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## CONFIRM RACHEL BLOOMEKATZ TO THE SIXTH CIRCUIT

*Carl Tobias* \*

Now that the United States Senate is convening after the July Fourth holiday, the upper chamber must promptly appoint Rachel Bloomekatz to the U.S. Court of Appeals for the Sixth Circuit. The nominee, whom President Joe Biden selected in May 2022, provides remarkable experiential, gender, and ideological expertise that she deftly realized in litigating high-profile gun control, environmental, and other significant cases in federal appellate courts and district courts.<sup>1</sup> Over fifteen years, the nominee has reached law's pantheon across a broad spectrum from extremely prestigious clerkships with Justice Stephen Breyer and particularly distinguished federal court and state court jurists to robustly participating in many suits for the powerful global law firm Jones Day.<sup>2</sup> The opening that the nominee would fill has been vacant for months.<sup>3</sup> Thus, the Senate needs to rapidly approve the exceptionally competent, mainstream nominee.

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\* Williams Chair in Law, University of Richmond School of Law. I wish to thank Peggy Sanner, Carley Ruival, and Jamie Wood for their exceptional suggestions, Kristina Hunt, Leslee Stone, and Ashley Griffin for their exceptional processing, *University of Richmond Law Review Online* Editor Mariah Riley for her expeditious, careful, and flexible editing, the University of Richmond Law Library Staff, especially Alex Hutchings, for their exceptional research, as well as Russell Williams and the Hunton Andrews Kurth Summer Endowment Research Fund for their generous, continuing support. I assume complete responsibility for all errors that remain in this piece.

1. Press Release, White House, Off. of the Press Sec'y, *President Biden Names Eighteenth Round of Judicial Nominees* (May 25, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/25/president-biden-names-eighteenth-round-of-judicial-nominees/> [<https://perma.cc/29RB-5X32>].

2. For nominee Rachel Bloomekatz's comprehensive, exceptional qualifications, see *id.*

3. Judge Cole may have actually assumed senior status in January 2022, because Biden nominated Bloomekatz in May. *Current Judicial Vacancies*, U.S. COURTS (July 10, 2023), <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> [<https://perma.cc/26QK-MLKN>]; Nate Raymond, *Biden Gets Three Seats to Fill on 4th, 6th Circuits as Judges Take Senior Status*, REUTERS (Dec. 14, 2021, 2:05 PM), <https://www.reuters.com/legal/government/biden-gets-three-seats-fill-4th-6th-circuits-judges-take-senior-status-2021-12-14/> [<https://perma.cc/J57J-B93T>]; Jordan Rubin, *Three Appeals Court Seats to Open for Biden Nominations*, BLOOMBERG L. (Dec. 14, 2021, 3:59 PM), <https://news.bloom>

The open post arose in early December 2021, when Guy Cole, the astute Sixth Circuit Judge, announced that he clearly intended to assume, upon a replacement's confirmation, the position of senior jurist after more than a quarter century of dedicated public service.<sup>4</sup> The judge appeared to notify Biden earlier that he was planning on becoming a senior jurist.<sup>5</sup>

The President's White House Counsel applied a systematic process to supply capable, moderate people for Biden's analysis.<sup>6</sup> The team canvassed several able, centrist picks whom they assiduously scrutinized for this vacant post by thoroughly consulting Ohio Senators Rob Portman and Sherrod Brown, while the latter official characterized Bloomekatz as a very "qualified nominee with impressive legal credentials."<sup>7</sup> The administration expeditiously considered, interviewed, and proposed a few excellent, mainstream candidates, namely Bloomekatz.

When tendering the aspirant, Biden comprehensively surveyed her multifaceted qualities.<sup>8</sup> The nominee presently is a leader at Columbus, Ohio's Bloomekatz Law, which she founded multiple years ago. From 2016 until 2019, the choice was a principal for Gupta Wessler, a respected law firm, whose major emphasis is appeals, especially to the Supreme Court. The nominee astutely prepared briefs on complex matters throughout America, including the U.S. Supreme Court, federal appellate courts, and state high courts. From 2013 until 2015, the nominee practiced at Jones Day,

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berglaw.com/us-law-week/three-appeals-court-seats-to-open-for-biden-nominations [https://perma.cc/YU9Z-B7K5].

