah Cook, who at the time was an Ohio Supreme Court justice. The Chief Executive nominated to the Tenth Circuit Michael McConnell, who had been a law clerk to Justice William Brennan and was then a law professor at the University of Utah. See Tobias, *supra* note 4, at 110; David G. Savage, *Bush Picks 11 for Federal Bench*, L.A. TIMES, May 10, 2001, at A1.

6. I rely here and in the remainder of this paragraph on President's Remarks, *supra* note 4.

porary judicial selection, which is a fundamental aspect of constitutional governance. For example, the decisions to eschew any ceremony; to have the press secretary write and read a statement, rather than have the Chief Executive speak; and to make the announcement immediately before a significant national holiday indicate that the second Bush Administration hoped to de-emphasize the confrontational nature of renominating so many persons whom Democrats had vociferously opposed.

Numerous reasons seem to underlie the Bush Administration's willingness to renominate these candidates whom the Democrats have consistently blocked and have expressly announced that they will persist in opposing, notwithstanding the President's statements about cooperating with Democrats. First, Mr. Bush emphasized judicial appointments in his re-election campaign, vowing to end Democratic "obstructionism" and to select judges who would interpret the law, not make it. Second the Republican Party enjoys an increased majority of fifty-five members in the Upper Chamber, numbers which strengthen the Chief Executive's prerogatives in appointing judges. More specifically, Democrats have one fewer representative on the Senate Judiciary Committee, which assumes lead responsibility for the confirmation process, so the Grand Old Party ("GOP") has a 10-8 majority.

Third, forcing the judicial selection issue appears rather cost-free politically and enables the President to cultivate conservative constituencies. Submitting candidates who are proponents of federalism and public school prayer or who hold ideologically conservative viewpoints on related, controversial social policy questions that federal judges decide is perceived as a "win-win" approach.<sup>7</sup> Should these nominees be confirmed, Mr. Bush will establish or increase conservative majorities on the twelve regional circuits, which are essentially the courts of last resort in their respective locales, because the Supreme Court entertains such a minuscule number of appeals.<sup>8</sup> If Democrats stop the nominees' confirma-

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7. See, e.g., DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 23-45 (2000) (discussing the long-term policymaking impact that a president may have through targeted courts of appeals nominations); Susan B. Haire et al., *The Voting Behavior of Clinton's Courts of Appeals Appointees*, 84 JUDICATURE 274 (2001) (discussing the important policymaking role of courts of appeals judges).

8. See THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 17 (1994) (discussing how the twelve courts of appeals are "becoming more final in all areas of federal law" in light of the small percentage of cases that

tion, the Chief Executive believes he can win politically by asserting that he fought Democratic obstructionism and battled for the candidates, regardless of their ideological perspectives or qualifications.

Fourth, Mr. Bush may be expressing loyalty to his nominees, and their advocates, namely senators from areas where the vacancies occur, because the candidates have endured the confirmation process's vicissitudes, such as lengthy public scrutiny and uncertainty about whether they will be approved.

Fifth, the Chief Executive knows that his Administration will be most powerful at the second term's beginning, when it can capitalize on the 2004 re-election and an ostensible mandate. The President, therefore, appears to think that he must act boldly now to realize his selection objectives and that compromise would not be appropriate until the last term's conclusion.

Sixth, Mr. Bush seems keenly aware that judicial appointments permit him to leave a legacy by choosing judges who will be resolving appeals years after he has departed the White House.<sup>9</sup>

Renominating the twelve candidates and aggressively promoting their appointment will have detrimental consequences. First, the actions will continue the unproductive dynamics of accusations and recriminations, partisan divisiveness, and paybacks which have punctuated selections for over two decades. For instance, Democrats have declared that they will persist in opposing, and even filibustering the nominees, while the Majority Leader, Senator Bill Frist (R-Tenn.), has vowed to end filibusters.<sup>10</sup>

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the Supreme Court of the United States is able to review); Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403 (1996); Neil A. Lewis, *Bush to Reveal First Judicial Choices Soon*, N.Y. TIMES, Apr. 24, 2001, at A17 (discussing the ideologically conservative judicial nominees of President George W. Bush).

9. See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS 100-01* (2000); Carl Tobias, *Leaving a Legacy on the Federal Courts*, 53 U. MIAMI L. REV. 315 (1999).

10. See, e.g., Charles Babington, *GOP Moderates Wary of Filibuster Curb*, WASH. POST, Jan. 16, 2005, at A5; Kevin Drum, *Resist the Filibuster Fiat*, WASH. POST, Jan. 31, 2005, at A21; Carl Hulse, *Frist Warns on Filibusters over Bush Nominees*, N.Y. TIMES, Nov. 12, 2004, at A21. See generally *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the Senate Comm. on the Judiciary*, 108th Cong., 1st Sess. (May 6, 2003), available at <http://www.gpoaccess.gov/data/bases.html> (last visited Feb. 4, 2005).

