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## Filling the District of Arizona Vacancies

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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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> These vacancies—which are more than eleven percent nationally and surpass forty-five percent in the

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\* Williams Chair in Law, University of Richmond. I wish to thank Peggy Sanner and Glenn Sugameli for valuable suggestions, Cassie Sheehan for helpful research,

1. Federal Judiciary, *Current Vacancies*, U.S. CTS. (Jan. 31, 2014), <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx>; Press Release, White House, Office of the Press Sec'y, *President Obama Nominates Eight to Serve on the U.S. District Courts*, (Sept. 19, 2013), <http://www.whitehouse.gov/the-press-office/2013/09/19/president-obama-nominates-eight-serve-united-states-district-courts>.

2. Federal Judiciary, *Current Vacancies*, *supra* note 1.

3. See Federal Judiciary, *Emergencies*, U.S. CTS. (Jan. 31, 2014), <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx>; see also Evan Bell, *U.S. Court Pick in Arizona Awaiting Hearing - 2 Years Later*, AZ. CENT. (June 21, 2013, 9:56 PM), [http://www.azcentral.com/news/politics/articles/20130621us-court-pick-awaiting-hearing-years-later-cns.html?nclck\\_check=1](http://www.azcentral.com/news/politics/articles/20130621us-court-pick-awaiting-hearing-years-later-cns.html?nclck_check=1).

4. Andrew Cohen, *The Right Way to Honor Judge John Roll*, THE ATLANTIC (Feb. 18, 2011), <http://www.theatlantic.com/national/archive/2011/02/the-right-way-to-honor-judge-john-roll/71424>; Michael Kiefer, *Roll's Death Prompts Judicial Emergency*, ARIZ. REPUB., Jan. 26, 2011, at A10; Carol J. Williams, *Judicial Emergency Declared in Arizona*, L. A. TIMES, Jan. 26, 2011, at 14; Editorial, *Vote on Judicial Nominees*, ARIZ. REPUB., June 29, 2013, at B6.

District of Arizona—undermine speedy, economical, and fair dispute resolution.<sup>5</sup> 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.<sup>6</sup> The substantial number and protracted character of those openings have imposed numerous detrimental effects.<sup>7</sup> 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.<sup>8</sup> Indeed, the emergency designation has meant that some criminal proceedings were delayed in the Arizona District.<sup>9</sup> 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.<sup>10</sup>

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 Zipps, a magistrate judge with chambers in Tucson, and the nominee easily

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5. See FED. R. CIV. P. 1.

6. Federal Judiciary, *Current Vacancies*, *supra* note 1; see also 159 CONG. REC. S5519 (daily ed., July 8, 2013) (statement of Sen. Leahy).

7. See Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2253 (2013).

8. See 18 U.S.C. § 3161 (2006); see also Gary Fields & John R. Emshwiller, *Criminal Case Glut Impedes Civil Suits*, WALL ST. J., Nov. 10, 2011, at A1.

9. See *supra* note 4 and accompanying text.

10. 28 U.S.C. § 371; see also David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 641 (2007); Todd Ruger, *Judges Suffer Under Weight of Caseloads*, NAT'L L. J. (Sept. 10, 2013), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202618788145&Judges\\_Suffer\\_Under\\_Weight\\_of\\_Caseloads](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202618788145&Judges_Suffer_Under_Weight_of_Caseloads).

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

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.<sup>12</sup> 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.<sup>13</sup> The essential bottleneck is the chamber floor.<sup>14</sup> The GOP Leader has slowly entered agreements for debates and votes.<sup>15</sup> Most problematic has been Republican unwillingness to promptly consider well-qualified, uncontroversial nominees, inaction that violates Senate customs.<sup>16</sup> When

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11. Press Release, White House, Office of the Press Sec'y, *President Obama Nominates Two to the United States District Court Bench* (June 23, 2011), <http://www.whitehouse.gov/the-press-office/2011/06/23/president-obama-nominates-two-united-states-district-court-bench>; 157 CONG. REC. S6027 (daily ed. Oct. 3, 2011) (statement of Sen. Leahy). Similar efforts, particularly by Senator Kyl, prompted the rather smooth confirmation of Arizona Supreme Court Justice Andrew Hurwitz for the Ninth Circuit. *See* U.S. SENATE COMM. ON THE JUDICIARY, *Exec. Business Mtg.*, (Mar 1, 2012) (statement of Sen. Kyl), <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=8b30fa475a5089d793576cd94703da61>; 158 CONG. REC. S3880, S3886–90 (daily ed. June 11, 2012) (statements of Sens. Leahy & Kyl).

12. Tobias, *supra* note 7, at 2242.

13. *See, e.g.*, ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, FEDERAL JUDICIAL VACANCIES: THE TRIAL COURTS (2013), *available at* <http://www.brennancenter.org/sites/default/files/publications/Judicial%20Vacancies%20Report%20Final.pdf>; BARRY MCMILLION, CONG. RESEARCH SERVICE, PRESIDENT OBAMA'S FIRST TERM U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS (2013), *available at* <http://www.fas.org/spp/crs/misc/R43058.pdf>; RUSSELL WHEELER, GOVERNANCE STUDIES AT BROOKINGS INST., JUDICIAL NOMINATIONS AND CONFIRMATIONS IN OBAMA'S FIRST TERM (2012), *available at* [http://www.brookings.edu/~media/research/files/papers/2012/12/13%20judicial%20nominations%20wheeler/13\\_obama\\_judicial\\_wheeler.pdf](http://www.brookings.edu/~media/research/files/papers/2012/12/13%20judicial%20nominations%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.

