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Carl Tobias

University of Richmond - School of Law

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ARTICLE

FILLING JUDGE FLAUM'S VACANT SEVENTH CIRCUIT SEAT

*Carl Tobias**

On November 30, 2020, United States Court of Appeals for the Seventh Circuit Judge Joel Flaum assumed senior status after completing more than forty years in public service as one of the nation's preeminent jurists.¹ By then, Judge Flaum had compiled the longest active status tenure provided by a federal appellate court jurist, serving over practically thirty-eight years, six as chief judge of the prominent tribunal. On this day, the Senate also promptly resumed Congress' lame duck session, which the upper chamber had begun after voters chose Joe Biden as President yet concomitantly appeared to retain a close Grand Old Party (GOP) Senate majority.²

* Williams Chair in Law, University of Richmond School of Law. I wish to thank Peggy Sanner for her valuable suggestions; Jane Baber, Emily Benedict, and Jamie Wood for their valuable research and careful editing; the University of Richmond School of Law Library staff for their valuable research; the *Houston Law Review* editors for their diligence, excellent editing, and sound advice; Ashley Griffin and Leslee Stone for their excellent processing; and Russell Williams and the Hunton Andrews Kurth Summer Endowment Fund for their generous, continuing support. A substantial number of federal appellate court and district court judges, and additional federal court personnel, law professors, and law students afforded numerous ideas which I evaluate below. Remaining errors are mine alone.

1. *Current Judicial Vacancies*, U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> (last updated Jan. 7, 2021); see *Biographical Directory of Article III Federal Judges: Flaum, Joel Martin*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/judges/flaum-joel-martin> (last visited Jan. 7, 2021) (documenting Judge Flaum's Seventh Circuit service from May 1983 until November 2020, including 2000-2006 service as Chief Judge).

2. *2020 Tentative Schedule*, U.S. SENATE, https://www.senate.gov/legislative/resources/pdf/2020_calendar.pdf (last visited Jan. 7, 2021). The Senate majority depended on the results of two January Georgia Senate runoffs. Audra Burch, *Knocking on Two Million Doors in Georgia*, N.Y. TIMES, <https://www.nytimes.com/2020/12/29/magazine/georgia-senate-runoff-election.html> (last updated Jan. 7, 2021, 8:13 AM); Amy Gardner, *I Just Want*

These elections followed four years in which President Donald Trump and the Republican chamber majority appointed three extremely ideologically conservative, able, young Supreme Court Justices, fifty-four peculiarly analogous circuit jurists, and 174 comparatively similar district judges.³ The politicians established records for appellate confirmations and dramatically filled the country's 179 positions for the initial time since Ronald Reagan was President.⁴

Trump and GOP senators discharged this responsibility by decidedly contravening the rules, procedures, and traditions which have long controlled appointments while yielding exceptionally qualified, centrist jurists. For instance, the administration only minimally consulted senators from jurisdictions where vacancies arose, even though the lawmakers know more prospects who could be impressive judges.⁵ Trump also systematically excluded the American Bar Association (ABA) from participating in the court selection process, although chief executives in office, except George W. Bush and Trump, since the 1950s did carefully rely on its detailed evaluations and professional ratings.⁶

The Senate failed to comprehensively analyze many nominees designated or to robustly question those nominees in Senate Judiciary Committee hearings.⁷ The panel also developed a "circuit exception" to the "blue slip" idea - that permitted both senators from jurisdictions with appellate court openings to halt nominee consideration - even though Republican and Democratic politicians had respected circuit slips all eight years throughout President Barack

to Find 11,780 Votes': In Extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote In His Favor, WASH. POST (Jan. 3, 2021, 8:59 PM), https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html. However, the Senate ultimately became evenly divided when Jon Ossoff and Raphael Warnock captured the Georgia Senate seats, which means that Vice President Kamala Harris may cast the tie-breaking vote when senators vote along party lines. *Georgia Senate Runoff Election Results*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/01/05/us/elections/results-georgia-runoffs.html> (last updated Jan. 15, 2021).

3. *Archive of Judicial Vacancies*, U.S. COURTS, (2017–2020) <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies>.

4. *Archive of Judicial Vacancies* (1984), *supra* note 3; *see id.* Confirmations (documenting thirty-three Reagan appellate court appointees in his first term and fifty-three Reagan appellate court appointees in his second term).

5. *See* Carl Tobias, *Keep the Federal Courts Great*, 100 B.U. L. REV. ONLINE 196, 206–07 (2020).

6. *See* Carl Tobias, *Selecting District Judges in the 116th Senate Lame Duck Session*, 37 YALE J. ON REG. NOTICE & COMMENT, notes 7–8 and accompanying text (Dec. 4, 2020).

7. 163 CONG. REC. S8,021–24 (daily ed. Dec. 14, 2017) (statements of Sens. Leahy & Feinstein); *see also* Tobias, *supra* note 5, at 214–15.