Second, protracted judicial vacancies impair expeditious and fair appellate disposition. For instance, the United States Court of Appeals for the Sixth Circuit—which entertains appeals from Kentucky, Michigan, Ohio, and Tennessee—has operated without a fourth of its judges since 2000. These lengthy openings have made the court’s resolution times the slowest in the country. To the extent that forcing the question on circuit nominees worsens conflicts between Republicans and Democrats, this might also infect Supreme Court selection. Given ailing Chief Justice William Rehnquist and his colleagues’ ages, Mr. Bush could have the opportunity to appoint several Justices.<sup>11</sup> Should the appeals court process exacerbate already deteriorated relations between the GOP and Democrats, that could threaten High Court nominees or badly slow appointments. The Senate will concomitantly process no appellate nominees while prolonged, divisive confirmation hearings for Justices are ongoing. All of these phenomena will further stall a delayed process and will undermine gravely eroded respect for selection, the Upper Chamber, the President, and even the Judiciary.

Numerous alternatives seem more promising than the approach that the Bush Administration now seemingly contemplates. First, efforts to halt or reduce the acerbic, partisan bickering and the overblown rhetoric could be initiated. Second, Bush might consult with the Senate, a technique which President Bill Clinton profitably invoked when Republicans enjoyed a Senate majority.<sup>12</sup> If the Bush Administration informally broached nominees with Democrats, such as the ranking minority member on the Judiciary Committee, Senator Patrick Leahy (D-Vt.), the process would function more smoothly. Third, the Chief Executive may want to proffer some candidates who possess rather moderate views, which can expedite their appointment. When Bush consulted or forwarded centrist nominees, he realized great success. Instructive are Fourth Circuit Judges Allyson Duncan and Roger Gregory, who felicitously won confirmation. Congress might also enact a statute that would authorize more judges to

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11. See, e.g., Charles Lane, *To Some, ‘Chief Justice Scalia’ Has a Certain Ring*, WASH. POST, Jan. 30, 2005, at A7; John C. Yoo, *Clarence Thomas is in the Right Seat*, L.A. TIMES, Jan. 5, 2005, at B11.

12. See, e.g., Charles Babington, *Reid Vows to Stand Up to GOP*, WASH. POST, Dec. 19, 2004, at A6; Steve Tetreault, *Reid Urges Bush to Consult on High Court*, LAS VEGAS REV.-J., Dec. 6, 2004, at A6, available at [http://www.reviewjournal.com/lvrj\\_home/2004/Dec-06-Mon-2004/news/25415060.html](http://www.reviewjournal.com/lvrj_home/2004/Dec-06-Mon-2004/news/25415060.html) (last visited Feb. 4, 2005).

address growing workloads and dockets.<sup>13</sup> The President could allow Democrats to propose nominees in exchange for agreeing to his candidates or to judgeships legislation and, thus, introduce bipartisan judicial selection. Additional bold ideas would be renominating Clinton nominees or placing on appeals courts his district judges, as Mr. Bush did with Circuit Judges Gregory and Barrington Parker. The Sixth Circuit impasse may well break, if the Chief Executive submitted a Clinton nominee for the court.

In conclusion, the decision to renominate twelve candidates whom Democrats have opposed will set the Bush Administration on a collision course, perpetuate the confrontational, unproductive dynamics which have long infected selection, and propel appointments' downward spiral. If the President expeditiously implements the recommendations above, he can facilitate judicial selection. The ideas will enable the appellate courts to operate at full strength with every active judge authorized, so they can promptly and fairly decide appeals. More cooperative selection will also increase respect for appointments, the Senate, the President, and the courts. The starting point to improve a process which many in the Upper Chamber, the Executive, and the Judiciary frankly admit is broken would be reconsidering the renomination of appellate candidates whom Democrats opposed.

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13. See, e.g., S.878, 108th Cong. (2003); S.920, 108th Cong. (2003); H.R. 211, 109th Cong. (2005) (proposing to reorganize the ninth judicial circuit and to authorize more judges for that court); see also William H. Rehnquist, *2004 Year-End Report on the Federal Judiciary* (2004), available at <http://www.supremecourtus.gov/publicinfo/year-end/2004-year-endreport.pdf> (last visited Feb. 4, 2005). See generally *108th Legislative Session Disappoints*, THE THIRD BRANCH, Dec. 2004, at 4, available at <http://www.uscourts.gov/ttb/dec04ttb/legislative/index.html> (last visited Feb. 4, 2005); *Judicial Conference Asks Congress for New Judgeships*, THE THIRD BRANCH, Aug. 2000, at 2, available at <http://www.uscourts.gov/ttb/aug00ttb/judconf.html> (last visited Feb. 4, 2005).