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## Judicial Selection in Congress' Lame Duck Session

CARL TOBIAS\*

In September, Congress recessed until November. Lawmakers' absence permitted merely one judge's confirmation after July 28, leaving the courts five dozen openings when senators assemble following the November elections. Democrats and Republicans need to collaborate and fill the posts over the lame duck session. Because courts require every member to deliver justice—yet had a ninety-jurist vacancy rate for much of President Barack Obama's tenure—appointments merit attention.

This Article first scrutinizes the Obama Administration confirmation and nomination processes. It then critically explores selection and concludes that Republican obstruction instigated the most open positions the longest time. Because this deficiency undermines swift, economical, and fair case resolution, the Article suggests ideas to promptly decrease the remaining unoccupied judgeships after the session commences.

When the President assumed office, the judiciary experienced fifty-five vacancies.<sup>1</sup> The administration tried to speedily ensure the careful nomination and confirmation of accomplished, consensus, diverse prospects.<sup>2</sup> Obama assiduously consulted home state elected officials and urged their recommendation of impressive minority, female, and LGBT picks.<sup>3</sup> Numerous legislators correspondingly effectuated special initiatives that would yield superb minority, female, and LGBT submissions.<sup>4</sup> The White House concomitantly pursued input from traditional sources, especially the ABA, and less conventional outlets, including minority, female, and LGBT bar groups and politicians familiar with skilled potential candidates.<sup>5</sup> These groups helped aspirants negotiate the

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\* Williams Chair in Law, University of Richmond. I wish to thank Peggy Sanner for excellent suggestions, Katie Lehnen for valuable research, Leslee Stone for exceptional processing, and Russell Williams and the Hunton Williams Summer Endowment Fund for generous support. Remaining errors are mine.

<sup>1</sup> Jeffrey Toobin, *Bench Press*, NEW YORKER (Sept. 21, 2009), <http://www.newyorker.com/magazine/2009/09/21/bench-press>; *Archive of Judicial Vacancies, Oct. 1, 2009*, UNITED STATES COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx>.

<sup>2</sup> Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2239–40 (2013). Obama named a fine White House Counsel and others with much expertise. *Id.* at 2239.

<sup>3</sup> *Nomination of Jill A. Pryor To Be United States Circuit Judge for the Eleventh Circuit*, 160 CONG. REC. S5364 (daily ed. Sept. 8, 2014) [hereinafter *Pryor Nomination*] (statement of Sen. Leahy); Sheldon Goldman, Elliot Slotnick & Sara Schiavoni, *Obama's First Term Judiciary*, 97 JUDICATURE 7, 18 (2013); Tobias, *supra* note 2, at 2239–40.

<sup>4</sup> Goldman et al., *supra* note 3; Carl Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 777 (2010).

<sup>5</sup> I rely here and in the next two sentences on sources *supra* note 2; Goldman et al., *supra* note 3.

pre-nomination regime while tendering multiple competent designees. The administration then efficiently canvassed and nominated many candidates.

Obama has improved the appointments process<sup>6</sup> and comprehensively solicited assistance from both parties.<sup>7</sup> He engaged Senators Patrick Leahy (D-Vt.), the Judiciary Committee Chair, who organizes nominee hearings and votes; Harry Reid (D-Nev.), the Majority Leader, who directly controls the floor; and Chuck Grassley (R-Iowa) and Mitch McConnell (R-Ky.), Republican analogues.<sup>8</sup> Despite the President's concerted attempts, the GOP has clearly not reciprocated.<sup>9</sup> After most nominations, Chairman Leahy insisted on swiftly arranged hearings,<sup>10</sup> but the minority party held over ballots seven days—without explanation—for talented nominees whom the committee unanimously approved the next week.<sup>11</sup> McConnell collaborated little to schedule final votes, and his colleagues placed anonymous holds or those with no substantiation on capable mainstream nominees; this frustrated appointments, mandating cloture.<sup>12</sup> Republicans aggressively demanded unnecessary roll call ballots and upper chamber debate time.<sup>13</sup> Accordingly, by fall 2009, circuits wrestled with twenty vacancies, and district courts, seventy—openings that remained near or above these parameters the subsequent five years and comprised the largest rate for an unprecedented period.<sup>14</sup>

Obstruction is deleterious. Making sterling nominees wait lengthy times places robust careers on hold while discouraging myriad prospects from even envisioning the bench.<sup>15</sup> This recalcitrance deprives tribunals of needed judicial resources,

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<sup>6</sup> I rely here and below on Jeffrey Toobin, *The Obama Brief*, NEW YORKER (Oct. 27, 2014), <http://www.newyorker.com/magazine/2014/10/27/obama-brief>; sources *supra* note 2.

