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APPOINT JUDGE ANA DE ALBA TO THE NINTH CIRCUIT

Carl Tobias *

The United States Senate must rapidly appoint Eastern District of California Judge Ana de Alba to the Ninth Circuit. This appellate tribunal is a preeminent regional circuit, which faces substantial appeals, has the largest complement of jurists, and clearly includes a massive geographic expanse. The nominee, whom President Joe Biden designated in spring 2023, would offer remarkable gender, experiential, ideological, and ethnic diversity realized primarily from serving productively with the California federal district, and state trial, courts after rigorously litigating for one decade in a highly regarded private law firm.¹ For over fifteen years, she deftly excelled in law's upper echelon.² The post which the judge could fill has been vacant for months. Thus, the Senate needs to promptly approve the well qualified, mainstream nominee.

The open slot materialized in early January 2023, when Ninth Circuit Judge Paul Watford informed Biden that he would resign

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1. Press Release, White House, Off. of the Press Sec'y, President Biden Names Thirty-Second Round of Judicial Nominees (Apr. 14, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/14/president-biden-names-thirty-second-round-of-judicial-nominees/> [https://perma.cc/RUU3-GC7Q]; Juan Esparza Loera, *President Biden Nominates the Daughter of Central Valley Farmworkers to Ninth Circuit Court*, FRESNO BEE, <https://www.fresnobee.com/news/local/article274324645.html> [https://perma.cc/3TG5-75PT] (Apr. 19, 2023, 2:03 PM); Nate Raymond, *Biden Nominates 8 New Judges, Including First Muslim Woman on Federal Bench*, REUTERS (Jan. 19, 2022, 11:50 AM), <https://www.reuters.com/legal/litigation/biden-nominates-8-new-judges-including-first-muslim-woman-federal-bench-2022-01-19/> [https://perma.cc/C2SY-EJ72].

2. See sources cited *supra* note 1 (recounting de Alba's excellent qualifications).

effective May 31,³ after salutary, dedicated public service whereby he certainly received ample consideration as a possible Supreme Court aspirant.⁴ The White House Counsel professionally depended upon systematic practices to recommend able centrists for Biden's scrutiny in filling the empty appellate court position.⁵ The nomination team assembled superbly competent, moderate prospects whom it had analyzed by consulting assiduously California Senators Dianne Feinstein and Alex Padilla. Their statement for the press respected Biden's choice of "Judge Ana de Alba to serve on the Ninth Circuit," as both legislators remained "proud of her service on the bench for the Eastern District of California, where she has more than proven herself to be a qualified jurist," while the jurist supplies robust "legal experience and commitment to public service [that] will be an asset on the Ninth Circuit."⁶

Judge de Alba's confirmation process also did move comparatively smoothly, principally because the nominee had skillfully pursued a similar avenue before. The prospect's trial court appointment was rather uneventful. In the Judiciary Committee hearing, Senators Feinstein and Padilla completely, effusively, and cautiously introduced Judge de Alba, who easily treated the few complex inquiries that Grand Old Party ("GOP") senators presented and cogently and comprehensively answered them, while she recounted her compelling personal life story.⁷ A month later, the

3. *Current Judicial Vacancies*, U.S. COURTS (Nov. 19, 2023), <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> [https://perma.cc/Z4R2-LG KJ]; see Madison Alder, *Ninth Circuit Judge Paul Watford to Resign, Leaving Vacancy*, BLOOMBERG L. (Jan. 9, 2023, 2:40 PM), <https://news.bloomberglaw.com/us-law-week/ninth-circuit-judge-paul-watford-to-resign-leaving-vacancy> [https://perma.cc/5FHJ-43VH].

4. See Cheryl Miller, *Judge Paul Watford Will Resign from 9th Circuit*, LAW.COM (Jan. 9, 2023, 1:50 PM), <https://www.law.com/therecorder/2023/01/09/judge-paul-watford-will-resign-from-ninth-circuit/> [https://perma.cc/GAP5-SPQ5]; Nate Raymond, *9th Circuit's Watford, Onetime Supreme Court Contender, to Resign*, REUTERS (Jan. 9, 2023, 12:15 PM), <https://www.reuters.com/legal/government/9th-circuits-watford-onetime-supreme-court-contender-resign-2023-01-09/> [https://perma.cc/RHP5-QD5A].

5. Carl Tobias, *How Biden Could Keep Filling the Federal Circuit Court Vacancies*, 80 WASH. & LEE L. REV. ONLINE 1, 9–10 (2022).

