

## Diversity on the bench

Examining the first two years of Obama's presidency reveals that, in terms of judicial nominees, ethnic and gender diversity is the "change we can believe in." Justice Sonia Sotomayor's confirmation as the first Latina to serve on the United States Supreme Court was one of many historic "firsts" during the 111th Congress. In the courts of appeals, O. Rogeriee Thompson is the first African American to serve on the First Circuit, Albert Diaz the first Hispanic American to serve on the Fourth Circuit, and Denny Chin the first Asian American to serve on the Second Circuit. The results are similar for the district courts: women were confirmed to district courts in two of the nine states where no woman previously had served (Vermont and Wyoming); African Americans were confirmed to district courts in two states (West Virginia and Indiana) where none previously had served and the first Asian American was confirmed to a district court in Illinois.

These historic firsts are not surprising given the high proportion of non traditional appointees during Obama's first term. Out of 61 appointments to lifetime judgeships on courts of general jurisdiction, 43 were nontraditional, that is, not white males, and total a remarkable 70.5 percent. As Table 6 in the main text notes, 31 women were confirmed during the 111th Congress, accounting for more than half of Obama's appointees. The proportion of women confirmed far exceeds that of any previous administration (including Clinton, who made the largest impact on diversifying the federal bench prior to Obama). African-American appointees also enjoyed great success as they comprised 26.2 percent of those confirmed, again a vast increase over any previous administration. Five Hispanic Americans were appointed by Obama, but the proportion of total nominees (8.2 percent) - while higher than Clinton's 6.8 percent - was slightly lower than during the administration of W. Bush.

However, the starkest comparison across presidential administrations is for Asian Americans. In his first two years in office, Obama appointed six Asian Americans to the federal bench, which totals in absolute numbers more than any other president during an entire presidency. These appointees accounted for nearly 10 percent of those confirmed during the 111th Congress, which when compared over time, is truly remarkable.

Despite Obama's attention to appointing diverse judges, the relative impact of the new set of appointees on the overall diversity of the federal bench is fairly small. The percentage of nontraditional judges in active service (when not double counting women who also belong to a racial minority group) was 38.8 percent when Obama took office and totaled 39.5 percent at the end of the 111th Congress. This represents an increase of only 1.8 percent during Obama's first two years in office. (See Table 1) This slight increase is even more puzzling when compared to the 36.2 percent increase after Clinton's first two years or the 6.7 percent increase at W. Bush's first midterm. Three factors help explain why the overall impact of Obama's confirmed judges was so small, despite the large proportion of nontraditional nominees: 1) in absolute numbers, Obama made fewer appointments; 2) the large number of vacancies created by nontraditional

judges leaving active service or being elevated; and 3) the high proportion of "double diverse" nominees.

First, Obama simply made fewer appointments during his first two years than past presidents. Having benefited from the extraordinary number of vacancies he inherited, W. Bush successfully added 99 judges to the federal bench during his first two years, 32 of whom were nontraditional. Clinton's imprint was even larger - he made 127 appointments (including 2 to the Supreme Court) during his first two years, 75 of whom were nontraditional. Comparing these numbers to Obama's 61 appointments, it becomes clear that although a greater proportion of Obama's appointments were diverse, the lower number of appointments resulted in less progress overall in terms of diversifying the federal courts.

Second, a greater number of vacancies - especially on the district courts - came from nontraditional judges leaving active service or being elevated to a higher-level federal court. Of the 102 vacancies that occurred during the 111th Congress, 37 were from nontraditional judges (36.3 percent). This number is much higher than during W. Bush's (13) or Clinton's (17) first two years.

