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# Commentary, Considering Lesbian, Gay, Transgender, and Bisexual Nominees for the Federal Courts

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# CONSIDERING LESBIAN, GAY, TRANSGENDER, AND BISEXUAL NOMINEES FOR THE FEDERAL COURTS

CARL TOBIAS\*

In April 2010, President Barack Obama nominated Edward DuMont to the United States Court of Appeals for the Federal Circuit, and more than one and a half years later the nominee withdrew. The aspirant possesses impeccable credentials, having argued eighteen Supreme Court matters and captured a unanimous well-qualified American Bar Association (ABA) rating. Despite his immense capabilities, the nominee never received a hearing. Because Edward DuMont is an exceptionally competent individual and would have been the first openly gay court of appeals judge, he merited expeditious review. The nominee's cautionary tale illuminates how excessive Senate partisanship deprived the appellate bench of a remarkable jurist.

The federal circuit and district courts included strikingly few ethnic minority and female jurists before President Jimmy Carter's administration.<sup>1</sup> Carter invoked strategies to efficaciously proffer strong persons of color and women for the circuit bench<sup>2</sup> and urged senators to propose skilled candidates when trial level vacancies arose.<sup>3</sup> Carter nominated and confirmed a plethora of minority and female judges during his term in office, but failed to nominate or confirm any openly lesbian, gay, bisexual, or transgender (LGBT) court members.<sup>4</sup> His Republican successors also failed to name a

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1. See, e.g., Elliot Slotnick, *Lowering the Bench or Raising it Higher?: Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. POL'Y REV. 270 (1983) (describing the dearth of female and minority judges prior to President Carter's administration). For the early history, see SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1999); Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9 (2001).

2. See LARRY C. BERKSON & SUSAN B. CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES* (1980). See generally GOLDMAN, *supra* note 1, at 238-45, 248-50.

3. Selection panels fostered appointments. ALAN NEFF, *THE UNITED STATE DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES, AND CANDIDATES* (1981); see *Federal Judicial Selection: The Problems and Achievements of Carter's Merit Plan*, 62 JUDICATURE 463-510 (1979) (special issue).

4. People of color were 21, and women 14, percent of Carter appointees. Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 322 (1989); see also *Biographical Directory of Judges*, <http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx> (last visited Nov. 11, 2012). This Commentary uses the term "LGBT" to refer

single LGBT jurist.<sup>5</sup> President Bill Clinton asked senators to provide many superb, diverse counsel.<sup>6</sup> He recruited the first openly lesbian judge, Deborah Batts,<sup>7</sup> while establishing records for appointing people of color and women.<sup>8</sup> Nevertheless, minority and female jurists continue to be substantially underrepresented. At Obama's inauguration, Batts was the lone LGBT federal court judge among 1300 circuit and district court jurists, while African Americans essentially comprised a tenth and women constituted one fifth of the federal judiciary.<sup>9</sup>

President Obama rapidly implemented effective special initiatives<sup>10</sup> to promote diversity vis-à-vis sexual orientation, ethnicity, and gender.<sup>11</sup> This process included contacting less traditional sources for judicial nominations, notably LGBT, minority, and women's groups and bars, while canvassing and recommending numerous fine persons of color and women and certain gay and lesbian choices. The White House solicited help from politicians, such as minority and female elected officials, carefully asking that lawmakers institute concerted actions to pick diverse candidates. Officers evaluated and

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to individuals who have openly disclosed their sexual orientation. It is possible that some LGBT judges may have not divulged this information.

5. See, e.g., Jennifer Segal Diascro & Rorie Spill Solberg, *George W. Bush's Legacy on the Federal Bench: Policy in the Face of Diversity*, 92 JUDICATURE 289 (2009); Goldman, *supra* note 4; Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282 (1993).

6. George, *supra* note 1, at 10–11; Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 265, 266–67 (1999); see Sheldon Goldman et al., *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228 (2001).

7. *A Portrait of Diversity*, HARV. L. BULLETIN (Spring 2002), [http://www.law.harvard.edu/news/bulletin/2002/spring/bf\\_05.html](http://www.law.harvard.edu/news/bulletin/2002/spring/bf_05.html).

8. See *supra* note 6. President Clinton named Emily Hewitt as the first LGBT Federal Court of Claims Judge, one Native American, 5 Asian Americans and 24 Latinos. *Biographical Directory of Judges*, *supra* note 4; see also sources cited *supra* note 6.