6. The senators earlier supported her district confirmation. Press Release, Alex Padilla, Padilla, Feinstein Applaud Nomination of Judge Ana de Alba to the Ninth Circuit Court of Appeals (Apr. 14, 2023), <https://www.padilla.senate.gov/newsroom/press-releases/padilla-feinstein-applaud-nomination-of-judge-ana-de-alba-to-the-ninth-circuit-court-of-appeals/> [https://perma.cc/SM9R-ND8A].

7. She testified that her farmworker parents immigrated in pursuit of the American dream. Judge de Alba first slept in a real bed at fifteen. See *Nomination Hearing: Hearing on Nancy G. Abudu, Julianna Michelle Childs, Nusrat Jahan Choudhury, Ana Isabel de Alba and Natasha C. Merle Before the S. Comm. on the Judiciary*, 117th Cong. (2022); Loera, *supra* note 1.

nominee won panel approval;⁸ soon thereafter the chamber appointed her.⁹ District jurists' elevation to appeals courts is a mechanism on which every administration currently relies.¹⁰ White House personnel swiftly canvassed and proposed a few strong, mainstream candidates, notably including de Alba.

When Biden recommended the pick, he completely and efficaciously surveyed the prospect's multiple impressive qualifications.¹¹ Since 2022, the nominee has been a judge on California's Eastern District whose members are plainly responsible for immense lawsuits comprising twice the national average.¹² From 2018 until 2022, she capably discharged responsibility for analogously plentiful matters in the Fresno County Superior Court. From 2013 until Judge de Alba joined this Fresno County tribunal, the nominee earned partnership with the superb Long, Richert & Patch firm where she litigated cases that mostly involved employment and torts. During the prior six years, the nominee was a particularly competent firm associate.¹³

Her comprehensive record shows that Judge de Alba constitutes an industrious, ethical, intelligent, rigorous, careful, and diverse choice vis-à-vis experience, ideology, ethnicity, and gender, who in turn possesses measured temperament.¹⁴ The nominee captured a

8. *Executive Business Meeting to Consider Pending Nominations and Legislation Before the S. Comm. on the Judiciary*, 117th Cong. (May 26, 2022) (resulting in a 12–10 bipartisan vote in favor of de Alba's appointment); Juan Esparza Loera, *Ana de Alba, Daughter of Farmworkers, Will be Eastern District Court's First Latina Judge*, FRESNO BEE: VIDA EN EL VALLE (June 22, 2022, 3:17 PM), <https://www.fresnobee.com/vida-en-el-valle/noticias/california-es/article262744977.html> [<https://perma.cc/LFC6-ZP3S>].

9. 168 CONG. REC. S3,025 (daily ed. June 21, 2022) (confirming Judge de Alba by a 53–45 vote); see Loera, *supra* note 8.

10. Elisha Carol Savchak et al., *Taking It to the Next Level: The Elevation of District Court Judges to the U.S. Court of Appeals*, 50 AM. J. POL. SCI. 478, 486 (2006).

11. Press Release, *supra* note 1; *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 118th Cong. (May 17, 2023) [hereinafter *Hearing*]; Joe Morton, *From West Texas Cotton Fields to the 5th Circuit: Dallas Judge Poised to Make History*, DALL. MORNING NEWS (May 17, 2023, 4:01 PM), <https://www.dallasnews.com/news/politics/2023/05/17/from-west-texas-cotton-fields-to-the-5th-circuit-dallas-judge-poised-to-make-history/> [<https://perma.cc/J5LL-WMKZ>].

12. She carries 1,156 cases and has issued more than 1,000 orders. *Hearing, supra* note 11; see COMM. ON JUD. RES., U.S. JUDICIAL CONF., REP. OF PROC. (March 14, 2023), https://www.uscourts.gov/sites/default/files/jcus_mar_2023_proceedings_final_7-5-23_0.pdf [<https://perma.cc/X35W-CZEC>] (federal court policymaking arm proposed that Congress approve four new judges for the Eastern District of California and premised this recommendation on conservative estimates of cases and workloads).

13. She actively engaged in substantial pro bono work at the firm. De Alba earned a JD in 2007 and a BA in 2002 from U.C. Berkeley. See sources cited *supra* note 1.