While interesting, this occurrence is not all that surprising when we take into account the progression and retirement of federal judges. Many judges leaving active service do so under a partisan-compatible president and Congress, since their replacement is more likely to be ideologically similar. Clinton was the last partisan-compatible president to Obama and appointed more nontraditional judges to the federal bench than any other president, in terms of both absolute numbers and proportionately. (See Table 6 in the main text) Thus, it makes sense that many of the judges who took senior status or resigned during Obama's first two years were nontraditional Clinton appointees (18 of 30 judges - totaling 60 percent). Including all Democratic appointees in the analysis, the number increases to 21 of 30 judges - totaling 70 percent.<sup>2</sup>

Additionally, many of Obama's initial nominees to the courts of appeals were elevated from the district courts (9 of 15), all 9 of whom were Clinton appointees. Even more striking, every nontraditional judge elevated from the district court to the court of appeals originally was a Clinton appointee (6 of 6). Similarly, Justice Sonia Sotomayor, Obama's first nominee to the U.S. Supreme Court, initially was appointed to the Second Circuit by Clinton. In other words, over the past two years, Obama essentially was playing catch-up with the vacancies created by nontraditional judges appointed by Clinton (and a few by Carter).

Third, the diminished impact of Obama's diverse appointments can be explained in part by the high proportion of "double diverse" nominees, i.e., those with more than one nontraditional characteristic. Of the 43 nontraditional appointees through midterm, 15 were women who also belong to a racial minority group (34.9 percent). When examining "diversity" in the aggregate, this double counting artificially inflates the number of diverse judges credited to the President. However, when viewing nominations as a simple dichotomy, diverse or not diverse, the impact is lessened. Obama is not the first President to appoint a high proportion of minority women to the federal courts. During his presidency, 37 percent of W. Bush's nontraditional appointees were judges with more than one diversity characteristic, one of the reasons why his impact on the

overall diversification of the bench was more limited than the aggregate numbers in Table 6 would suggest.

In contrast to the small overall impact of Obama's nontraditional appointees at the district court level, the story is quite different at the courts of appeals. When not double counting women who also belong to a racial minority group, the proportion of nontraditional judges on the courts of appeals is 42 percent, an increase of 11.1 percent (7 seats) from January 1, 2009 - January 1, 2011. Over these past two years every nontraditional group made gains, although the net increase of 4 seats by African Americans is most substantial. This stands in contrast to the last two years of Bush's second term, when only women increased their presence at this level. In just two years Obama's appointments led to a majority of nontraditional judges on the Fourth Circuit (4 African Americans, 2 white females, and 1 Hispanic American) as well as an even split on the First Circuit between nontraditional and traditional judges. This achievement equals what W. Bush accomplished during his entire presidency.

Gender diversity increased on 3 courts of appeal (the First, Ninth, and Eleventh Circuits) and decreased on 1 (the Second Circuit). Presently, all of the geographic circuits have a sitting female judge, and all but the Eighth Circuit have more than one woman, with the Ninth Circuit having the most (10). Most significantly, the racial and ethnic diversity on 5 of the geographic circuit courts increased, and 3 of those courts (the First, Second and Fourth Circuits) added nontraditional judges not previously represented. With the addition of Judge O. Rogeriee Thompson to the First Circuit, every geographic circuit now has seated an African-American judge. However, Hispanic-American judges have yet to serve on 5 of the 12 circuit courts of general jurisdiction (the Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits). With the elevation of Judge Denny Chin, an Asian American now sits on the Second Circuit. No Native American has ever served on the federal court of appeals.

As we explored in the main text, the hyperpartisan politics of the 111th Congress really took a toll on Obama's ability to confirm district court nominees; only 56.4 percent of his nominees were confirmed, compared to 68.2 percent at the courts of appeals. This contributed to Obama's limited ability to alter the diversity balance at the district court level. Specifically examining the district courts, when not double counting women who also belong to a racial minority group, the proportion of nontraditional judges is 38.9 percent, a decrease of 1.2 percent (3 seats) from the preceding Congress. As was discussed previously, a number of factors contribute to this result: the lower overall number of Obama's appointments, the large number of nontraditional judges leaving the district court (33), as well as the high proportion of "double diverse" nominees (12).

Although diversity decreased on the district courts in the aggregate, women were appointed to the bench in 2 states where none previously had served. However, district courts in 7 states remain without any female judges, 19 without an African-American judge and 37 without a Hispanic-American judge. At the end of the 110th Congress, these numbers were, 9, 20 and 36, respectively. Asian Americans are present only on district courts in New York, California, Hawaii, Kentucky, and most recently Illinois. In addition, there are 6 states that have never seated a nontraditional judge (Alaska, Idaho, Maine, Montana, New Hampshire, and North Dakota). Some of this can be explained by the small size of these courts, resulting in fewer appointment opportunities - e.g., only 1 vacancy occurred on a district within these states in the

past two years. However, as these opportunities arise, Obama seems poised to offer the "first" nomination.