<sup>7</sup> Tobias, *supra* note 2, at 2239; Peter Baker, *Obama Hails Judge as 'Inspiring'*, N.Y. TIMES (May 27, 2009), [http://www.nytimes.com/2009/05/27/us/politics/27court.html?th&emc=th&\\_r=0](http://www.nytimes.com/2009/05/27/us/politics/27court.html?th&emc=th&_r=0).

<sup>8</sup> Grassley succeeded Jeff Sessions (Ala.) as Ranking Member in 2011. Tobias, *supra* note 2, at 2242.

<sup>9</sup> For instance, many failed to swiftly propose names, while some made no proffers.

<sup>10</sup> Maureen Groppe, *No Sparks Fly at Hearing*, INDIANAPOLIS STAR (Apr. 30, 2009), <http://www.indystar.com/article/20090430/NEWS05/904300456/1008/>.

<sup>11</sup> Sessions found most to be “fine nominees.” *Exec. Business Mtg., S. Judiciary Comm.*, 111th Cong. (Oct. 8, 2009); *Exec. Business Mtg., S. Judiciary Comm.*, 111th Cong. (Oct. 15, 2009).

<sup>12</sup> 155 CONG. REC. S11421 (daily ed. Nov. 17, 2009); 156 CONG. REC. S820 (daily ed. Feb. 26, 2010); Tobias, *supra* note 2, at 2246 (affording examples of how filibusters consume resources and prolong vacancies).

<sup>13</sup> Republicans even sought sixty minutes (and used five) for able picks like Judge Beverly Martin; she won approval 97-0. 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](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/10/the_bench_in_purgatory.html).

<sup>14</sup> *Archive of Judicial Vacancies*, *supra* note 1.

<sup>15</sup> 157 CONG. REC. S6027 (daily ed. Oct. 3, 2011) (statement of Sen. Leahy); Tobias, *supra* note 2, at 2253.

undercuts case disposition, and harms public respect for the confirmation system and the coordinate branches.

The above developments came to a head in 2013 when Obama introduced five mainstream aspirants for three D.C. Circuit vacancies.<sup>16</sup> Once the GOP rejected affirmative or negative votes for each, the machinations propelled Democrats to release the “nuclear option,”<sup>17</sup> a rule change that reduced the majority vote needed for cloture from sixty to a simple majority—substantially decreasing Republicans’ filibustering power. Unleashing the nuclear option readily permitted up or down ballots regarding all three D.C. Circuit selections and many other lower court designees.<sup>18</sup> In 2014, Reid emphasized circuit nominees by promptly arranging cloture and chamber floor votes most every week that lawmakers were in session.<sup>19</sup> The nuclear procedure’s employment means the appellate tribunals now have seven openings, while the districts currently face thirty-nine openings.<sup>20</sup>

President Obama’s rigorous work with legislators brought success when confirming highly qualified diverse jurists. For instance, he appointed the first openly gay circuit judge,<sup>21</sup> tripled the Asian American circuit jurists,<sup>22</sup> and

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<sup>16</sup> Press Release, White House, Office of the Press Sec’y, Remarks by the President on Nominations to the D.C. Circuit (June 4, 2013), <http://www.whitehouse.gov/the-press-office/2013/06/04/remarks-president-nominations-us-court-appeals-district-columbia-circuit>; Michael Shear, *Judicial Picks Set Stage for Senate Battle*, 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?\\_r=0](http://www.nytimes.com/2013/06/05/us/politics/obama-to-name-3-to-top-appeals-court-in-challenge-to-republicans.html?_r=0).

<sup>17</sup> I rely in this and the next sentence on 159 CONG. REC. S8418 (daily ed. Nov. 21, 2013); Toobin, *supra* note 6; Jeremy Peters, *Building a Legacy, Obama Reshapes Appellate Bench*, N.Y. TIMES, Sept. 14, 2014, at A1.

