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Carl W. Tobias

University of Richmond, ctobias@richmond.edu

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FILLING THE FEDERAL APPELLATE COURT VACANCIES

*Carl Tobias**

Multiple observers have criticized President Barack Obama's discharge of his Article II constitutional responsibility to nominate and confirm federal judges. Senators have blamed the administration for slowly making nominations, liberals have contended that the executive appointed myriad candidates who are not sufficiently centrist, and conservatives have alleged that President Obama proffered many nominees who could become liberal judicial activists. Despite the sharp criticisms, the President has actually realized much success when nominating and confirming well qualified moderate jurists. President Obama has named more judges than Presidents George W. Bush and Bill Clinton had at this juncture in their tenure, while courts of appeals currently have the fewest openings since 1990. Because appointments to circuits are crucial when delivering justice, as they are courts of last resort for virtually all cases, the appellate confirmation system merits evaluation.

When the President was inaugurated during 2009, the bench encountered fourteen appeals court vacancies.¹ The White House swiftly implemented numerous productive endeavors to foster the speedy nomination and careful approval of highly qualified diverse choices.² The administration quickly installed a fine White House Counsel and other lawyers with pertinent expertise.³ Obama vigorously consulted

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1 UNITED STATES COURTS, ARCHIVE OF JUDICIAL VACANCIES: YEAR 2009 (2009), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2009> (archiving federal court vacancies by year and month).

2 See Sheldon Goldman et al., *Obama's Judiciary at Midterm*, 94 JUDICATURE 262, 264 (2011) (describing some of the changes to the nomination process and how these changes have affected the role of the White House and made the process more efficient) ; Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2239-2240 (2013) ("Obama instituted concerted efforts to vastly improve ethnic, gender, and sexual-preference diversity.").

3 Carl Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 776 (2010) ("Obama quickly installed Gregory Craig, a respected attorney with much pertinent expertise, as White House Counsel, and Craig immediately enlisted several talented lawyers to identify

home state elected officers urging their proposal for his review of skilled aspirants who could diversify the bench.⁴ Most politicians responded affirmatively to White House importuning, cautiously effectuating special initiatives that would find, examine, and proffer strong persons of color, women, and lesbian, gay, bisexual, and transgender (“LGBT”) candidates.⁵ The administration correspondingly sought help from particular traditional sources, namely the ABA, and less conventional outlets, including minority, women’s and LGBT bar groups, and politicians knowledgeable about talented choices.⁶ These organizations and individuals suggested a multitude of exceptional counsel and innovative concepts while assisting candidates to negotiate the pre-nomination scheme. The White House then promptly evaluated, and mustered nominations of, most candidates submitted.

Obama has deftly improved the appointments regime,⁷ comprehensively pursuing salient assistance from both parties.⁸ He engaged Senator Patrick Leahy (D-Vt.), the Judiciary Committee Chair, who organized nominee hearings and votes; Senator Harry Reid (D-Nev.), the Majority Leader, who controlled the floor; and Chuck Grassley (R-Iowa) and Mitch McConnell (R-Ky.), GOP analogues.⁹ Despite concert-

designees.”); see Letter from Gregory Craig, Counsel to the President, to President Barack Obama (Nov. 13, 2009).