Going forward, Obama's ability to diversify the district courts may continue to be hampered if a substantial number of the surviving Clinton cohort leave active service. s However, there are a number of factors that may help him overcome this roadblock. First, his focus on elevating nontraditional Clinton district court judges seems to be waning. Since January 1, 2011, there have been 11 nominations to positions on courts of appeals, of which 2 already have been confirmed, and only 1 was a nontraditional Clinton district court judge. Additionally, at the district court level, Obama's appointment opportunities abound given the number of vacancies left at midterm. His opportunities, combined with his continued emphasis on appointing nontraditional judges - 21 judges have been confirmed since January 1, 2011, 10 of whom are nontraditional (48 percent); 26 of the 38 nominees pending are nontraditional (68 percent) - indicate that Obama could impact the overall diversity of the district courts much more significantly during the second half of his term.

Table 2 aggregates district courts by circuit. It also lists the percentage of women judges in each district and compares the percentage of African Americans and Hispanic Americans to the percentage of each group in the circuit's general population, since we expect states with more diverse populations to also have more diverse courts.<sup>4</sup> Women continue to have the greatest presence on district courts within the Second and Tenth Circuits, and the lowest within the Fourth and Sixth Circuits. That said, the Fourth Circuit saw the largest percentage increase (8.5 percent) with a net gain of 4 seats. As in years past, the highest concentration of African-American district judges is in the Fourth Circuit, and it also is the circuit with the largest population of African Americans.<sup>5</sup> However, comparing overall representation on the bench to the general population, only four circuits have African-American representation on the courts greater than their representation in the population (the Third, Eighth, Ninth, and Tenth Circuits). The converse is true in the most Southern circuits (the Fifth and Eleventh).

Underrepresentation is even more acute for Hispanic Americans, despite 43 percent population growth over the past decade; the states within the First, Fourth, Sixth, and Eighth Circuits have no Hispanic-American district judges and relative to their representation in the population, the Second, Fifth and Ninth Circuits have very few.<sup>6</sup> The highest congruence between population and judicial representation is on the Third and Seventh Circuits. Table 2 does not report the relative proportions of Asian Americans on the federal bench as compared to the population because the numbers have been quite small until recently. However, according to the 2010 census, the Asian-American population grew faster than any other racial minority group, and outnumbers African Americans in 9 states. If Obama's historic record of appointing Asian Americans to the bench continues, this comparison may be noteworthy.

### Influencing factors

The diversity of Obama's judicial appointees gained widespread media attention. While ultimately it is the President's responsibility to nominate judges, we would be remiss not to acknowledge factors both within and outside of his control, which assisted the selection of diverse candidates. First, comparing Obama's administration to past administrations, Nan Aron,

head of the liberal group Alliance for Justice, noted, "there is now a much more active engagement by a diverse number of groups. For instance, in addition to organizations like the NAACP Legal Defense Fund, now there is a very active engagement by Latino organizations as well as Asian American ones." These outside interest groups are bringing worthy candidates to the attention of the White House, and, in the case of district court nominees, homestate senators. As Vincent Eng of the Asian American Justice Center observed, "The White House is open, they ask for names ...and when they ask for names, they look at them. And I think that certain groups have been very successful. I think the more successful groups are the bar associations that have submitted names to the White House."

For example, the National Asian Pacific American Bar Association helped shepherd the successful confirmation of 6 Asian Americans to the bench and the Hispanic National Bar Association was instrumental with Justice Sotomayor's nomination and subsequent confirmation.