<sup>18</sup> 159 CONG. REC. S8584 (daily ed. Dec. 10, 2013); 159 CONG. REC. S8667 (daily ed. Dec. 11, 2013); 160 CONG. REC. S283 (daily ed. Jan. 13, 2014); Todd Ruger, *Court Seats Filling Up: Dems Push Votes Ahead of Elections*, NAT’L L.J., Aug. 11, 2014.

<sup>19</sup> *Pryor Nomination*, *supra* note 3; Burgess Everett, *How Going Nuclear Unclogged the Senate*, POLITICO.COM (Aug. 22, 2014), <http://www.politico.com/story/2014/08/how-going-nuclear-unclogged-the-senate-110238.html>; sources *supra* note 17.

<sup>20</sup> *Archive of Judicial Vacancies*, *supra* note 1. Circuit openings are fewest since 1990. This is striking; a 1990 law approved 11 judgeships, making the total 179. Pub. L. No. 101-650, Tit. II, § 206, 104 Stat. 5098 (1990). Partisanship once limited to Justices now infects all courts’ picks. Goldman et al., *supra* note 3, at 12–14; Tobias, *supra* note 2, at 2234–38.

<sup>21</sup> Todd Ruger, *Obama Names Record Number of Gay Judges*, NAT’L L.J. (July 21, 2014), <http://www.nationallawjournal.com/id=1202663836700/Obama-Names-Record-Number-of-Gay-Federal-Judges-?slreturn=20150120112757>; 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](http://www.slate.com/blogs/outward/2014/06/17/openly_gay_federal_judges_are_obama_s_most_enduring_gay_rights_achievement.html); Toobin, *supra* note 6.

<sup>22</sup> *Biographical Directory of Judges*, FED. JUDICIAL CENTER, <http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.as>

appointed women to 42% of lower court openings.<sup>23</sup> However, the seven circuit vacancies lack nominees, while the thirty-nine trial level openings require priority.<sup>24</sup>

Obama's achievement, together with that of members who helped confirm able diverse nominees, yields benefits. Tribunals which have fewer vacancies can more rapidly, economically, and fairly treat immense, complex filings.<sup>25</sup> Enhanced diversity also improves comprehension and resolution of essential questions, namely criminal law and discrimination.<sup>26</sup> People of color, women and LGBT individuals correspondingly lessen ethnic, gender, and similar biases which undermine justice.<sup>27</sup> Courts that reflect America's demographics increase public confidence.<sup>28</sup>

Because seating diverse jurists furnishes advantages, both parties should redouble their efforts to fill the maximum number of trial court posts over the lame duck session. Activities must begin immediately to facilitate endeavors when Congress returns. The President should aggressively pursue creative ideas from those knowledgeable about strong picks. Moreover, he ought to continue asking that lawmakers speedily consider and propose for the twenty-two district openings without nominees several talented, centrist minority, female, or LGBT counsel.<sup>29</sup> Officers next must proffer numerous suggestions whom Obama in turn should promptly evaluate before legislators reconvene.<sup>30</sup>

Until then, Judiciary Committee Democratic and Republican staff might canvass the nominees who lack hearings and prepare for these sessions and may even

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px (2014); *This Is the First Time Our Judicial Pool Has Been this Diverse*, WHITE HOUSE.GOV (Oct. 20, 2014), <http://www.whitehouse.gov/share/judicial-nominations>.

<sup>23</sup> He also appointed two female Justices. Toobin, *supra* note 6; WHITE HOUSE.GOV, *supra* note 22.

<sup>24</sup> *Archive of Judicial Vacancies*, *supra* note 1.

<sup>25</sup> This relieves overworked courts. *Pryor Nomination*, *supra* note 3; Tobias, *supra* note 2, at 2254.

<sup>26</sup> See Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 599–600, 610–17 (2003); Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 19–21 (2001). But see Stephen J. Choi, G. Mitu Gulati, Mirya R. Holman & Eric A. Posner, *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504, 505 (2011).

<sup>27</sup> REPORT OF THE FIRST CIRCUIT GENDER, RACE AND ETHNIC BIAS TASK FORCES (1999); FINAL REPORT, NINTH CIRCUIT TASKS FORCE ON RACIAL, RELIGIOUS, AND ETHNIC FAIRNESS (1997).

<sup>28</sup> Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 253 (1978); Sylvia R. Lazos, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1442 (2008); Toobin, *supra* note 6.