14. See sources cited *supra* note 1, *infra* notes 15–17. But see sources cited *infra* notes 18–20.

qualified rating from the American Bar Association Standing Committee on the Federal Judiciary.¹⁵ Judge de Alba pragmatically exhibited those critical attributes in a recent committee hearing, while Democratic members appeared satisfied with her complete, nuanced responses. Senator Padilla began the session with a distinctive reprisal of his effusive 2022 introduction by dramatically reviewing her myriad professional achievements while emphasizing diversity's copious benefits.¹⁶ One illustration of the nominee's effective answers came when the astute Judiciary Committee Chair, Senator Richard Durbin, ably questioned her regarding child pornography sentences, because de Alba persuasively replied: "I take very seriously child pornography sentencing, while I apply binding court precedent and the law to facts of individual cases."¹⁷

However, some GOP legislators pressed Judge de Alba on these court rulings and considerable related decision making. For example, Senator Ted Cruz assertively criticized her determination that allowed removal of a monitoring device from one culpable person accused with what the legislator described as a nefarious crime,¹⁸ while Senator Mike Lee aggressively castigated the nominee about

15. One member recused. STANDING COMM. ON FED. JUDICIARY, AM. BAR ASS'N, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES: 118TH CONG. (Sept. 19, 2023), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/webratingchart-118.pdf [<https://perma.cc/VTN3-7ZAT>]; STANDING COMM. ON FED. JUDICIARY, AM. BAR ASS'N, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES: 117TH CONG. (Dec. 12, 2022), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/webratingchart-117.pdf [<https://perma.cc/7RD9-NNWE>] (documenting an identical rating).

16. He praised her robust pro bono, private practice, as well as Superior Court and California Eastern District judicial, work "deciding the most difficult questions," saying that she was "dedicated, fair, and few were as qualified and prepared for the role." Padilla lauded her diversity, especially in terms of ethnicity, gender, ideology, and experience. Judicial diversity is especially important, because it means that courts reflect the people whom judges serve, builds public trust in court rulings, and improves the quality of judicial decision making. *Hearing*, *supra* note 11; *see supra* notes 6–7 and accompanying text.

17. GOP members criticized her treatment of the cases. *Hearing*, *supra* note 11. Judge de Alba responded "as a juvenile court judge, I saw firsthand" the concerns. *Id.* For more hearing analysis, see Andrew Goudsward, *Senate Panel Hails Rare Unity on Biden Nominee for 5th Circuit Judge*, REUTERS (May 17, 2023, 1:31 PM), <https://www.reuters.com/legal/government/senate-panel-hails-rare-unity-biden-nominee-5th-circuit-judge-2023-05-17/> [<https://perma.cc/SN8B-EU6S>]; Brad Kutner, *Fifth and Ninth Circuit Nominees Elicit Varied Responses at Senate Judiciary Hearing*, LAW.COM (May 17, 2023, 2:14 PM), <https://www.law.com/nationallawjournal/2023/05/17/fifth-and-ninth-circuit-nominees-elicited-varied-responses-at-senate-judiciary-hearing/> [<https://perma.cc/3UZA-Y87G>]; Morton, *supra* note 11.

18. *Hearing*, *supra* note 11; *see* Goudsward, *supra* note 17; Morton, *supra* note 11; *see also* Kutner, *supra* note 17 (remarking about Sen. Lindsey Graham's similar criticism). *But see* Kutner, *supra* note 17 (remarking about de Alba's response).

her child pornography jurisprudential approach.¹⁹ Senator John Kennedy, who often posits technical, arcane, or ridiculous queries, sought her views on the Dormant Commerce Clause plus the Fourth Amendment; while she cautiously passed on the initial question, the senator seemed pleased by her response to the second.²⁰

Early in June, the panel deliberated respecting Judge de Alba's salient capabilities that yielded a promising, but razor-thin, 11–10 vote, mostly because Democratic and Republican senators plus the country sharply disagree about child pornography sentencing and other relatively divisive “culture war” issues that members ventilated at the hearing, notwithstanding the pick's remarkable competence.²¹ Democratic and Republican senators' perspectives mirrored notions which they had espoused in that earlier hearing. For instance, Senator Lindsey Graham reiterated dubious claims that her approach to child pornography was regularly beyond the mainstream.²² Durbin replied by aptly calling de Alba “outstanding”; the Chair carefully asserted that federal sentencing guidelines require judges to exercise consummate discretion.²³ In the end, the panel favored this superb nominee, who is a highly qualified moderate, and because the court needs each of its jurists to expeditiously, inexpensively, and equitably resolve a gigantic docket.

Related ideas elucidate why the chamber must immediately appoint the nominee. First, Judge Watford's appellate court vacancy has essentially been open for three quarters of a year. Moreover, Biden named Judge de Alba in April. Demanding that excellent, mainstream candidates and nominees wait rather lengthy periods can unfairly mean that numerous specific individuals place their lives and careers on hold. This may be salient for the nominee, who

19. Sen. Marsha Blackburn echoed Cruz and Lee. *Hearing, supra* note 11. *But see* Kutner, *supra* note 17 (remarking about de Alba's response to her and Lee).