In addition to the White House and home-state senators readily listening to outside groups, there is simply a larger pool of diverse candidates, and they now have the assistance of dedicated interest groups in getting their names to the right people. Eng noted, for example, the work of his organization, "to create the pipeline of individuals that would be competitive candidates" has borne some fruit. "If you look at the Asian-American population growth ...it's a growing population, more and more individuals are...breaking the mold of being engineers and doctors. More are going to law school and so you have a critical mass of individuals who are in the right age group, the right education, and now the qualifications. So I think it works out very well for the community. You had an administration that was friendly and open to receiving names." Going forward, the continued engagement of outside interest groups who have the ear of the White House and connections to senators will certainly ensure that diversity is kept at the forefront of the nomination process.

Overall, the sentiments of Assistant Attorney General Christopher Schroeder sum up the Obama nomination strategy at midterm: "I think overall the effort to expand the biographies of people on the bench has been a very important concern of his administration..." Indeed, they have pursued it and quite successfully.

1. Barack Obama, Democratic National Convention Acceptance Speech, August 28, 2008.
2. Democratic appointees who took senior status or resigned during the 111th Congress were appointed by Carter and Clinton.
3. Since January 1, 2011 only 6 nontraditional judges have left active service, 4 of whom were Clinton appointees.
4. Calculations for the First Circuit are performed with and without Puerto Rico to get a more reliable view of the congruence between the Hispanic population in that jurisdiction and its representation on the district bench.

5. The African-American population in the D.C. Circuit is actually the highest, but since the Circuit consists only of one district court the underlying unit of analysis is different, thus we excluded it from comparison.

6. Since January 1, 2011, 3 Hispanic-American district court judges have been confirmed and all were to seats in the Fifth (1) and Ninth (2) Circuits. Judge Marco Hernandez is the first ever Hispanic American district court judge to serve in the state of Oregon.

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# OBAMA'S JUDICIARY at MIDTERM

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## THE CONFIRMATION DRAMA CONTINUES

When Barack Obama assumed the presidency on January 20, 2009, he inherited a country struggling with an economy on the brink of reprising the Great Depression of the 1930s, two middle-eastern wars, crushing deficits, a lopsided tax policy that favored the wealthy and deprived the country of badly needed tax revenue, a health care crisis, and myriad other problems. President Obama also inherited a poisonous political climate where hyperpartisanship put party above the public interest and had trumped civility and compromise.

The new president promised a new direction and the electorate gave him not only a decisive endorsement to pursue that direction and the agenda he had articulated in the campaign but also a Congress controlled by Democrats by large majorities. Part of that agenda, although not given much media attention at the time, was to use judicial appointments to further ethnic and gender diversity on the bench.<sup>1</sup> As the data reported in this article clearly reveal, at the end of President Obama's first two years in office, for the first time in American history, women and ethnic minorities who together constitute a large majority of the population, received the large majority of judicial appointments.

But President Obama's first two years in office were not easy ones. His ambitious agenda met with stiff resistance from a defiant and stubborn Republican minority in the Senate whose secret holds, threats of filibusters, and deft use of Senate procedures were used to slow down if not stymie the Obama agenda including staffing the judiciary. The Administration also had difficulties in fashioning effective and efficient judicial selection machinery.

Our purpose in this article, consistent with the series of articles on judicial selection- that have appeared in this journal since 1978, is to illuminate the process by which federal judges were chosen and the appointees who emerged from it during the first two years of the Obama Administration and the 111th Congress. We do this by way of extensive interviewing of key players and observers of the process and also by a statistical analysis of the biographical/demographical data of those confirmed by the 111th Congress. The findings for the Obama appointees are compared to those of the appointees of the previous four presidents.

Our interviews were conducted with officials in the Department of Justice and the Senate who participated in the nomination and/or confirmation processes. Tellingly, no one from the White House Counsel's office was able or willing to meet with us - the first time in our over 30 years of conducting our research on judicial selection that we have not had cooperation from that office. While the perspective from the White House Counsel's office would have been welcome, we believe that our other sources have enabled us to provide an accurate portrait of the successes

and failures of the president's judicial selection team. Other sources included interest group participants from groups along the ideological continuum.