<sup>29</sup> *Archive of Judicial Vacancies*, *supra* note 1. Nominees could receive hearings before their confirmation.

<sup>30</sup> He may even deploy notices of intent to nominate. Press Release, White House, Office of the Press Sec'y, President Obama Announces His Intent to Nominate Christina Reiss to the U.S. District Court for the District of Vermont (Oct. 9, 2009).

commence investigating designees that the White House plans to nominate after senators return. The panel concomitantly ought to schedule hearings and executive business meetings during the week Congress reassembles and conduct the greatest possible number before adjournment.

Once the lame duck session begins, lawmakers must probe nominees' skills, character, and temperament with committee hearings and panel ballots swiftly followed by thorough debates and positive or negative votes. More specifically, politicians ought to contemplate implementing again several customs. Perhaps most salient would be processing a number of accomplished, mainstream district court recommendations across the lame duck session, a nuanced tradition which contemporary Presidents and Senates conventionally have honored.<sup>31</sup> This year, Obama and members should particularly respect that concept, as the bench critically needs the empty seats filled, and the vast majority of trial level prospects have been nominated because they are competent, uncontroversial, and diverse, rather than ideologically aligned with the President.<sup>32</sup> Another tradition which officials should honor is fast yes or no ballots for many consensus submissions, especially before recesses.<sup>33</sup> Politicians also should restore the custom of providing ample deference to home state colleagues and Obama, who has meticulously consulted legislator preferences and chosen numerous aspirants named by Republican senators.<sup>34</sup>

The GOP should correspondingly revisit the determination to refuse all nominees floor votes, which has necessitated cloture even for noncontroversial candidates. If Republicans keep enforcing this policy, Democrats might revive notions the "Gang of 14" invoked, which effectively address the conduct by

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<sup>31</sup> Judith E. Schaefer, *What's Good for One Lame Duck Ought to be Good for Another*, HUFFINGTONPOST.COM, Nov. 11, 2010. Indeed, Stephen Breyer won First Circuit approval *after* Ronald Reagan defeated Jimmy Carter. DENIS STEVEN RUTKUS & KEVIN M. SCOTT, NOMINATION AND CONFIRMATION OF LOWER FEDERAL COURT JUDGES IN PRESIDENTIAL ELECTION YEARS 18 (CRS 2008), available at [www.fas.org/sgp/crs/misc/RL34615.pdf](http://www.fas.org/sgp/crs/misc/RL34615.pdf); see Onika K. Williams, *How Jon Stewart and Lady Gaga Made Congress Less Lame: The Impact of Social Media on the Passage of Bills Through the "Lame Duck" Session of the 111th Congress and Beyond*, 87 IND. L.J. SUPP. 17, 17 (2012).

<sup>32</sup> Robert A. Carp, Kenneth L. Manning, & Ronald Stidham, *A First Term Assessment*, 97 JUDICATURE 128, 136 (2013); Tobias, *supra* note 2, at 2249. These qualities mean Obama will not have to choose between the type of jurists he prefers and filling the courts. The Judicial Conference proposal for 91 new judgeships based on conservative case and work load estimates in empirical data shows the bench's critical need. U.S. JUDICIAL CONF., PROCEEDINGS 18 (Mar. 12, 2013); see S.1385, 113th Cong. (2013).

<sup>33</sup> Fine consensus Bush district nominees had quick approval, especially at recesses. Goldman et al., *supra* note 2; Michael L. Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 292 (2012).

<sup>34</sup> Goldman et al., *supra* note 3, at 16–17; Carl Tobias, *Justifying Diversity in the Federal Judiciary*, 106 NW. U. L. REV. COLLOQUY 283, 296 (2012).

adopting compromises that moderate lawmakers now deem acceptable.<sup>35</sup> The majority can also resort to comparatively dramatic reforms, as happened when it cautiously eliminated anonymous chamber holds implicating nominees and the sixty-vote cloture apparatus.<sup>36</sup> Democrats could even allow the GOP or party senators to propose more choices in exchange for Republican agreements to have floor ballots on superior, centrist, diverse trial level picks.<sup>37</sup>

In the final analysis, Republicans and Democrats should balance the necessity to review suggestions against efficiently filling vacancies. The Constitution envisions that politicians will inquire about nominee capability, ethics, and temperament.<sup>38</sup> They should deemphasize ideology (as the chief executive has)<sup>39</sup> and stop speculation about how jurists would decide issues because this can erode judicial independence.<sup>40</sup> The GOP also should quit obstructing nominees for partisan benefit, as this strategy has substantial costs for them, litigants, jurists, and the judicial process. One solution for those concerns is a presumption that exceptional, moderate nominees warrant speedy floor ballots.<sup>41</sup>

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<sup>35</sup> The Gang permitted filibusters only in “extraordinary circumstances,” which lacks meaning, so it warrants clearer definition. *Senate Compromise on Nominations of Judges*, N.Y. TIMES, May 24, 2005, at A18. See also 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); Tobias, *supra* note 34, at 297.