9. See sources cited *supra* notes 4 and 7; Sheldon Goldman, *Obama and The Federal Judiciary*, 7 FORUM 1–9 (2009).

10. Marisa McQuilken & Joe Palazzolo, *Will Counsel Office Expand Policy Role?*, NAT'L L.J., Feb. 9, 2009; Jon Ward, *White House Beefs Up Legal Staff*, WASH. TIMES (July 21, 2009), [http://www.washingtontimes.com/news/2009/jul/21/white-house-beefs-up-legal-staff/?feat=home\\_headlines](http://www.washingtontimes.com/news/2009/jul/21/white-house-beefs-up-legal-staff/?feat=home_headlines). I depend below on Sheldon Goldman et al., *Obama's Judiciary at Midterm*, 94 JUDICATURE 262 (2011); Jeffrey Toobin, *Bench Press: Are Obama's Judges Really Liberals?*, NEW YORKER (Sept. 21, 2009), [http://www.newyorker.com/reporting/2009/09/21/090921fa\\_fact\\_toobin](http://www.newyorker.com/reporting/2009/09/21/090921fa_fact_toobin).

11. Letter from Gregory Craig, White House Counsel, to President Barack Obama (Nov. 13, 2009), available at <http://thecaucus.blogs.nytimes.com/2009/11/13/craig-resigns-as-white-house-counsel/>; Carl W. Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 788 (2010); see sources cited *supra* note 10.

submitted numbers of very capable LGBT, minority, and female lawyers.<sup>12</sup> Particularly relevant to this effort were New York Senators Charles Schumer (D) and Kirsten Gillibrand (D). They proposed multiple LGBT counsel (Paul Oetken and Alison Nathan) for the Southern District and, rather late in 2012, suggested lawyer Pamela Ki Mai Chen for the Eastern District. Oetken's recent appointment made him the first openly gay district court judge, while Nathan's approval promptly thereafter made her the country's only active lesbian jurist.<sup>13</sup>

When selecting DuMont, Obama remarked that he possesses "a keen intellect and a commitment to fairness and integrity. . . ."<sup>14</sup> DuMont graduated *summa cum laude* from Yale University in 1983 and received his J.D. from Stanford Law School in 1986, earning membership in the Order of the Coif.<sup>15</sup> The able prospect clerked for the legendary Seventh Circuit Judge Richard Posner.<sup>16</sup> DuMont practiced as a highly regarded Supreme Court

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12. Senators suggested African Americans for eight, as well as Asian Americans and Latinos for four, appeals court vacancies. *111th Congress—Judicial Nominations*, THE DEP'T OF JUSTICE: OFFICE OF LEGAL POLICY (last visited Nov. 14, 2012), [http://www.justice.gov/archive/olp/nominations\\_111.htm](http://www.justice.gov/archive/olp/nominations_111.htm) [hereinafter *Nominations 111th*]; *112th Congress—Judicial Nominations*, THE DEP'T OF JUSTICE: OFFICE OF LEGAL POLICY (last visited Nov. 14, 2012), <http://www.justice.gov/olp/nominations112.htm> [hereinafter *Nominations 112th*]; see *infra* notes 13 and 14.

13. 157 CONG. REC. S4634 (daily ed. July 18, 2011) (confirmation of Paul Oetken); *id.* at S6484, S6493 (daily ed. Oct. 13, 2011) (confirmation of Alison Nathan); Devlin Barrett, *Over 12 Years, Schumer Tips Court Balance*, WALL ST. J. (Oct. 7, 2011), <http://online.wsj.com/article/SB10001424052970204612504576611263146437944.html>; 158 CONG. REC. S1711, S1714 (daily ed. Mar. 15, 2012) (confirmation of Michael Fitzgerald as first gay Central District of California judge); Barbara Ross, *Obama Nominates Asian American Lesbian*, N.Y. DAILY NEWS (Aug. 2, 2012), <http://www.nydailynews.com/new-york/obama-nominates-asian-american-lesbian-federal-judgeship-article-1.1128076> (discussing Chen nomination). For four recently tapped LGBT nominees, see Aimee Green, *Obama Nominates Multnomah County Circuit Judge Michael McShane to Federal Bench*, THE OREGONIAN (Sept. 19, 2012), [http://www.oregonlive.com/portland/index.ssf/2012/09/obama\\_nom\\_inates\\_multnomah\\_coun.html](http://www.oregonlive.com/portland/index.ssf/2012/09/obama_nom_inates_multnomah_coun.html); Justin Snow, *Obama Nominates Gay African-American Judge to Federal Bench*, METRO WEEKLY (Nov. 14, 2012), <http://www.metroweekly.com/poliglot/2012/11/obama-appoints-gay-african-american-judge-to-feder.html>; Chris Johnson, *Obama Nominates Lesbian Latina to Pa. Court*, WASH. BLADE (Nov. 27, 2012), <https://www.washingtonblade.com/2012/11/27/obama-nominates-lesbian-latina-judge-to-pa-court/>; Chris Johnson, *Obama Names Gay Attorney to Fed'l Appeals Court*, WASH. BLADE (Feb. 7, 2013), <http://www.washingtonblade.com/2013/02/07/obama-names-gay-attorney-to-fedl-appeals-court/>; see *supra* note 7 (Batts is now a senior judge).