- 4 160 CONG. REC. S5364 (daily ed. Sept. 8, 2014) (statement of Sen. Leahy) (“[S]taffer Christopher Kang has worked with home State Senators to implement President Obama’s goal of finding judicial nominees who not only embody the necessary integrity, intellect, and commitment to the rule of law, but who are drawn from diverse backgrounds.”); Sheldon Goldman et al., *Obama’s First Term Judiciary: Picking Judges in the Minefield of Obstructionism*, 97 JUDICATURE 7, 16 (2013) (“We have specifically noted the administration’s commitment to extensive consultation with senators regarding vacancies that arise in their states. . . .”); Tobias, *supra* note 2, at 2239–40 (“He comprehensively approached . . . politicians [about nominations], especially certain minority and female lawmakers.”).
- 5 Goldman et al., *supra* note 4, at 18 (“President Obama has amassed an unprecedented record for diversifying the federal bench on metrics associated with gender, race, and ethnicity”); see Tobias, *supra* note 3, at 777.
- 6 I rely here and in the remainder of this paragraph on sources cited *supra* note 2; Goldman, *supra* note 4.
- 7 I rely here and below on Jeffrey Toobin, *The Obama Brief: The President Considers his Judicial Legacy*, NEW YORKER, Oct. 27, 2014, at 24 (describing Obama’s record of diversifying the bench); sources cited *supra* note 2.
- 8 Tobias, *supra* note 2, at 2239 (“The President emphasized bipartisanship through rigorous consultation, seeking useful guidance from Democratic and Republican Judiciary Committee members. . . .”); Peter Baker & Jeff Zeleny, *Obama Hails Judge as ‘Inspiring’*, N.Y. TIMES (May 26, 2009), <http://www.nytimes.com/2009/05/27/us/politics/27court.html?> (citing as an example of Obama’s bipartisanship his nomination of Justice Sotomayor whom President George H. W. Bush appointed to district bench).
- 9 Grassley replaced Jeff Sessions (K-Ala.) as Ranking Member in 2011. Tobias, *supra* note 2, at 2242 (describing how the President, White House leadership, and Justice Department coordinated with Democratic and Republican members of Congress). Grassley became Chair this year. Jennifer Jacobs, *Grassley’s Checklist of Priorities*, DES MOINES REGISTER, Jan. 7, 2015.

ed attempts, Republicans have not cooperated. For example, many failed to swiftly propose names, while some made no proffers. After most nominations, Chair Leahy insisted on speedily arranged hearings,¹⁰ yet the minority party held over committee ballots seven days without explanations for accomplished prospects who captured unanimous approval the next week.¹¹ Senator McConnell collaborated little to set final votes, and his GOP colleagues placed anonymous or unsubstantiated holds on well-qualified mainstream nominees; this complicated appointments, mandating cloture.¹² Republicans did actively solicit plentiful, unnecessary roll call ballots and upper chamber debate time.¹³ Accordingly, by Fall 2009, circuits had twenty openings and trial courts seventy, totals which remained near or above those points over the subsequent half decade.¹⁴

Making competent nominees wait prolonged times means able selections place careers on hold and discourages superior prospects from contemplating the bench.¹⁵ This recalcitrance deprives tribunals of judicial resources they need, undercuts swift, inexpensive, and equitable case resolution, imposes greater duties on overburdened jurists, and undermines public regard for the confirmation system and the coordinate branches.

The above developments came to a head in 2013 when the President sent highly qualified moderate nominees for three vacancies on

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- 10 Tobias, *supra* note 2, at 2242 (“[W]hen Leahy diligently convened a hearing so fast that Republicans lacked enough preparation time, he quickly set another. . . .”); Maureen Groppe, *No Sparks Fly at Hearing*, INDIANAPOLIS STAR (Apr. 30, 2009), <http://archive.indystar.com/article/20090430/NEWS05/904300456/No-sparks-fly-hearing>. Leahy is now the Ranking Member.
- 11 Sessions found most “well-qualified nominees.” Senate Judiciary Comm., Exec. Business Mtgs., Oct. 15, 2009 (statement of Sen. Leahy).
- 12 156 CONG. REC. S820 (daily ed. Feb. 26, 2010) (reporting the cloture motion on nominee Barbara Milano Keenan); 155 CONG. REC. S11,421 (daily ed. Nov. 17, 2009) (reporting the cloture debate on nominee David F. Hamilton); Tobias, *supra* note 2, at 2246 (giving illustrations of how filibusters consume resources and lengthen vacancies).
- 13 They sought sixty and used five minutes for fine picks like Judge Beverly Martin, who won 97–0 approval. 156 CONG. REC. S13, S18 (daily ed. Jan. 20, 2010); Doug Kendall, *The Bench in Purgatory*, SLATE (Oct. 26, 2009), http://www.slate.com/articles/news_and_politics/jurisprudence/2009/10/the_bench_in_purgatory.html (“Beverly Martin, an appeals court nominee supported by Georgia’s two conservative Republican senators, was unanimously reported out of the Senate Judiciary Committee She, too, has not received a Senate floor vote.”).
- 14 This was the highest rate for an unprecedented time. JUDICIAL VACANCIES, *supra* note 1 (2009–14); see also 157 CONG. REC. S6027 (daily ed. Oct. 3, 2011) (statement of Sen. Leahy) (“there has never been anything such as this [needless delay]”).
- 15 157 CONG. REC. S6027 (daily ed. Oct. 3, 2011) (statement of Sen. Leahy) (“[The nominee’s] life is put on hold.”); Tobias, *supra* note 2, at 2253 (“Numbers of endeavors assessed made nominees suspend careers, prevented superior prospects from thinking about bench service . . .”).