<sup>36</sup> 157 CONG. REC. S296-305 (daily ed. Jan. 27, 2011) (secret holds); Gerhardt & Painter, *supra* note 35, at 972 (same); Everett, *supra* note 19 (nuclear option). It could even restore the latter rule. Burgess Everett, *Confirmation Battles Are Back*, POLITICO.COM (Sept. 28, 2014), <http://www.politico.com/story/2014/09/senate-confirmation-battles-111402.html>; Carl Hulse, *GOP Tries To Become the Party of Yes*, N.Y. TIMES, Aug. 10, 2014, at A1.

<sup>37</sup> Michael Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 688 (2003); Tobias, *supra* note 4, at 790.

<sup>38</sup> U.S. CONST., art. 2; *The Judicial Nomination and Confirmation Process: Hearings Before the Senate Judiciary Subcomm. on Admin. Oversight & the Courts*, 107th Cong. 4–8, 262–64 (2001) (statements of Sen. Sessions & Prof. John McGinnis); Douglas Laycock, *Forging Ideological Compromise*, N.Y. TIMES (Sept. 18, 2002), <http://www.nytimes.com/2002/09/18/opinion/forging-ideological-compromise.html>.

<sup>39</sup> See *supra* notes, 3, 32, 38 and accompanying text. Stressing ideology is as futile as attempting to detect activism. STEFANIE LINDQUIST & FRANK CROSS, *MEASURING JUDICIAL ACTIVISM* (2009).

<sup>40</sup> THOMAS O. SARGENTICH, PAUL D. CARRINGTON, BARBARA E. REED, CHARLES GARDNER GEYH, & ERWIN CHERMERINSKY, *UNCERTAIN JUSTICE: POLITICS AND AMERICA’S COURTS* 1–75, 121–205 (2000); *Symposium, Judicial Independence and Accountability*, 72 S. CAL. L. REV. 315, 339 (1999).

<sup>41</sup> For instance, ten Republicans agreed to cloture on Judge David Hamilton, but nine voted not to confirm. 155 CONG. REC. S11,421 (daily ed. Nov. 17, 2009) (cloture); *id.* at S11,552 (daily ed. Nov. 19, 2009) (approval). For many other

President Barack Obama and legislators collaborating with him realized much success when the parties approved very competent, diverse appellate court judges. If Republicans and Democrats carefully recalibrate appointments by cooperating over the lame duck session, they will fill a number of trial court vacancies with excellent, uncontroversial jurists who more promptly, inexpensively, and equitably resolve cases.

#### *Epilogue*

The Senate apparently followed some of the advice proffered in this paper by confirming twenty-seven well-qualified, diverse, consensus district court nominees throughout the lame duck session.<sup>42</sup> Democrats successfully pursued cloture ballots for each of these nominees, although for eleven nominees Republicans permitted voice votes, rather than demand roll call ballots, as the chamber was adjourning.<sup>43</sup> The number of confirmations attained compares quite favorably with Obama Administration efforts in previous lame duck sessions—and contrasts sharply with appointments initiatives of his two most recent predecessors.<sup>44</sup>

That accomplishment will furnish numerous benefits. Senate confirmation of twenty-seven more judges reduced the total district level openings to thirty-nine, a number significantly lower than it has been across virtually all of President Obama's tenure.<sup>45</sup> The addition of these jurists enables courts to resolve disputes more speedily, economically, and fairly, and will ameliorate pressures on the remaining members of the federal bench.<sup>46</sup> Improving diversity will yield the constructive advantages—namely enhanced understanding and disposition of crucial issues, reduced ethnic, gender, and other prejudices that erode justice, and increased public confidence in a bench that resembles America—that were scrutinized earlier in this piece.<sup>47</sup>

However, the White House and the chamber neglected other recommendations that were previously tendered. For instance, the administration nominated only two candidates throughout the lame duck session, even though both prospects were diverse moderate court of appeals nominees,<sup>48</sup> while the Senate Judiciary

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proposals for improvements, see Shenkman, *supra* note 33, at 298–311; Tobias, *supra* note 2, at 2255–65.