4. See Press Release, *supra* note 1; see also Rubin, *supra* note 3.

5. *Current Judicial Vacancies*, *supra* note 3; see sources cited *supra* note 1. As a prior Sixth Circuit Chief Judge, Cole's respect for the court and its litigants, judges, and staff suggests that the jurist notified Biden earlier that he would become a senior judge.

6. I rely in this paragraph on the selection process that Biden deploys to choose most appellate court nominees. Carl Tobias, *How Biden Could Keep Filling the Federal Circuit Court Vacancies*, 80 WASH. & LEE L. REV. ONLINE 1, 5 (2022); Madison Alder, *White House Said to Vet Two Women for Sixth Circuit Seat (1)*, BLOOMBERG L. (Apr. 19, 2022, 9:07 AM), <https://news.bloomberglaw.com/us-law-week/white-house-said-to-vet-two-women-for-sixth-circuit-seat> [https://perma.cc/TA68-92AL].

7. *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 117th Cong. (2022) (statement of Sen. Sherrod Brown) [hereinafter *Hearing*]; Madison Alder, *Trial Judge Nominated as Jackson's Successor on DC Circuit (3)*, BLOOMBERG L. (May 25, 2022, 6:36 PM), <https://news.bloomberglaw.com/us-law-week/trial-judge-to-be-nominated-as-jackson-successor-on-dc-circuit> [https://perma.cc/V8EY-CGMU] (Portman's staff did not "respond to a request for comment on [Bloomekatz's] nomination"); S. COMM. ON THE JUDICIARY, *Questionnaire for Judicial Nominees* 40 (2022) (noting that Bloomekatz formally expressed interest in Judge Cole's vacancy to Senator Brown in December 2021) [hereinafter *Questionnaire*].

8. Press Release, *supra* note 1; *Questionnaire*, *supra* note 7, at 23–37.

working on many exceedingly complicated appeals that involved the firm’s substantial corporate practice. Upon graduation, the nominee had served as a law clerk, who efficaciously assisted Guido Calabresi, the preeminent, accomplished Second Circuit Judge, before analogously helping Margaret Marshall, the nationally pathbreaking Chief Justice of the Massachusetts Supreme Judicial Court.<sup>9</sup>

Bloomekatz’s powerful record aptly shows that the nominee comprises a diligent, intelligent, ethical, rigorous, independent, and diverse candidate vis-à-vis experience, ideology, and gender, who possesses measured judicial temperament.<sup>10</sup> She earned a “Well Qualified” rating from the professional ABA Standing Committee on the Federal Judiciary.<sup>11</sup>

When Brown introduced her at the June 2022 Judiciary Committee hearing, the politician expressed abundant support for the “highly qualified nominee [who definitely brings] impressive legal credentials [plus the requisite expertise,] intellect, empathy and deep commitment to justice.”<sup>12</sup> He found that she had masterfully represented ample clients “across the ideological and political spectrum [lauding] the breadth of her practice.”<sup>13</sup>

The Senator also quoted from a letter that effusively praised the nominee, which twenty of her fellow Supreme Court clerks pertinently addressed to the committee saying: “We hold diverse opinions on many areas of law, but we [concur] that Rachel is an extraordinary nominee who will uphold . . . the rule of law, equal jus

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9. From 2010 to 2011, she served as a Massachusetts Assistant Attorney General litigating appeals of administrative agency decisions and regulations. *See* Press Release, *supra* note 1.

10. *See* sources cited *supra* notes 1 & 7; *infra* notes 11–20, 25, 27 and accompanying text. *But see infra* notes 21–24, 26 and accompanying text.

11. This is the highest rating. AM. BAR ASS’N, STANDING COMM. ON THE FED. JUDICIARY, RATINGS OF ART. III & ART. IV JUDICIAL NOMINEES: 118TH CONG. (May 5, 2023), [https://www.americanbar.org/content/dam/aba/administrative/government\\_affairs\\_office/webratingchart-118.pdf](https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/webratingchart-118.pdf) [<https://perma.cc/TGQ3-ZAB7>].

12. “The people of the Sixth Circuit” deserve nominees who possess those attributes. *Hearing, supra* note 7; *see also* Press Release, *Brown Introduces Rachel Bloomekatz at Her Confirmation Hearing to Serve on the Sixth Circuit*, SHERRON BROWN (June 22, 2022), <https://www.brown.senate.gov/newsroom/press/release/brown-introduces-rachel-bloomekatz-confirmation-hearing-sixth-circuit-court-appeals> [<https://perma.cc/S73F-RG6N>] (quoting remarks prepared and delivered by Senator Brown) [hereinafter *Brown*].