Obama's tenure, which comprised the most salient, relevant precedent.⁸

Trump stated numerous times that he would "make the federal judiciary great again" by confirming plentiful numbers of accomplished, conservative, young appeals court jurists.⁹ Senator Mitch McConnell (KY), the GOP Leader, frequently noted that his 2020 motto was "leave no vacancy behind."¹⁰ The parameters examined have jeopardized ideological balance and multiple critical facets of diversity (vis-à-vis ethnicity, gender, sexual orientation, independence and experience) on the federal courts, the nomination and confirmation processes and citizen regard for selection, the bench, the President and the Senate. Those concepts distinctly portended that Trump may well have nominated, and the chamber might have attempted to confirm, Judge Flaum's replacement ahead of the Biden inauguration.

Filling the distinguished jurist's empty seat before the new President assumed office would have been a mistake for numerous pertinent reasons. Copious strictures, practices, and conventions show why Trump should have directly refrained from proffering Flaum's successor. However, if the lame duck President had stubbornly persisted by nominating someone at his presidency's end, the chamber should have respectfully declined to review any court of appeals pick tapped over the lame duck session, principally because so little time remained.¹¹

Particularly significant, Trump must have dutifully rejected proposing a nominee in deference to the record-shattering eighty

8. Carl Tobias, *Senator Chuck Grassley and Judicial Confirmations*, 104 IOWA L. REV. ONLINE 31, 54–55 (2019); see also Tobias, *supra* note 6, at nn. 19–20 and accompanying text.

9. Tobias, *supra* note 5, at 197; see also Carl Tobias, *Filling the Federal District Court Vacancies*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 421, 427 (2020).

10. See Chris Cioffi, *McConnell: 'We're Going to Clean the Plate' on Judges*, ROLL CALL (Oct. 30, 2020, 12:47 PM), <https://www.rollcall.com/2020/10/30/mcconnell-senate-judges-lame-duck>; Alex Swoyer, *Mitch McConnell on Judges: My Motto for the Year Is 'Leave No Vacancy Behind'*, WASH. TIMES (Feb. 11, 2020), <https://www.washington-times.com/news/2020/feb/11/mitch-mcconnell-judges-my-motto-year-leave-no-vaca>.

11. The Senate lame duck session convened for twenty-one days across December, notwithstanding the holidays. *Congressional Record: 116th Congress (2019-2020)*, CONGRESS.GOV, <https://www.congress.gov/congressional-record/116th-congress/browse-by-date> (last visited Jan. 20, 2021); see Natalie Andrews, *McConnell Blocks Vote on Bigger Stimulus Checks*, WALL ST. J. (Dec. 29, 2020, 7:00 PM), <https://www.wsj.com/articles/mcconnell-says-senate-will-address-trumps-call-for-bigger-stimulus-checks-11609263622>; Catie Edmondson, *McConnell Blocks Vote on \$2,000 Checks Despite G.O.P. Pressure*, N.Y. TIMES (Dec. 29, 2020), <https://www.nytimes.com/2020/12/29/us/politics/mcconnell-blocks-stimulus-check-vote.html>.

million American people, who spoke by choosing a new President.¹² Biden's dynamic victory abundantly showed that members of the public have placed considerable trust in his consummate ability to rigorously discharge the essential constitutional responsibility for nominating and confirming appellate court and district court judges.¹³

The minimal time which remained in the 116th Congress did not permit the Senate to meaningfully assess an appellate court nominee. For example, this approach would have required a Federal Bureau of Investigation background check, an extensive committee inquiry, a hearing with probing questions and cogent member discussion ahead of a nominee committee ballot, and a robust floor debate before a confirmation vote.

Fairness also warranted concerted attention. Comparison of the most recent applicable 2015-2016 precedent, which spanned President Obama's final half term, with 2007-08, President Bush's last two years, illuminates disparate nominee treatment. The Republican chamber majority specifically allowed confirmation ballots regarding two Obama appeals court nominees and eighteen trial level prospects.¹⁴ In sharp contrast, the Democratic majority had rather promptly appointed ten Bush circuit, and nearly sixty district, jurists.¹⁵ Finally, modern Presidents have rarely designated nominees, much less confirmed submissions, after federal elections. Indeed, the nineteenth century was actually the last time a party which had lost the White House election insisted on marshaling a circuit nominee's appointment with one contemporary exception.¹⁶

12. Domenico Montanaro, *President-Elect Joe Biden Hits 80 Million Votes in Year of Record Turnout*, NPR (Nov. 25, 2020, 9:06 AM), <https://www.npr.org/2020/11/25/937248659/president-elect-biden-hits-80-million-votes-in-year-of-record-turnout>.

13. U.S. CONST., art. II, § 2.

14. *Archives of Judicial Vacancies* (2015–16), *supra* note 3.

15. *Id.* (2007–08). The 2007–08 and 2015–16 discrepancy could have justified Democrats' refusal to support Trump nominees during the lame duck session. Tobias, *supra* note 5, at 204. GOP senators also claim that Democrats have long mistreated GOP Presidents' nominees. *E.g.*, S. Judiciary Comm., *Hearing on Nomination of the Hon. Amy Coney Barrett To Be An Associate Justice of the Supreme Court of the U.S.* (Oct. 12, 2020) (statements of Sens. Cruz & Lee).