14. Press Release, White House Office of the Press Sec'y, President Obama Nominates Edward C. DuMont for the U.S. Court of Appeals for the Federal Circuit (Apr. 14, 2010), available at <http://www.whitehouse.gov/the-press-office/president-obama-nominates-edward-c-dumont-united-states-court-appeals-federal-circu> (internal quotations omitted); see Dennis Crouch & Jason Rantanen, *Ed DuMont's "Controversial" Federal Circuit Nomination Continues to Languish After One Year*, PATENTLY-O PATENT L. BLOG (Apr. 21, 2011, 4:35 PM), <http://www.patentlyo.com/patent/2011/04/ed-dumonts-controversial-federal-circuit-nomination-continues-to-languish-after-one-year.html>.

15. Press Release, White House Office of the Press Sec'y, *supra* note 14; see Chris Geidner, *Judicial Symbolism*, METRO WEEKLY (Aug. 1, 2011), <http://www.metroweekly.com/news/?ak=6469>.

16. Posner observed that "[Edward] DuMont was an excellent law clerk[,] had a distinguished career [and] seems eminently qualified [for] the Federal Circuit." Chris Geidner, *Breaking Barriers*, METRO

advocate with the Solicitor General for over seven years and was Clinton's Associate Deputy Attorney General.<sup>17</sup> He later practiced mostly Supreme Court litigation as a very respected WilmerHale partner. DuMont has argued numerous Supreme Court appeals and briefed even more. Indeed, these qualities prompted the ABA's finest ranking.<sup>18</sup>

Because the Federal Circuit exercises nationwide jurisdiction over specific subject matter, in particular intellectual property issues, such as patents,<sup>19</sup> the court resolves few disputes over "social policy" questions, like sexual preference and terrorism, which can make appellate nominees controversial.<sup>20</sup> The Federal Circuit's sole post-2004 nonmilitary ruling on sexual preference affirmed a Merit Systems Protection Board judgment upholding a federal agency's suspension of an employee for alleging the employee's co-workers were LGBT and insisting they "hired Chinese homosexuals to stalk and harass him."<sup>21</sup>

Notwithstanding DuMont's myriad compelling attributes, the competent aspirant received no Judiciary Committee hearing mainly because Grand Old Party (GOP) senators objected. Despite Obama's coordination with Senators Patrick Leahy (D-Vt.), the chair of the Judiciary Committee, Harry Reid (D-Nev.), the Senate Majority Leader, and the Democrats' Republican counterparts prior to and following nominations, the GOP has not always cooperated.<sup>22</sup> For instance, the Senate panel swiftly processed designees.<sup>23</sup>

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WEEKLY (Apr. 16, 2010), <http://www.metroweekly.com/news/?ak=5094>.

17. I rely in this and the next two sentences on sources cited *supra* notes 13–14, 16.

18. *Ratings of Article III Judicial Nominees: 112th Congress*, ABA STANDING COMM. ON THE JUDICIARY, <http://www.americanbar.org/content/dam/aba/uncategorized/2011/ratings112.authcheckdam.pdf> (last updated Nov. 28, 2012); see Terry Carter, *Do Over: After 8-Year Pause, ABA is Again Vetting Federal Judicial Nominees*, A.B.A. J., May 2009, at 62 (discussing the ABA's current role in judicial nominations).