13. “[H]er practice . . . includes work on both civil and criminal matters.” *Hearing, supra* note 7. “She has represented companies and consumers, argued on behalf of the government and for the rights of private citizens.” *Id.*

tice, and fidelity to the Constitution.”<sup>14</sup> Brown productively quoted a similar letter penned by twenty-five Ohio appellate lawyers.<sup>15</sup> He deftly surmised that Bloomekatz’s “most powerful endorsement is [from] the Sixth Circuit [judges], who have appointed her to represent clients [with decidedly] fundamental rights [at] stake.”<sup>16</sup> The panel Chair, Senator Dick Durbin, emphasized her proponents’ bipartisanism, aptly remarking that the Columbus chapter of the Federalist Society, a politically active, conservative legal organization, supported the pragmatic nominee.<sup>17</sup>

She manifested these attributes when carefully testifying at the panel hearing, while Democrats seemed pleased with her complete, incisive responses and broad experience.<sup>18</sup> For instance, she distinctly explained representing a wide spectrum of interests, which did encompass numerous individual persons who sue large companies and massive corporate employers.<sup>19</sup> When questioned regarding the distinction in her present role and that of a jurist, she capitalized on this query to enunciate her appreciation of the profound difference.<sup>20</sup>

However, GOP senators probed Bloomekatz on her client representation during litigation about gun control and related “culture war” issues.<sup>21</sup> For example, Senator Marsha Blackburn wondered

14. The signatories remarked that the last concepts articulated are federal courts’ “best traditions and defining attributes.” *Id.* The signatories included “several Scalia and Kavanaugh clerks.” *Id.*

15. The signatories stated that Bloomekatz possesses a measured temperament and great “intelligence, diligence, and respect for the rule of law.” *Id.* A few signatories would “disagree with some of the opinions Rachel will author or join.” Signatories included “Benjamin Flowers, a former Scalia clerk [and Ohio] Solicitor General” and “Louis Chaiten, former Scalia clerk and Jones Day partner.” *Brown, supra* note 12.

16. See sources cited *supra* note 12; see also *infra* notes 22–27 and accompanying text.

17. *Hearing, supra* note 7; see *Brown, supra* note 12 (the Columbus chapter’s President signed the letter).

18. *Hearing, supra* note 7; see James Arkin, *DC, 6th Circuit Picks Tout Broad Experience in Senate Hearing*, LAW360 (June 22, 2022, 4:19 PM), <https://www.law360.com/articles/1505180/dc-6th-circ-picks-tout-broad-experience-in-senate-hearing> [<https://perma.cc/QC3C-P2FS>]; Rose Wagner, *Gun Control Work by 6th Circuit Pick Draws GOP Shelling*, COURTHOUSE NEWS SERV. (June 22, 2022), <https://www.courthousenews.com/gun-control-work-by-6th-circuit-pick-draws-gop-shelling/> [<https://perma.cc/FG88-C79C>].

19. *Hearing, supra* note 7.

20. Rachel Bloomekatz testified that, as a lawyer, you must “advocate for your client to the best of your ability.” A judge, though, must “approach a case without any assumptions, [bias, or] prejudgment. I’m confident about [making] that transition.” *Id.*

21. *Id.*; see Sabrina Eaton, *GOP Senators Target Ohio Judge Candidate Rachel Bloomekatz’s Views on Guns and Youthful Offenders at Confirmation Hearing*, CLEVELAND.COM (June 22, 2022, 12:31 PM), <https://www.cleveland.com/news/2022/06/gop-senators-target-ohio-judge-candidate-rachel-bloomekatzs-views-on-guns-and-youthful-offenders-at-confirmation-hearing.html> [<https://perma.cc/6BKU-DKQ4>]; Wagner, *supra* note 18.

precisely how the nominee intended to separate her political views on the Second Amendment when deciding cases.<sup>22</sup> Bloomekatz replied by pledging that she would persistently adhere to U.S. Supreme Court and Sixth Circuit precedents.<sup>23</sup> Acerbic Senator John Kennedy pressed her on whether she personally favored Everytown for Gun Safety’s political stances, particularly banning most assault weapons.<sup>24</sup> The nominee strongly responded that it would effectively be improper for her to “express personal opinions,” because, if confirmed, she might have to address the exact question.<sup>25</sup> Notwithstanding her cogent answers, panel member Senator Josh Hawley caustically probed the nominee about the dimensions of representation that she provided someone convicted for heinous acts.<sup>26</sup> Bloomekatz conceded that the defendant’s activity was plainly “horrific” yet responsively contended that anyone charged “is entitled to a defense [and] a constitutional sentence.”<sup>27</sup>