the U.S. Court of Appeals for the District of Columbia Circuit.¹⁶ After the minority party rejected yes or no chamber votes for any of these suggestions, the machinations propelled Democrats, numbers of whom had grown ever more frustrated with Republican lack of cooperation, to ignite the nuclear option.¹⁷ Democrats employed fifty-one, rather than sixty-seven, votes in amending filibusters to demand only a majority vote for cloture.¹⁸

The nuclear option's release permitted up or down ballots on all three D.C. Circuit submissions and many other lower court recommendations.¹⁹ During 2014, Senator Reid focused on appellate nominees, promptly scheduling cloture and floor votes for one most weeks when Congress was in session.²⁰ The nuclear apparatus' detonation means the circuits presently experience nine openings, but trial courts have fifty-four and the Senate has confirmed a lone appellate judge since Republicans captured a Senate majority.²¹

Indeed, appeals courts have encountered the fewest vacancies in twenty-four years, a numerical parameter which is even more striking for two reasons. First, the comprehensive judgeships legislation

16 Remarks on the Nominations of Patricia A. Millett, Cornelia T.L. "Nina" Pillard, and Robert L. Wilkins to be Judges on the United States Court of Appeals for the District of Columbia Circuit, 2013 DAILY COMP. PRES. DOC. 1 (June 4, 2013) ("As a result [of Republicans' delays,] my judicial nominees have waited three times longer to receive confirmation votes than those of my Republican predecessor."); Michael D. Shear & Jeremy W. Peters, *Judicial Picks Set the Stage for a Battle in the Senate*, N.Y. TIMES (June 4, 2013), <http://www.nytimes.com/2013/06/05/us/politics/obama-to-name-3-to-top-appeals-court-in-challenge-to-republicans.html> (describing the three nominees to the D.C. Circuit and the delay in confirmation).

17 159 CONG. REC. S8418 (daily ed. Nov. 21, 2013) ("Under the precedent set by the Senate today . . . the threshold for cloture on nominations, not including those to the Supreme Court of the United States, is now a majority."); Jeremy W. Peters, *Eye on Legacy, Obama Shapes Appeals Courts*, N.Y. TIMES, Sept. 14, 2014, at A1, 22 ("Before Democrats curtailed Republicans' right to use filibusters, which they accomplished by rewriting Senate rules through a maneuver known as 'the nuclear option'").

18 159 CONG. REC. S8418 (daily ed. Nov. 21, 2013).

19 160 CONG. REC. S283 (daily ed. Jan. 13, 2014) (confirming Robert Leon Wilkins to the D.C. Circuit); 159 CONG. REC. S8667 (daily ed. Dec. 11, 2013) (confirming Cornelia T.L. Pillard to the D.C. Circuit); 159 CONG. REC. S8584 (daily ed. Dec. 10, 2013) (confirming Patricia Ann Millett to the D.C. Circuit); Toobin, *supra* note 7, at 28 ("Republican intransigence about the D.C. Circuit nominees finally brought around even the most senior Democrats to the idea of filibuster reform.").

20 Statement of Sen. Leahy, *supra* note 4; Burgess Everett, *How Going Nuclear Unclogged the Senate*, POLITICO (Aug. 22, 2014), <http://www.politico.com/story/2014/08/how-going-nuclear-unclogged-the-senate-110238.html> ("Democrats have churned through dozens of new judges . . . [T]he Senate confirmed 36 district and circuit court judges before the rules change and 68 after . . ."); Peters, *supra* note 17 ("[T]he rules change sped up the confirmation process.").