<sup>42</sup> *Archive of Judicial Vacancies*, *supra* note 1.

<sup>43</sup> 160 CONG. REC. S6906-08 (daily ed. Dec. 16, 2014).

<sup>44</sup> For example, the Senate confirmed thirteen in 2012, nineteen in 2010, none in 2008, and three in 2004. The Senate confirmed none in 2000, 1998, and 1994. *Biographical Directory of Judges*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx>

<sup>45</sup> *Archive of Judicial Vacancies*, *supra* note 1; see *supra* notes 14, 16, and accompanying text.

<sup>46</sup> See *supra* notes 15, 25, and accompanying text.

<sup>47</sup> See *supra* notes 26–28 and accompanying text.

<sup>48</sup> Press Release, White House, Office of the Press Sec'y, President Obama Nominates Two to Serve on the U.S. Courts of Appeals (Nov. 12, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/11/12/president-obama-nominates-two-serve-united-states-courts-appeals>; Jeremy Roebuck, *President Appoints Restrepo to U.S. Court of Appeals*, PHILA. INQUIRER (Nov. 13, 2014)



Committee conducted merely one judicial nominee hearing across the entire session.<sup>49</sup>

Certain ideas explain this relative dearth of activity. First, there was comparatively little time for completing many tasks over the lame duck session, as numerous matters (especially involving fiscal concerns) appeared to receive higher priority.<sup>50</sup> Second, the President may have concluded that there was limited advantage in nominating candidates whom the Senate could purportedly not finish processing in 2014, meaning the nominees would essentially be required to start over in the new Congress. Third, many Republicans criticized Democrats for taking actions that would ostensibly not receive approval once the GOP assumed the majority during 2015, contending that Republicans had captured the Senate last November and Democratic members who had lost or were retiring should not vote to confirm life-tenured judges after the electorate had spoken.<sup>51</sup>

There are several promising signs that the 114th Congress will follow certain advice that was provided above. The President and the Majority Leader have pledged to find areas and initiatives on which the political parties might collaborate and judicial appointments could be one important field—although neither person has expressly confirmed that idea.<sup>52</sup> More specifically, the day after the new Senate convened, the White House renominated practically all of the judicial nominees whom the 113th Senate had not thoroughly considered when the chamber

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[http://articles.philly.com/2014-11-13/news/56394795\\_1\\_u-s-court-third-circuit-appeals](http://articles.philly.com/2014-11-13/news/56394795_1_u-s-court-third-circuit-appeals); *see infra* note 53 and accompanying text.

<sup>49</sup> *Hearing on Judicial Nominees, S. Judiciary Comm.*, 114th Cong. (Nov. 13, 2014). In fairness, Obama had only nominated on September 18 those candidates who received November hearings. Press Release, White House, Office of the Press Sec’y, President Obama Nominates Seven to Serve on the United States District Courts (Sept. 18, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/09/18/president-obama-nominates-seven-serve-united-states-district-courts>.

<sup>50</sup> *See, e.g.*, Carl Hulse, *Lame-Duck Session Is First Crucial Test of Breaking Gridlock*, N.Y. TIMES (Nov. 11, 2014), <http://www.nytimes.com/2014/11/12/us/politics/lame-duck-session-is-first-crucial-test-of-breaking-gridlock.html>; Jonathan Weisman, *Chance for Tax Overhaul Is Seen in Shift of Power*, N.Y. TIMES (Nov. 6, 2014), <http://www.nytimes.com/2014/11/07/us/politics/republican-wins-may-lead-to-fiscal-deal-with-democrats.html>.

<sup>51</sup> *See, e.g.*, Al Kamen & Paul Kane, *Did ‘Nuclear Option’ Boost Obama’s Judicial Appointments?*, WASH. POST (Dec. 17, 2014), <http://www.washingtonpost.com/blogs/in-the-loop/wp/2014/12/17/did-nuclear-option-boost-obamas-judicial-appointments/>; Hans A. von Spakovsky, *The Dangers of Lame Duck Sessions in Congress—Unfair and Undemocratic*, THE HERITAGE FOUNDATION (Nov. 13, 2014), <http://www.heritage.org/research/reports/2014/11/the-dangers-of-lame-duck-sessions-in-congress-unfair-and-undemocratic>.