On August 4, 2022, the committee held a robust discussion of her abundant competence, which resulted in a tie vote, ostensibly because the parties and the country disagree respecting the Second Amendment, despite Bloomekatz’s obvious capabilities.<sup>28</sup> The perspectives of senators from each party mirrored notions that most had articulated in the hearing. For example, Senator Chuck Grassley asserted that Bloomekatz “had a history of progressive litigation that raises concerns [she’ll] be an activist on the bench.”<sup>29</sup> Durbin replied by defending the nominee; the panel Chair maintained

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22. See sources cited *supra* note 21. When Senator Marsha Blackburn asked the nominee whether jurists should invoke their “lived experience” when resolving disputes, Bloomekatz carefully replied that a “judge should decide each case with humility” by consulting the record, the law, and binding precedent. *Hearing, supra* note 7; see *infra* note 23 and accompanying text.

23. *Hearing, supra* note 7; see *supra* note 22 and accompanying text.

24. *Hearing, supra* note 7.

25. Senator Kennedy interrupted Bloomekatz, saying “if you haven’t thought about this, you aren’t qualified for the bench.” *Id.*

26. See sources cited *supra* note 18.

27. See sources cited *supra* note 18.

28. *Executive Business Meeting to Consider Pending Legislation and Nominations Before the S. Comm. on the Judiciary*, 117th Cong. (Aug. 4, 2022) (documenting 11–11 vote); see James Arkin, *Senate Panel OKs 5 Judge Noms, Deadlocks on 6th Circ. Pick*, LAW360 (Aug. 4, 2022, 11:29 AM), <https://www.law360.com/articles/1517932/senate-panel-oks-5-judge-noms-deadlocks-on-6th-circ-pick> [<https://perma.cc/ND7E-8QKK>]; Rose Wagner, *Senate Panel Ties over Sixth Circuit Nominee with History of Gun Control Work*, COURTHOUSE NEWS SERV. (Aug. 4, 2022), <https://www.courthousenews.com/senate-panel-ties-over-sixth-circuit-nominee-with-history-of-gun-control-work/> [<https://perma.cc/CD6T-HU9L>]; see sources cited *supra* notes 20, 22–23.

29. See sources cited *supra* note 28.

that her advocacy would not cloud how Bloomekatz addresses matters, if confirmed.<sup>30</sup>

At the 117th Congress' end, insufficient time remained to appoint this nominee or myriad other prominent, centrist Biden aspirants, so the candidates' nominations duly expired on January 3, 2023.<sup>31</sup> Therefore, Biden renamed many nominees in that month.<sup>32</sup> The panel then directly reported Bloomekatz with an 11–10 vote on February 9.<sup>33</sup>

Beyond her distinguished credentials and compelling record, there are numerous specific reasons why the chamber must expeditiously approve the nominee. First, Judge Cole's position has been vacant for more than a year. Second, the White House named Bloomekatz over thirteen months ago. Demanding that well qualified candidates and nominees wait protracted times can unfairly mean that some individuals need to put their lives and careers on hold. This may be salient for nominee Bloomekatz, who presently assumes significant practitioner responsibilities. Third, the open seat essentially mandates that Cole and his colleagues dispose of ample cases, although plentiful senior jurists resolve considerably

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30. See sources cited *supra* note 28.

31. 169 CONG. REC. S29 (daily ed. Jan. 3, 2023); Rule XXXI, S. Doc. No. 113-18, at 43–44 (2013) (mandating the return of expired nominations to the President); SENATE RULE XXXI (2023) (same); see Madison Alder, *Dozens of Biden Judicial Nominations Returning to White House*, BLOOMBERG L. (Dec. 23, 2022, 4:45 AM), <https://news.bloomberglaw.com/us-law-week/dozens-of-biden-judicial-nominations-returning-to-white-house> [https://perma.cc/PW59-YPBR].