21 UNITED STATES COURTS, VACANCY SUMMARY FOR APRIL 2015 (Apr. 2015), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2015/04/summary/html>.

adopted in 1990 did create eleven appellate posts, making the total 179.²² Second, the charges, recriminations, divisive partisanship, and serial paybacks once reserved for Supreme Court appointments have infected the circuit procedures since 1987.²³

President Obama's efforts and initiatives of specific politicians who collaborated with the administration enjoyed marked success in confirming prominent diverse judges. For example, he appointed the first gay circuit jurist²⁴ while tripling the Asian American contingent of appeals court judges,²⁵ and women comprise two in five appellate confirmations.²⁶ The Fourth and Ninth Circuits also experienced thorough complements of fifteen and twenty-nine jurists for the first time since Congress authorized those court positions.²⁷ There are six circuits which lack openings and three courts with one.²⁸

The President's success and that of members when confirming excellent minority, female, and LGBT circuit nominees furnish manifold benefits. Appeals courts with fewer vacancies rather promptly, inexpensively, and equitably treat huge, complex appellate caseloads.²⁹ Increased diversity *vis-à-vis* ethnicity, gender, and sexual orientation

22 Federal Judgeship Act of 1990, Pub. L. No. 101-650, tit. 2, § 206, 104 Stat. 5098, 5099 (1990) (adding circuit judgeships to Third, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits).

23 Goldman et al., *supra* note 4, at 12–14 (describing frustration and partisan practices surrounding judicial nominees); Tobias, *supra* note 2, at 2234–38 (“Politicization severely multiplied after President Richard Nixon staunchly pledged to demonstrably improve ‘law and order’ by nominating ‘strict constructionists’ and increased most prominently once Judge Robert Bork lost his dramatic 1987 Supreme Court nomination fight.”).

24 See Todd Ruger et al., *Obama Names Record Number of Gay Federal Judges*, NAT'L L. J. (July 21, 2014), <http://www.nationallawjournal.com/id=1202663836700/Obama-Names-Record-Number-of-Gay-Federal-Judges-?slreturn=20150727204923> (noting Todd Hughes' appointment to the federal bench); Mark Joseph Stern, *Obama's Most Enduring Gay Rights Achievement*, SLATE (June. 17, 2014), http://www.slate.com/blogs/outward/2014/06/17/openly_gay_federal_judges_are_obama_s_most_enduring_gay_rights_achievement.html (noting Todd Hughes' appointment to the Federal Circuit).

25 *Diversity of the Bench*, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/history/home.nsf/page/research_categories.html (select “Race or Ethnicity” and then “Asian American”) (last visited Aug. 28, 2015); see also *This is the First Time Our Judicial Pool Has Been This Diverse*, WHITE HOUSE (Dec. 17, 2014), <https://www.whitehouse.gov/share/judicial-nominations> [hereinafter WHITE HOUSE].

26 He also named two female Justices. Toobin, *supra* note 7, at 24 (noting Justices Sonia Sotomayor's and Elena Kagan's nominations); WHITE HOUSE, *supra* note 25 (showing 42% of Obama's confirmed judges are female).

27 It authorized them in 1990 and 2008. See Court Security Improvement Act, Pub. L. No. 110-177, tit. 5, § 509, 121 Stat. 2534, 2543 (2009); *supra* note 22.

28 UNITED STATES COURTS, JUDICIAL VACANCY LIST FOR AUGUST 2015 (Aug. 2015), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2015/08/vacancies> (noting how many openings each circuit has).

29 Statement of Sen. Leahy, *supra* note 4; Tobias, *supra* note 2, at 2238 (“[S]tunning case growth and protracted vacancies required that a few circuits suspend oral arguments. Voluminous, complicated dockets and remarkably long vacancies created so much difficulty [in 1997] . . .”)

concomitantly improves understanding and resolution of crucial questions, namely abortion, constitutional law, and employment discrimination, which circuits address.³⁰ People of color, women, and LGBT selections correspondingly limit prejudices that undercut justice.³¹ Tribunals which reflect America can also strengthen public confidence.³²

Because filling appeals court openings with superb diverse judges provides invaluable benefits, Republicans and Democrats should redouble their future endeavors to confirm impressive minority, female, and LGBT nominees.³³ The White House must keep aggressively consulting home state politicians, encouraging the legislators to speedily afford numerous well qualified mainstream persons of color, women, and LGBT suggestions. For their part, lawmakers should discover, vet, and proffer fine submissions whom the President concomitantly reviews and nominates quickly. Senators must then carefully process designees with swiftly arranged committee hearings and ballots, which probe nominee skills, character, and temperament followed by comprehensive rigorous floor debates and positive or negative final votes.