20. *Hearing, supra* note 11; *see id.* (providing her responses); Morton, *supra* note 11 (assessing Kennedy's queries).

21. *Executive Business Meeting to Consider Pending Nominations and Legislation Before the S. Comm. on the Judiciary*, 118th Cong. (June 8, 2023) [hereinafter *Meeting*]; *see* sources cited *supra* notes 11–17.

22. *Meeting, supra* note 21. For tie votes and dynamics similar to Judge de Alba's in meetings on Sixth and First Circuit nominees Rachel Bloomekatz and Julie Rikelman, *see Executive Business Meeting to Consider Pending Legislation and Nominations Before the S. Comm. on the Judiciary*, 117th Cong. (Aug. 4, 2022); *Executive Business Meeting to Consider Pending Legislation and Nominations Before the S. Comm. on the Judiciary*, 117th Cong. (Dec. 1, 2022); *see also supra* notes 18–19 (remarking about claims made by Senators Blackburn, Cruz, and Lee in the hearing that Graham reiterated).

23. *Hearing, supra* note 11; *see* U.S. SENT'G GUIDELINES MANUAL §1A1.1(B) (U.S. SENT'G COMM'N 2004). *See generally* *United States v. Booker*, 543 U.S. 220, 245–46 (2005).

presently executes abundant duties in the Eastern District of California. Third, the vacancy acutely makes Judge Watford's Ninth Circuit colleagues address copious suits, although plentiful jurists have responsibility for considerably fewer appeals.²⁴ Those Ninth Circuit judges have actually continued maintaining and deciding numbers of matters, which enables the tribunal in fact to keep speedily, economically, and fairly resolving the country's biggest docket.²⁵ Numerous parties, lawyers, and citizens are clearly indebted to these jurists for robust, efficacious, ongoing service. However, the delay and partisan controversies, which implicate Republican and Democratic senators that might have left Watford's opening empty, can be inequitable to litigants and members of the public who need their lawsuits completed more quickly.

Now that the Senate has convened after the October Recess, Majority Leader Chuck Schumer necessarily must expeditiously offer a floor debate and ballot that readily confirms Judge Ana de Alba to the prolonged Ninth Circuit vacancy. The jurist's stellar record means that the accomplished, diverse nominee merits prompt confirmation, and her capabilities will allow the tribunal to continue rapidly, inexpensively, and fairly concluding substantial appeals.

EPILOGUE

Once the Senate returned from the October Recess, Democrats resolved to confirm nominee de Alba. Thus, on November 9, the Majority Leader set a cloture vote that the distinguished nominee captured on a 49–42 party-line ballot except for Senator Joe Manchin who voted no, and eight Republican members did not cast ballots.²⁶ Four days later, the chamber appointed Judge de Alba, who promises to be a strong addition to the Ninth Circuit, on a practically analogous 48–43 vote.²⁷

24. See Marin K. Levy, *The Promise of Senior Judges*, 115 NW. U. L. REV. 1227, 1233 (2021); Xiao Wang, *The Old Hand Problem*, 107 MINN. L. REV. 971, 972 (2023).

25. See generally FED. R. CIV. P. 1 (2022) (providing that the Federal Rules of Civil Procedure “should be construed, administered, and employed by the courts . . . to secure the just, speedy, and inexpensive determination of every action and proceeding”); 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) (critically analyzing the Rule 1 mandate that courts construe the rules to further judicial efficiency).

26. 169 CONG. REC. S5,443 (daily ed. Nov. 9, 2023).

27. Seven Republican members and two Democratic members did not vote. See *id.* at S5,475 (daily ed. Nov. 13, 2023).

Therefore, although Judge de Alba ultimately secured confirmation, her prolonged confirmation process and rather narrow confirmation vote resemble those for other Biden highly qualified, mainstream, diverse appellate court nominees, and her confirmation process supplies a cautionary tale. For instance, de Alba, Judges Myrna Perez, Jennifer Sung, Nancy Abudu, Holly Thomas, Julie Rikelman, and Rachel Bloomekatz experienced contentious queries in their committee hearings and GOP members even called some “radical activists.”²⁸ When nominees must wait protracted times of more than one year for confirmation, this prolonged period may dissuade superb possible candidates from thinking about service on the federal judiciary and even prompt strong prospects to eschew consideration of public service as a federal jurist.

28. See, e.g., *Hearing, supra* note 11 (documenting de Alba’s confirmation hearing); *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 117th Cong. (July 14, 2021) (documenting Perez’s confirmation hearing); *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 117th Cong. (Apr. 27, 2022) (documenting Abudu’s confirmation hearing).