19. 28 U.S.C. § 1295 (2012); see Pub. L. No. 97-164 § 165, 96 Stat. 50 (1982) (detailing the creation and jurisdiction of the Federal Circuit). Its jurisdiction and Washington, D.C., location mean that the President assumes lead responsibility for designating its nominees. Geidner, *supra* note 15.

20. See *supra* note 19. Circuits have fewer and more critical openings, are courts of last resort in 99 percent of cases, and treat disputed issues. See Carl Tobias, *Judge Thompson and the Appellate Court Confirmation Process*, 91 B.U. L. REV. 727, 729 (2011); Neil A. Lewis, *Effort to Limit Clinton Judge Choices Fails*, N.Y. TIMES (Apr. 30, 1997), <http://www.nytimes.com/1997/04/30/us/move-to-limit-clinton-s-judicial-choices-fails.html>.

21. *Jack v. Dep't of Commerce*, 143 Fed. App'x 331, 332 (Fed. Cir. 2005); see Crouch & Rantanen, *supra* note 14.

22. Leahy sets hearings and votes, Reid sets floor debates, and both work with GOP analogues, Senators Jeff Sessions (R-Ala.) and Charles Grassley (R-Iowa), who replaced Sessions in 2011 as Ranking Member of the Judiciary Committee, and Mitch McConnell (R-Ky.), the Senate Republican Leader. Tobias, *supra* note 11, at 779; see sources cited *supra* note 10.

23. The committee used full questionnaires and hearings, holding one so fast that the GOP sought another, which Leahy granted. Maureen Gropp, *No Sparks Fly at Hearing*, INDIANAPOLIS STAR (Apr. 30,

However, Republicans automatically held over votes seven days without cogent reasons for minority and female nominees whom they did approve the next week.<sup>24</sup> Senator McConnell nominally cooperated to schedule prompt floor votes, and many of his party colleagues systematically placed anonymous holds or those lacking justifications on strong uncontroversial nominees; these actions delayed Senate confirmations and required that Democrats file cloture petitions.<sup>25</sup> The GOP requested significant floor debate time and roll call ballots, even for nominees who ultimately secured overwhelming approval.<sup>26</sup>

The failure to consider DuMont is an egregious illustration of GOP recalcitrance; the candidate experienced the most intractable dilatory tactics with the least explanation. Press accounts specifically claimed that the “reason for the delay in the process [was] not publicly known.”<sup>27</sup> One Leahy aide found that the chair was reluctant to schedule DuMont’s hearing, as he preferred cooperation with Republicans, who sought more time for examining paperwork.<sup>28</sup> A GOP staff assistant did confirm that the party insisted on an extension; however, she proffered little substantiation for the request.<sup>29</sup> The *Washington Post* succinctly editorialized: “no one involved in the nominations process can provide a satisfactory explanation,” although it lacked persuasive “evidence that Mr. DuMont’s sexual orientation has played

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2009, 12:56 AM), <http://www.indystar.com/article/20090430/NEWS05/904300456/No-sparks-fly-hearing;Toobin,supra> note 10.

24. Sessions found most “fine nominees.” Senate Judiciary Comm., Exec. Business Mtgs., Oct. 8, 15, 2009.

25. 155 CONG. REC. S11,421 (daily ed. Nov. 17, 2009) (Judge David Hamilton’s cloture vote); 156 CONG. REC. S820 (daily ed. Feb. 26, 2010) (Judge Barbara Milano Keenan’s 99–0 cloture and final votes); *see also infra* note 38.

26. For example, Republicans sought an hour for Judge Beverly Martin and only needed ten minutes; the Senate approved her 97–0. 156 CONG. REC. S13, S18 (daily ed. Jan. 20, 2010); *see* Doug Kendall, *The Bench in Purgatory*, SLATE (Oct. 26, 2009, 9:34 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/10/the\\_bench\\_in\\_purgatory.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/10/the_bench_in_purgatory.html).

27. David Ingram, *Senate Skips Federal Circuit Nominee*, THE BLT: BLOG OF LEGAL TIMES (Feb. 11, 2011, 1:39 PM), <http://legaltimes.typepad.com/blt/2011/02/senators-skip-over-federal-circuit-nominee-edward-dumont.html>; *see* Chris Geidner, *Feldblum Approved for EEOC, DuMont Nomination in Question*, METRO WEEKLY (Jan. 2, 2011), <http://www.metroweekly.com/poliglot/2011/01/feldblum-approved-for-eeoc-dum.html>; David Ingram, *In a First, Senate Confirms Judge Who is Openly Gay*, NAT’L L.J. (July 18, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202502881879>; Carrie Johnson, *Obama Gets High Marks for Diversifying the Bench*, NAT’L PUB. RADIO (Aug. 4, 2011), <http://www.npr.org/2011/08/04/138903866/obama-gets-high-marks-for-diversifying-the-bench>.