16. *Cf. Senate Approves Two District Court Nominees, 16 Judicial Nominees Awaiting Consideration*, Patrick Leahy—United States Senator for Vermont (Dec. 13, 2012),

senators have eventually voted, they overwhelmingly confirmed many nominees like Judge Zippis.<sup>17</sup> Senator Leahy has asserted that Democrats accorded President George W. Bush's nominees considerably more solicitous treatment,<sup>18</sup> although Republican leaders dispute that contention.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> On January 2, 2013, the Marquez nomination expired when the 112th Congress adjourned.<sup>23</sup>

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.<sup>24</sup> 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."<sup>25</sup> 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.<sup>26</sup> In early February 2013, after the meeting, Senator Flake remarked: "I'm not sitting on her, I'm waiting to receive the material" that

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<http://www.leahy.senate.gov/press/senate-approves-two-district-court-nominees-16-judicial-nominees-awaiting-consideration>.

17. See *supra* note 11 and accompanying text.

18. See, e.g., 159 CONG. REC. S3878-79, 3881 (daily ed., May 23, 2013) (statement of Sen. Leahy), S3599-3600 (statement of Sen. Leahy).

19. See, e.g., 159 CONG. REC. at 3810 (daily ed., May 23, 2013) (statement of Sen. Grassley), S3706 (daily ed. May 22, 2013) (statement of Sen. McConnell).

20. *President Obama Nominates Two to the United States District Court Bench*, *supra* note 11.

21. See *id.*; ABA STANDING COMMITTEE ON THE JUDICIARY, RATINGS OF ARTICLE III JUDICIAL NOMINEES: 112TH CONGRESS (2011), available at <http://www.americanbar.org/content/dam/aba/uncategorized/2011/ratings112.authcheckdam.pdf>.

22. See Connor Radnovich, *Flake Raises Hopes For Hearing On Judicial Nominee After 19-Month Wait*, ARIZ. CAPITOL TIMES (Feb. 12, 2013, 7:49 AM) (suggesting that Sens. McCain and Kyl "did not feel Marquez was qualified"), <http://azcapitoltimes.com/news/2013/02/12/jeff-flake-raises-hopes-for-hearing-on-judicial-nominee-after-19-month-wait/>.

23. See 159 CONG. REC. S16 (daily ed., Jan 3, 2013).

24. Press Release, White House, Office of the Press Sec'y, *President Obama Re-Nominates Thirty-Three to Federal Judgeships* (Jan. 3, 2013), <http://www.whitehouse.gov/the-press-office/2013/01/03/president-obama-re-nominates-thirty-three-federal-judgeships>; David Boyer, *Obama Nominates 33 Judicial Picks, Urges Senate to Act*, WASH. TIMES, Jan. 3, 2013, at A04.

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.<sup>27</sup> He elaborated: “After I see the material I’ll decide whether [the writing] is something I agree with or not.”<sup>28</sup> 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.”<sup>29</sup> 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.”<sup>30</sup> Until September 19, the Obama Administration had not proposed any nominations for five of the six openings in the District of Arizona.<sup>31</sup> 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.<sup>32</sup> On January 21, 2014, the Judiciary Committee conducted a hearing for all six Arizona District nominees.<sup>33</sup> 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.<sup>34</sup>

The 677 district court judgeships, 80 of which remain unoccupied,<sup>35</sup> 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.”<sup>36</sup> President Obama has nominated 46 highly qualified, consensus individuals and must quickly nominate similar

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27. *See id.*; Bell, *supra* note 3; *Vote on Judicial Nominees*, *supra* note 4.

28. *See Radnovich*, *supra* note 22.

29. *See Bell*, *supra* note 3; *Vote on Judicial Nominees*, *supra* note 4.

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

[http://www.mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord\\_id=3849419c-fc3d-dc3f-694e-a9d78e075685&Region\\_id=&Issue\\_id=](http://www.mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=3849419c-fc3d-dc3f-694e-a9d78e075685&Region_id=&Issue_id=)

31. *See Federal Judiciary*, *Current Vacancies*, *supra* note 1.

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>.

33. *Hearing on Judicial Nominations Before the S. Judiciary Comm.*; Jan. 21, 2014.

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>.

35. *See supra* note 2 and accompanying text.

36. BANNON, *supra* note 13, at 1; Nina Totenberg, *Obama’s Nominees Face Slowed Confirmation Process*, THE TWO-WAY (July 22, 2012, 2:20 PM) <http://www.npr.org/blogs/thetwo-way/2012/07/21/157169538/obamas-judicial-nominees-face-slowed-confirmation-process>.

prospects for the other 34 vacancies.<sup>37</sup> President Obama consulted with Arizona Republican Senators John McCain and Jeff Flake prior to making the September 19 and December 19 nominations.<sup>38</sup> 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.<sup>39</sup>

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.<sup>40</sup> This recommendation is embodied in a comprehensive judgeships bill that received a Senate Judiciary Subcommittee hearing on September 10, 2013.<sup>41</sup> 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.<sup>42</sup>

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.

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37. Federal Judiciary, *Current Vacancies*, *supra* note 1.

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 CONF. 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.

41. S.1385, 113th Cong. (2013); *see Hearing on the Federal Judgeship Act of 2013 Before the S. Judiciary Subcomm. on Bankruptcy & the Courts*, Sept. 10, 2013; Ruger, *supra* note 10.

42. *See* Emergency Judicial Relief Act, S.1014, 112th Cong. (2011); Southwest Border Judgeship Expansion Act, H.R. 2365, 112th Cong. (2011).