<sup>52</sup> *See, e.g.*, Neil Eggleston, *Judicial Nominations: Accomplishments and the Work That Lies Ahead*, WHITE HOUSE BLOG (Dec. 17, 2014), <http://www.whitehouse.gov/blog/2014/12/17/judicial-nominations-accomplishments-and-work-lies-ahead>; Colleen McCain Nelson & Michael R. Crittenden, *Obama Tries to Woo GOP on His Priorities*, WALL ST. J. (Jan. 13, 2015), <http://www.wsj.com/articles/obama-congressional-leaders-discuss-how-to-spur-economic-progress-1421169018>.

adjourned in December.<sup>53</sup> However, the Chief Executive submitted merely two new nominees between January 6, when the 114th Senate convened, and February 23, when the chamber returned from the Presidents' Day Recess.<sup>54</sup>

Senator Grassley, who assumed the position as Chair of the Senate Judiciary Committee, promised to efficiently process judicial nominees who are well-qualified, consensus selections and understand the role of a federal judge.<sup>55</sup> Grassley scheduled the first judicial nominee hearing on January 21 and apparently intends to conduct these proceedings every two weeks, as did Senator Leahy, but the new Chair did not schedule the second hearing until after the Presidents' Day Recess.<sup>56</sup> Unfortunately, Grassley will seemingly continue the GOP practice of automatically holding over Judiciary Committee nominee approval votes for one week.<sup>57</sup>

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<sup>53</sup> Press Release, White House, Office of the Press Sec'y, Presidential Nominations Sent to the Senate, Jan. 7, 2015; see David Ingram, *Despite Senate Power Shift, Obama Seeks to Shape U.S. Judiciary*, REUTERS.COM (Jan. 12, 2015), <http://www.reuters.com/article/2015/01/13/us-usa-politics-judges-idUSKBN0KM02Q20150113>.

<sup>54</sup> Press Release, White House, Office of the Press Sec'y, President Obama Nominates Two To Serve on the U.S. District Courts, Feb. 4, 2015, *available at* <http://www.whitehouse.gov/the-press-office/2015/02/04/president-obama-nominates-two-serve-united-states-district-courts>.

<sup>55</sup> David Catanese, *Chuck Grassley's Gavel Year*, U.S. NEWS & WORLD REP. (Jan. 28, 2015), <http://www.usnews.com/news/articles/2015/01/28/chuck-grassleys-gavel-year>; Jennifer Jacobs, *Grassley Picks Judiciary From Trio of Chairmanships*, DES MOINES REGISTER (Nov. 9, 2014), <http://www.desmoinesregister.com/story/news/politics/2014/11/09/chuck-grassley-picks-from-trio-of-chairmanships-its-judiciary/18756611/>; Timothy M. Phelps, *Iowa's Grassley Is First Non-Lawyer to Head Senate Judiciary Committee*, L.A. TIMES (Nov. 12, 2014), <http://www.latimes.com/nation/la-na-grassley-chairman-20141113-story.html>.

<sup>56</sup> *Hearings on Judicial Nominees, S. Judiciary Comm.*, 114th Cong. (Jan. 21, 2015); see Jennifer Jacobs, *Grassley's Checklist of Priorities*, DES MOINES REGISTER (Jan. 7, 2015), <http://www.desmoinesregister.com/story/news/politics/2015/01/07/grassley-checklist-priorities-judiciary-committee/21394233/>. In fairness, the hearing for Attorney General nominee Loretta Lynch may have delayed judicial nominee hearings. *Hearing on Attorney General Nomination, S. Judiciary Comm.*, 114th Cong. (Jan. 28-29, 2015); see Neils Lesniewski, *Cruz Says Fate of 'Dangerous' Lynch up to McConnell*, ROLL CALL (Jan. 28, 2015), [http://www.rollcall.com/news/cruz\\_says\\_fate\\_of\\_dangerous\\_lynch\\_up\\_to\\_mcconnell-239647-1.html](http://www.rollcall.com/news/cruz_says_fate_of_dangerous_lynch_up_to_mcconnell-239647-1.html).