28. *See* sources cited *supra* note 27. The aide added that Leahy had wanted to move forward on DuMont “for months, but has been trying to accommodate [GOP members,] who continue to not want to move. . . .” Geidner, *supra* note 15.

29. Ingram, THE BLT, *supra* note 27. She added: “[Q]uestions in Mr. DuMont’s background investigation . . . have to be resolved. . . . [And] the questions have been shared with Democrats on the committee and DuMont.” Geidner, *supra* note 15.

a role in the delays.”<sup>30</sup> Yet, a number of commentators essentially intimated that his sexual orientation may be relevant,<sup>31</sup> and this explanation assumed increasing plausibility with the significant passage of time. DuMont’s languishing nomination sharply contrasts with subsequent Obama picks, especially Federal Circuit nominees. The upper chamber approved Court of International Trade Judge Evan Wallach in fewer than four months<sup>32</sup> and expert counsel Jimmie Reyna in six.<sup>33</sup> Despite the problems regarding DuMont, Obama eclipsed records for advancing highly skilled diverse nominees.<sup>34</sup>

In short, this canvass pointedly shows that President Obama rapidly nominated Edward DuMont, but Republicans made the impressive nominee wait longer for a hearing that he never received than all 211 others. Therefore, why the chamber should have promptly examined DuMont and how the Senate could have quickly processed him merit scrutiny.

Article II of the Constitution, venerated norms, and much practice suggest that the President’s strong, noncontroversial judicial recommendations deserve expeditious committee investigation with efficient panel hearings and rapid committee votes, as well as swift chamber floor debates and yes or no ballots. These are ideas that Republicans and Democrats have perennially endorsed.<sup>35</sup> The GOP should have agreed to a quick committee hearing and vote because Leahy cautiously and graciously accommodated its persistent requests to evaluate DuMont in the spirit of consensus and cooperation,<sup>36</sup>

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30. Editorial, *Nominee for Federal Circuit Deserves a Hearing*, WASH. POST (Mar. 25, 2011), [http://www.washingtonpost.com/opinions/nominee-for-federal-circuit-deserves-a-hearing/2011/03/25/AFHqzZYB\\_story.html](http://www.washingtonpost.com/opinions/nominee-for-federal-circuit-deserves-a-hearing/2011/03/25/AFHqzZYB_story.html).

31. See, e.g., Crouch & Rantanen, *supra* note 14; sources cited *supra* note 27.

32. *Nominations 112th*, *supra* note 12; see 157 CONG. REC. S7171–73 (daily ed. Nov. 8, 2011) (confirming Judge Wallach).

33. *Nominations 112th*, *supra* note 12; see 157 CONG. REC. S2093 (daily ed. Apr. 4, 2011) (confirming Judge Reyna). Kathleen O’Malley required nine months. *Nominations 111th*, *supra* note 12; see 156 CONG. REC. S11,073 (daily ed. Dec. 22, 2010) (confirming Judge O’Malley).

34. For example, he rapidly appointed 14 minority and 11 female appellate judges. *Nominations 112th*, *supra* note 12; *Nominations 111th*, *supra* note 12; John Schwartz, *For Obama, a Record on Diversity but Delays on Judicial Confirmations*, N.Y. TIMES (Aug. 6, 2011), <http://www.nytimes.com/2011/08/07/us/politics/07courts.html?pagewanted=all>; see *supra* notes 13 and 14.

35. For the panel, see Michael J. Gerhardt, *Merit vs. Ideology*, 26 CARDOZO L. REV. 353 (2005); Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL’Y 1035, 1039–40 (2009). For the floor, see *Text of Senate Compromise on Judicial Nominations*, N.Y. TIMES (May 24, 2005), <http://www.nytimes.com/2005/05/24/politics/24text.html>; George Packer, *The Empty Chamber: Just How Broken is the Senate?*, NEW YORKER (Aug. 9, 2010), [http://www.newyorker.com/reporting/2010/08/09/100809fa\\_fact\\_packer](http://www.newyorker.com/reporting/2010/08/09/100809fa_fact_packer); see also Doug Kendall, *The Real Nuclear Option*, THE HUFFINGTON POST (Oct. 5, 2010, 1:32 PM), [http://www.huffingtonpost.com/doug-kendall/the-real-nuclear-option\\_b\\_751109.html](http://www.huffingtonpost.com/doug-kendall/the-real-nuclear-option_b_751109.html).