16. Chris Cioffi, *Trump Lost, But the Senate Keeps Confirming His Nominees*, ROLLCALL (Nov. 30, 2020, 11:00 AM), <https://www.rollcall.com/2020/11/30/trump-lost-but-the-senate-keeps-confirming-his-nominees>; Andrew Kragie, *Sen. Graham Doubts Confirmation for 1st Circ. Nominee*, LAW360 (Dec. 8, 2020), <https://www.law360.com/articles/1335928/sen-graham-doubts-confirmation-for-1st-circ-nominee>; *see* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 261 (1997) (documenting one modern exception when Sen. Edward Ken-

In short, many notions - particularly respect for Judge Flaum's abundant years of conscientious federal judicial service, the electorate's preference for Joe Biden to serve as the President who nominates and confirms jurists, and longstanding customs - show why President Donald Trump appropriately refrained from proffering Judge Flaum's successor.

Numerous concepts evaluated in this piece show why Biden should devote substantial care to filling Judge Flaum's Seventh Circuit vacancy. This is one of two appellate court openings and may well be the first vacancy which the new President fills. Thus, seating a jurist will have enormous symbolic and practical importance, because it will set the tone and standards which the President and Senate must satisfy in discharging their constitutional responsibilities to nominate and confirm exceptional federal judges. Moreover, it will be critically important to begin restoring many of the norms, rules and customs which Trump and the Republican Senate majority so cavalierly violated, ignored, changed or deemphasized in their haste to pack the appellate courts with extremely conservative, young jurists.

One important convention that Biden must revitalize is assiduous consultation with senators who represent the states in which vacancies arise. This means that the White House should cultivate, and cooperate with, Illinois Democratic Senators Richard Durbin who is the Majority Whip and the Senate Judiciary Committee Chair, and Tammy Duckworth. The senators might employ a merit selection commission like the one that has reviewed applications of, interviewed and recommended candidates for Illinois district court vacancies.¹⁷

Another measure that the senators might deploy is elevation of a present Illinois federal district court judge or an Illinois state appellate court jurist. Durbin and Duckworth successfully applied this practice in the Trump Administration by recommending Northern District of Illinois Judge Amy St. Eve for a Seventh Circuit vacancy.¹⁸ Trump nominated the experienced jurist, and the Senate easily confirmed her.

nedy (D-MA) persuaded Sen. Strom Thurmond (R-SC) to process First Circuit nominee Stephen Breyer after Ronald Reagan had defeated President Jimmy Carter). President Trump did nominate Northern District of Indiana United States Attorney Thomas Kirsch to the Seventh Circuit on November 16, 2020 and the Senate confirmed him on December 15, 2020. *Two Nominations Sent to the Senate*, WHITE HOUSE (Nov. 16, 2020), <https://www.whitehouse.gov/presidential-actions/two-nominations-sent-senate-111620/>; 166 CONG. REC. S7,492 (daily ed. Dec. 15, 2020).

17. Carl Tobias, *Keep the Federal Courts Great*, 100 B.U. L. REV. 196, 226 (2020).

18. Carl Tobias, *Filling the Illinois Federal District Court Vacancies*, 47 PEPP. L. REV. 1,13 & n.44 (2019).

Prospects whom the senators might consider include eight district judges whom the Illinois senators cooperated with Trump to place in vacancies. Two well qualified examples have served for eighteen months on the Northern District of Illinois. One is Mary Rowland,¹⁹ who served as a Magistrate Judge in the district for seven years, and the other is Martha Pacold, who clerked on the D.C. Circuit, the Ninth Circuit and the Supreme Court, was a highly regarded practitioner in Chicago for many years and served as the Treasury Department Deputy General Counsel in the Trump Administration.²⁰ If a senator or the White House prefers candidates with more experience, Biden, Durbin and Duckworth might seriously consider the numerous well qualified jurists whom President Barack Obama confirmed to the Illinois district courts. Strong examples include Northern District Judges Jorge Alonso, Edmond Chang, Manish Shah and Andrea Wood, whom Obama confirmed.

In sum, President Biden must capitalize on the opportunity to fill Judge Joel Flaum's vacancy by carefully nominating and confirming a worthy successor to the distinguished jurist. Biden must rely on this opportunity to begin restoring the dynamic rules and customs that have long governed federal judicial selection, namely presidential consultation, rigorous White House evaluation of candidates, nomination of excellent prospects, thorough Senate Judiciary Committee investigation of nominees in probing hearings and discussions, and robust floor debate followed by confirmation votes. Nominating and confirming an excellent, mainstream jurist and restoring regular order to the selection process would be fitting tributes to Judge Flaum on the occasion of his assuming senior status.

19. *Biographical Directory of Federal Judges, 1789-Present: Rowland, Mary Margaret*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/rowland-mary-margaret> (last visited Jan. 22, 2021); Tobias, *supra* note 18, at 13, 19.

20. *Biographical Directory of Federal Judges, 1789-Present: Pacold, Martha Maria*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/pacold-martha-maria> (last visited Jan. 22, 2021); see Tobias, *supra* note 18, at 13, 19.