<sup>57</sup> *Exec. Business Mtgs., S. Judiciary Comm.*, 114th Cong. (Jan. 22, Feb. 5, Feb. 12, 2015). In fairness, the nominee whom Grassley held over the first meeting was for the Court of International Trade, not a circuit or district court, and the panel approved Jeanne Davidson by voice vote at the next meeting. However, Grassley suggested in the second meeting that he would process Lynch in "regular order" for which Leahy sharply criticized him. Statement of Sen. Charles Grassley, *Exec. Business Mtg., S. Judiciary Comm.*, 114th Cong. (Feb. 5, 2015); see William

The more important test of Republicans' willingness to cooperate will come after the committee approves nominees and the Majority Leader decides when to schedule their floor votes. Although McConnell did not coordinate to agree on these ballots when he served as Minority Leader the past six years (thus provoking the nuclear option), the senator has pledged to cooperate more in his new position. The scheduling of floor debates and votes offers an excellent opportunity to fulfill this promise.<sup>58</sup>

In short, Republican leaders, especially Senators McConnell and Grassley, have trumpeted many pledges to return the Senate generally and the confirmation process specifically to what they describe as "regular order."<sup>59</sup> Nonetheless, between the January 6 date on which the 114th Senate assembled and the February 12 date on which it recessed for Presidents' Day, the Senate did not manage to confirm a single judicial nominee,<sup>60</sup> while the Judiciary Committee conducted one judicial nominee hearing and did not permit votes on any nominees for circuit or district courts.<sup>61</sup>

In sum, President Obama must forward nominees at a pace that will facilitate their chamber review. Senator Grassley, for his part, should quickly process nominees who satisfy the criteria by swiftly arranging hearings and committee ballots, while the Chair must eschew reflexively holding over nominees for seven days without explanation. Senator McConnell should concomitantly agree to schedule thorough debates, if needed, and floor votes comparatively quickly after

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Finnegan, *What's Stopping Loretta Lynch?*, NEW YORKER (Feb. 5, 2015), <http://www.newyorker.com/news/daily-comment/whats-stopping-loretta-lynch>; *infra* note 59 and accompanying text. In the third meeting, the GOP held over Lynch, four district nominees and five U.S. Court of Federal Claims nominees.

<sup>58</sup> See *supra* notes 12–14, 52, and accompanying text; see also Lesniewski, *supra* note 56 ("In [Cruz's] view, the majority leader should announce the Senate will not confirm any executive or judicial nominees in this Congress, other than vital national security positions, unless and until the president rescinds" the executive actions granting deferred status to almost 5 million undocumented individuals.); Seung Min Kim & Burgess Everett, *GOP Senators Block Ted Cruz Move to Hold up Loretta Lynch Vote*, POLITICO.COM (Feb. 4, 2015), <http://www.politico.com/story/2015/02/loretta-lynch-vote-ted-cruz-114921.html>.

<sup>59</sup> 161 CONG. REC. S27-28 (daily ed. Jan. 7, 2015) (statement of Sen. McConnell); *supra* note 57; see Ailsa Chang, *McConnell's Call for 'Regular Order' May Not Mean What It Used To*, NPR.ORG (Feb. 8, 2015), <http://www.npr.org/blogs/itsallpolitics/2015/02/08/384590663/mcconnells-call-for-regular-order-may-not-mean-what-it-used-to>.

<sup>60</sup> It did confirm one executive nominee whom the Judiciary Committee approved. 161 CONG. REC. S852-53 (daily ed. Feb. 9, 2015); Katie Zezima, *Senate Unanimously Confirms Botticelli To Be Drug Czar*, WASH. POST (Feb. 9, 2015), <http://www.washingtonpost.com/blogs/post-politics/wp/2015/02/09/senate-unanimously-confirms-botticelli-to-be-drug-czar/>; see Jonathan Bernstein, *Waiting for 2015's First Confirmation*, BLOOMBERGVIEW (Feb. 5, 2015), <http://www.bloombergview.com/articles/2015-02-05/waiting-for-2015-s-first-confirmation>.

<sup>61</sup> See *supra* notes 56–57 and accompanying text.

the panel reports nominees. If Democrats and Republicans collaborate during the 114th Congress, they will be able to fill the vacancies with excellent consensus nominees, who can more expeditiously, inexpensively, and equitably resolve disputes.