36. See *supra* notes 28–30 and accompanying text; see also Tobias, *supra* note 11, at 779.

providing ample opportunities for Republicans to investigate the extraordinary selection. One instructive example relates to partisan difficulties respecting the floor and their deft resolution. When the majority insisted that nominee David Hamilton<sup>37</sup> warranted a vote, Senator Reid filed a cloture petition. Ten GOP members actually favored cloture, appreciating that Hamilton deserved a vote, even while nine of them opposed his confirmation on the merits.<sup>38</sup> Requiring stellar nominees like DuMont to wait indefinitely relegates aspirants to placing their careers and lives on hold, stops many fine prospects from entertaining bench service, deprives courts of necessary judicial resources, and undermines prompt, inexpensive, and fair dispute resolution.

Enhanced court diversity, including sexual orientation, ethnicity, and gender, is critical. Excellent minority and female jurists ably conduct routine judicial duties, yet also furnish related benefits. They contribute “outsider” perspectives<sup>39</sup> and different, constructive views on issues, namely sexual preference, race, employment, constitutional law, and other daunting questions that judges confront.<sup>40</sup> LGBT individuals, minorities, and women concomitantly help narrow prejudices based on sexual orientation, ethnicity, and gender that might subvert justice.<sup>41</sup> Courts that reflect the nation also inspire more public confidence.<sup>42</sup>

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37. Press Release, White House Office of the Press Sec’y, President Obama Announces David Hamilton for the United States 7th Circuit Court of Appeals (Mar. 17, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/President-Obama-Announces-David-Hamilton-for-the-United-States-7th-Circuit-Court-of-Appeals](http://www.whitehouse.gov/the_press_office/President-Obama-Announces-David-Hamilton-for-the-United-States-7th-Circuit-Court-of-Appeals); Michael A. Fletcher, *Obama Names Judge to Appeals Court*, WASH. POST (Mar. 18, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/17/AR2009031703031.html>; Neil A. Lewis, *Moderate Is Said to Be Pick for Appeals Court*, N.Y. TIMES (Mar. 17, 2009), <http://www.nytimes.com/2009/03/17/us/politics/17nominate.html>.

38. 155 CONG. REC. S11,413 (daily ed. Nov. 17, 2009) (statement of Sen. Hatch); *id.* at S11,544 (daily ed. Nov. 19, 2009). However, this has not always occurred. For example, a lone Republican favored a cloture petition for Ninth Circuit nominee Professor Goodwin Liu, so he received no Senate floor vote. 157 CONG. REC. S3146 (daily ed. May 19, 2011) (detailing results of vote on cloture petition); see Goldman et al., *supra* note 10, at 282–85.

39. See, e.g., RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1995); PATRICIA J. WILLIAMS, *THE ROOSTER’S EGG* (1995); FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (2003); George, *supra* note 1, at 18–25.

40. Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005). But see Stephen Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504 (2011) (discussing failure to find significant differences between male and female judges in many of the tests conducted by the authors).

41. See, e.g., NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS AND ETHNIC FAIRNESS: FINAL REPORT (1997), [http://www3.ce9.uscourts.gov/web/ocelibra.nsf/0/5925a569c39bbbf882564e70002017d/\\$FILE/finalrep.pdf](http://www3.ce9.uscourts.gov/web/ocelibra.nsf/0/5925a569c39bbbf882564e70002017d/$FILE/finalrep.pdf); FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990), [http://www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/\\$file/repfsc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/$file/repfsc.pdf).