32. He renominated Bloomekatz and many other accomplished centrists the same day. 169 CONG. REC. S26 (daily ed. Jan. 3, 2023); see Press Release, White House, Off. of the Press Sec'y, *Nominations Sent to the Senate* (Jan. 3, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/03/nominations-sent-to-the-senate-91/> [https://perma.cc/LR65-7RU7]; Nate Raymond, *Biden Renominates 25 Judicial Nominees, Including Longest Pending Ones*, REUTERS (Jan. 3, 2023, 6:24 PM), <https://www.reuters.com/legal/government/biden-renominates-25-judicial-nominees-including-longest-pending-ones-2023-01-03/> [https://perma.cc/PPH2-ACD8].

33. Durbin admonished “there’s no presumption that if you didn’t make it on the calendar, you’re damaged goods [as] we just run out of time,” noting analogous backlogs in former President Donald Trump’s tenure. *Executive Business Meeting to Consider Pending Legislation and Nominations Before the S. Comm. on the Judiciary*, 118th Cong. (Feb. 9, 2023); see *Executive Business Meeting to Consider Pending Legislation and Nominations Before the S. Comm. on the Judiciary*, 118th Cong. (Feb. 2, 2023) (holding over for one-week votes on many nominees, including hers, as panel Rule 1 allows and the minority did); see also James Arkin, *Judiciary Committee Advances 24 Judge Nominations*, LAW360 (Feb. 9, 2023, 2:40 PM), <https://www.law360.com/articles/1574326/senate-judiciary-committee-advances-24-judge-nominations> [https://perma.cc/29V3-PZHM]. But see both sources *supra* (statements of Sens. Ted Cruz and Mike Lee criticizing Biden nominees as the most extreme).

fewer appeals.<sup>34</sup> This judge has continued deciding large numbers of matters, which permits the tribunal to keep swiftly, inexpensively, and equitably treating numerous cases.<sup>35</sup> Parties, lawyers, and citizens are certainly indebted to the experienced jurist for rigorous ongoing service. However, the delay and politicized conflicts, which involved Republican and Democratic senators that have left his vacancy empty, could be relatively inequitable to the distinguished public servant who plainly earned a senior judgeship plenty of months ago.

Now that the chamber has assembled, Majority Leader Chuck Schumer needs to immediately proffer a robust floor debate and confirmation ballot, which appoints Rachel Bloomekatz to the Sixth Circuit opening that has long been vacant. Her distinctive record means that the accomplished, diverse nominee merits fast confirmation, and Bloomekatz's competence will allow the tribunal to continue promptly, economically, and fairly discharging responsibility for deciding its substantial caseload.

#### EPILOGUE

After the chamber finished the July Fourth recess, Democrats resolved to appoint nominee Bloomekatz. Therefore, on July 13, the Majority Leader scheduled a cloture vote that the distinguished nominee won on a 50–45 party-line ballot except for Senator Joe Manchin who voted no, while five Republican party members were absent.<sup>36</sup> Five days later, the Senate confirmed Bloomekatz, who promises to be a valuable addition to the Sixth Circuit, on a practically similar 50–48 ballot.<sup>37</sup>

Thus, although Bloomekatz realized confirmation, her amply protracted confirmation and close final vote resemble those of other well qualified, highly experienced, diverse appeals court jurists, while her confirmation process trenchantly affords a cautionary tale. For instance, she and Judges Myrna Pérez, Jennifer Sung, Nancy Abudu, Holly Thomas, plus Julie Rikelman directly encoun-

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34. Marin Levy, *The Promise of Senior Judges*, 115 NW. U. L. REV. 1227, 1233 (2021); David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 461–463 (2007); Xiao Wang, *The Old Hand Problem*, 107 MINN. L. REV. 971, 972 (2023).

35. See FED. R. CIV. P. 1 (2023); see also Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325, 1326 (1995).

36. 169 CONG. REC. S2450 (daily ed. July 13, 2023).

37. See 169 CONG. REC. S2976 (daily ed. July 18, 2023).



tered contentious questioning in hearings and the GOP members called some “radical activists.”<sup>38</sup> When nominees must endure prolonged times which can surpass one year for appointment, this protracted wait could dissuade strong potential aspirants from even considering service on the federal bench. As the nomination and confirmation processes rampantly downward spiral, they are attended by radical delays, counterproductive politicization, and corrosive systematic partisanship, which might actually lead superb candidates to abandon contemplation of public service as a federal jurist.

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38. See, e.g., *Hearing, supra* note 7 (Bloomekatz); *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 117th Cong. (2021) (Pérez); *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 117th Cong. (2022) (Abudu).