More specifically, politicians need to seriously consider reinstituting multiple traditions. For instance, officials should again honor the convention of abundantly deferring to home state colleagues and President Obama, who has cultivated the legislators, respected their preferences, and directly selected numerous choices Republicans denomi-

30 SALLY J. KENNEY, *GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER* 2 (2013) (“It is difficult to think of a gender-relevant public policy issue not judicialized . . .”); PATRICIA WILLIAMS, *THE ROOSTER’S EGG* 17–18 (1995) (“To study the unreflective resurrection and recirculation of the metaphors of disregard in the United States is to reveal a powerful ideological pattern, a semantic of racism that is nurtured in the hidden spaces of cognitive blind spots.”); FRANK N. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 17 (2003) (“At the threshold, we must all be willing participants and equal players.”). *But see* Stephen Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504, 526 (2011) (“Women judges do not perform well because of outsized performance in traditionally women-focused subjects It might also be the case that women’s experiences in a gender-biased world give female judges a distinctive perspective that enhances their judicial talents.”).

31 REPORT OF THE FIRST CIRCUIT GENDER, RACE AND ETHNIC BIAS TASK FORCES 1–4 (1999)(examining bias perceptions of court employees, attorneys, and court participants in the First Circuit’s courts); FINAL REPORT: NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS & ETHNIC FAIRNESS 6–7 (1997).

32 Toobin, *supra* note 7, at 24 (“[T]he new makeup of the federal bench ‘speaks to the larger shifts in our society’”) (quoting President Barack Obama); Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1442 (2008) (“A representative judiciary provides important symbolic and political meaning, has more legitimacy, demonstrates to the American public that the system is equitable and free of discrimination, and is better able to achieve its goals of fairness and justice.”); *see* Tobias, *supra* note 2, at 2249 & n.75.

33 For many ideas, *see* Michael L. Shenkman, *Decoupling District from Circuit Judge Nominations*, 65 ARK. L. REV. 217, 298–311 (2012); Tobias, *supra* note 2, at 2255–65.

nated.³⁴ Another effective custom is the elevation of present jurists.³⁵ The GOP must also reassess the decision to refuse every nominee a floor vote since making the Democrats resort to the nuclear option, which has demanded cloture for all candidates. If Republicans assiduously continue endorsing this practice, Democrats may revitalize solutions the “Gang of 14” invented, which treat the activity by employing compromises that moderate lawmakers find acceptable.³⁶ Democrats could as well attempt to invoke relatively dramatic reforms like they did when revising the sixty-vote cloture approach in November 2013.³⁷ Democrats can even allow Republicans or party senators to propose more district choices in exchange for affirmative or negative ballots regarding stellar, centrist, diverse, appellate candidates.³⁸

President Barack Obama and senators who cooperated with his administration realized much success when filling the circuit bench with numbers of talented minority, female, and LGBT judges. If Republicans and Democrats recalibrate appointments by collaborating additionally, the parties could fill the empty seats with accomplished diverse jurists who provide numerous benefits, including rapid, economical, and fair case disposition.

34 Goldman et al., *supra* note 4, at 16–17 (describing how President Obama works with Republican senators); Carl Tobias, *Justifying Diversity in the Federal Judiciary*, 106 NW. U.L. REV. COLLOQUY 283, 296 (2012) (“President Obama . . . has rigorously consulted lawmakers, indulged their preferences, and even nominated some individuals suggested by Republicans.”).

35 Examples are Circuit Judges Jacqueline Nguyen and Robert Wilkins. 158 CONG. REC. S2912 (daily ed. May 7, 2012); 160 CONG. REC. S283 (daily ed. Jan. 13, 2014).

36 The Gang permitted filibusters only in “extraordinary circumstances,” which lacks meaning, so it warrants clearer definition. *Text of Senate Compromise on Nominations of Judges*, N.Y. TIMES, May 24, 2005, at A18; see Tobias, *supra* note 34, at 297; Michael Gerhardt & Richard Painter, “Extraordinary Circumstances”: *The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform*, 46 U. RICH. L. REV. 969, 971 (2012).

37 See sources cited *supra* note 17. They may even restore the sixty-vote rule. Burgess Everett, *Confirmation Battles are Back*, POLITICO (Sept. 28, 2014), <http://www.politico.com/story/2014/09/senate-confirmation-battles-111402.html>; Carl Hulse, *Uniting to Take Congress, G.O.P. Tries to Become the Party of “Yes”*, N.Y. TIMES, Aug. 10, 2014, at A1, 17.

38 Tobias, *supra* note 3, at 790; Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 688 (2003).