42. Sheldon Goldman, *A Profile of Carter’s Judicial Nominees*, 62 JUDICATURE 246, 253 (1978); Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the*



The previous concepts show why DuMont required expeditious processing. Thus, the Senate panel ought to have swiftly proffered the nominee a hearing and vote. Chair Leahy should have guided the proceeding in a way that maximized opportunities for straightforward, thorough exploration of pertinent issues about competence. Article II envisions that senators will consider abilities, character, and temperament.<sup>43</sup> Legislators plainly ought to disregard sexual preference, which is not relevant to skills, ethics, or temperament. Political ideology correspondingly warrants deemphasis effectively because it lacks much salience for those prominent attributes. To the extent a candidate's sexual preference and ideology could have relevance to service on any of the numbered appellate courts, the composition of the Federal Circuit's docket radically decreases their potential relevance.<sup>44</sup> Members should have eschewed the practice of rejecting or stalling DuMont premised on speculation about how the nominee would potentially resolve substantive matters because this notion can diminish judicial independence.<sup>45</sup> After the hearing, which the panel should have conducted, Leahy must have enabled the GOP to propound written questions and DuMont to carefully formulate answers. Upon the responses' completion, Democrats should have rapidly arranged a candid and full debate that would have permitted sufficient time for airing numerous crucial issues efficaciously with a panel vote.

Republicans should only have filibustered DuMont if the extensive inquiry elicited revelations that clearly disqualified him from service as a Federal Circuit judge; these would aptly be characterized as problems in the nature of "extraordinary circumstances."<sup>46</sup> Had GOP members, nonetheless,

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*Federal Bench*, 83 IND. L.J. 1423, 1442 (2008); see WILLIAM N. ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999) (for bias and why more LGBT judges merit selection); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000).

43. See, e.g., *Should Ideology Matter?: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 107th Cong (2001). But see Douglas Laycock, *Forging Ideological Compromise*, N.Y. TIMES (Sept. 18, 2002), <http://www.nytimes.com/2002/09/18/opinion/forging-ideological-compromise.html> (discussing the Senate's actual focus on issues other than ability, character and temperament).

44. Dana Milbank, *In a 'Quiet Moment,' Gay Judge Makes History*, WASH. POST (July 18, 2011), [http://www.washingtonpost.com/opinions/in-a-quiet-moment-gay-judge-makes-history/2011/07/18/gIQAo7PhMI\\_story.html](http://www.washingtonpost.com/opinions/in-a-quiet-moment-gay-judge-makes-history/2011/07/18/gIQAo7PhMI_story.html); see *supra* notes 19–21 and accompanying text. The ideas arguably have no relevance. See sources cited *supra* notes 35 and 43.

45. Symposium, *Judicial Independence and Accountability*, 72 S. CAL. L. REV. 311, 315–52 (1999). This occurs to most Justices. See, e.g., Hatch, *supra* note 35, at 1041; Ronald Dworkin, *Justice Sotomayor: The Unjust Hearings*, N.Y. REV. BOOKS (Sept. 24, 2009), <http://www.nybooks.com/articles/archives/2009/sep/24/justice-sotomayor-the-unjust-hearings/?pagination=false>.

46. See sources cited *supra* notes 25 and 38; *infra* note 47. The Senate's failure to accord Goodwin Liu, Caitlin Halligan, and Robert Bacharach cloture suggests that "extraordinary circumstances" lacks

orchestrated a robust filibuster attempt because the candidate apparently failed to meet their criteria, the Democrats should have promptly and strongly petitioned for cloture and Republicans, who subscribe to the concept that the President's nominees merit affirmative or negative votes, must have favored cloture.<sup>47</sup>

If DuMont's nomination had arrived on the Senate floor, the Majority Leader would have needed to expeditiously invoke every route that would promote frank, comprehensive debate on relevant questions about DuMont's fitness. Reid should have worked closely and diligently with McConnell, responsively and directly fielding requests that would candidly and productively ventilate numbers of applicable matters. Finally, the Senate ought to have provided a yes or no vote.

In sum, Edward DuMont, whom President Obama nominated to the Federal Circuit on April 14, 2010, waited interminably for a hearing, ultimately withdrawing eighteen months later.<sup>48</sup> The chamber should have quickly and rigorously considered DuMont because he is an exceptional candidate and would have been the first openly gay circuit judge.<sup>49</sup>

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vitality. See 157 CONG. REC. S3146 (daily ed. May 19, 2011) (Liu); *id.* at S8346–47 (daily ed. Dec. 6, 2011) (Halligan); 158 CONG. REC. S5642–51 (daily ed. July 30, 2012) (Bacharach); see also Dahlia Lithwick, *Extraordinary Hypocrisy*, SLATE (May 19, 2011), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/05/extraordinary\\_hypocrisy.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/05/extraordinary_hypocrisy.html); Ian Millhiser, *The Goodwin Liu Nomination: Impaired Judgment*, L.A. TIMES (June 1, 2011), <http://articles.latimes.com/2011/jun/01/opinion/la-oe-millhiser-liu-20110601>.

47. For examples of these ideas, see 157 CONG. REC. S2641–44 (daily ed. May 4, 2011) (floor debate and vote on Jack McConnell); *supra* notes 25 and 38 and accompanying text. See generally Gerard N. Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 303 (2011). But see *supra* notes 38 and 46 and accompanying text.

48. Letter from Edward DuMont to President Barack Obama (Nov. 4, 2011), available at <http://metroweekly.com/poliglot/DuMontwithdrawal%20letter%202011-4-11.PDF>; Sherri Qualters, *Edward DuMont Asks Obama to Withdraw His Nomination to Federal Circuit*, NAT'L L.J. (Nov. 9, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202531041506>.

On February 7, 2013, President Obama nominated to the Federal Circuit Todd Hughes, who hopefully will receive better treatment. Press Release, White House Office of the Press Sec'y, President Obama Nominates 2 to Serve on the U.S. Court of Appeals for the Federal Circuit (Feb. 7, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/02/07/president-obama-nominates-two-serve-us-court-appeals-federal-circuit>; see Justin Snow, *Obama Federal Appeals Court nominee could be a gay first*, METRO WEEKLY (Feb. 7, 2013), <http://www.metroweekly.com/poliglot/2013/02/obama-federal-appeals-court-nominee-could-be-a-gay.html>.

49. DuMont was not alone, and his treatment may suggest a pattern. For instance, Republicans made University of Wisconsin Law School Professor Victoria Nourse, the accomplished Seventh Circuit nominee, wait practically as long for a hearing that failed to materialize. Press Release, White House Office of the Press Sec'y, President Obama Nominates Victoria F. Nourse to U.S. Court of Appeals (July 14, 2010), available at <http://www.whitehouse.gov/the-press-office/president-obama-names-victoria-f-nourse-us-court-appeals>. The GOP returned her name to Obama in December 2011. 157 CONG. REC. S8784 (daily ed. Dec. 17, 2011). The following month, she withdrew. Bruce Vielmetti, *Nourse Asks Obama to Withdraw Her Nomination to Federal Appeals Court*, MILWAUKEE J. SENTINEL (Jan. 19, 2012), <http://www.jsonline.com/blogs/news/137702938.html> (citing a letter from Prof. Victoria Nourse to

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President Barack Obama dated Jan. 18, 2012). For Goodwin Liu's withdrawal, see Letter from Prof. Goodwin Liu to President Barack Obama (May 25, 2011), *available at* [http://www.slate.com/content/dam/slate/archive/media/2011/05/07\\_withdrawal\\_letter\\_topotus\\_110\\_525.pdf](http://www.slate.com/content/dam/slate/archive/media/2011/05/07_withdrawal_letter_topotus_110_525.pdf); *supra* note 38.

The GOP similarly made Jill Pryor, the highly qualified Eleventh Circuit nominee, wait from her February 16, 2012 nomination for a hearing that has yet to occur. Press Release, White House Office of the Press Sec'y, President Obama Nominates Jill A. Pryor to Serve on the U.S. Court of Appeals (Feb. 16, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/02/16/president-obama-nominates-jill-pryor-serve-us-court-appeals>; see Bill Rankin, *Vote Sets Stage for Changes on the Bench*, ATLANTA J. - CONST., Oct. 21, 2012, at 1A; Bill Rankin, *Lawyer Again Gets Fed-Bench Nod*, ATLANTA J. - CONST., Jan. 4, 2013, at 2B. The GOP also returned Caitlin Halligan, Tenth Circuit nominee Steve Six, as well as district court nominees Louis Butler, Michael Green, Natasha Perdue Silas, Linda T. Walker, and Arvo Mikkanen, all of whom are well qualified and all except Halligan did not receive renomination. Charlie Savage, *Obama Nominates Two for Federal Appeals Court*, N.Y. TIMES (June 11, 2012), <http://www.nytimes.com/2012/06/12/us/politics/obama-nominates-halligan-and-srinivasan-to-dc-appeals-court.html>. Butler, Silas and Walker are African Americans and Mikkanen is a Native American. At least Halligan, Butler and Green received hearings and committee votes and Six received a hearing.