Data on the appointees were derived primarily from the questionnaires completed by the judicial nominees for the Senate Judiciary\ Committee. The Committee posts the questionnaires on line. Other sources of demographic or background data included newspaper articles, and various resources on line on die internet. Political party preference or affiliation was determined from either the questionnaires, newspaper sources, or, in some instances, from registrars of voters or boards of election for the geographic area of primary residence of the appointees.

We first examine judicial selection by the Obama Administration and compare die process with that used by Obama's predecessors in office. We then focus on confirmation politics and processes. This is followed by a demographic/background portrait of the district court appointees and then those appointed to the appeals courts. The Obama judges are compared to the judges appointed by the previous four administrations. Finally we speculate about the emerging Obama judiciary.

### Great expectations

In die wake of eight years in office during which George W. Bush made bom spectacular and unprecedented use of the judicial selection process in pursuit of his public policy agenda and, as well, as a primary vehicle for exciting his political base, expectations ran extraordinarily high among Democrats and progressives who anticipated the nomination of a diverse slate of left-leaning judges by newly elected President Barack Obama. The W. Bush tidal wave would be abated and a rebalancing of the American judiciary would occur as untold numbers of liberal Obama appointees would take their place on the federal bench as countervailing forces to W. Bush's legacy.

By the end of die 111th Congress, some of these expectations were met. Nan Aron, head of the liberal group the Alliance for Justice freely noted:

Some of the nominees have been quite good.... We thought this was a new day for us and a clear departure from the past, and in some respects it has been. Clearly, the kinds of nominees being sent up to the Senate are different.<sup>3</sup>

Aron 's reference to the "kind" of nominees chosen by Obama, however, clearly speaks to their extraordinary and unprecedented diversity and not to their ideological leanings. Indeed, pondering die Obama nominees, Aron admitted that, perhaps, it was collective expectations and not Obama's nominating behavior that have been off the mark:

He has made the claim over the years that the courts really should not be an engine for social change. That role is more appropriately played by the legislature and you don't want courts too far out ahead of what the people want and what Congress wants.

Characterizing that approach as "fine in the 1980s when you had a responsible Congress," Aron concluded that such views "don't have much relevance in today's world." Another group spokesperson added, "He doesn't speak with passion about the courts."

When major disappointment with the raw numbers of nominations made by the President and the considerably smaller number of judges confirmed in the 111th Congress, coupled with an exploding vacancy rate, are added to the mix, it is hard to characterize the Obama nomination record as one of great success. Indeed, contrasting Obama's first two years to the W. Bush record, a senior legislative aide to a Judiciary Committee Democrat admitted his disappointment but underscored the political realities of what has transpired:

There is no single way to slice this ... where we have done nearly as well. I think there was probably an expectation that this would go without taking a lot of political capital, a lot of energy. At least the non-controversial ones. I think the liberal groups, who've been disappointed by the picks, have not put a lot of energy in the ...mu of the mill nominees. I'm not sure that the White House has put a ton of energy behind a lot of nominees.. ..I think everyone woke up late to what a slog this actually was going to be.

Surveying this landscape from outside of government, an expert observer of judicial selection politics characterized the feelings of Obama supporters on the political left as "ranging from total fed-up-ness on one end to... palpable angst.. ..People are pulling their hair out.. ..To read the Bush record is absolutely breathtaking. Bush knew how to play out the active communicative role of the presidency on this issue...The Bush people have thrown down a gauntlet for others to emulate."

Perhaps what we have witnessed is simply, as one Democratic legislative aide remarked, "the realities of governing versus the highs of campaigns." Expressing his greatest sense of disappointment the aide added, "You do everything...to avoid having fights and you don't get the results even if you've been willing to compromise. I think it's reflective of how everybody on the left feels about everything right now." Characterizing such "compromise," a prominent selection activist concluded, "we're losing without a fight. And to me that captures the whole judicial selection process."

An aide to a high-ranking Judiciary Committee Senate Democrat observed, "Would... we had liked... more nominations sooner? Sure. Would we have liked there to have been more hearings and more confirmations? Sure. We've done the best we can, in the time we've been given, with the nominations we've been sent."

### The nomination process

Our description of the Obama Administration's judicial nominations process is based largely on an interview with Assistant Attorney General Christopher Schroeder, supplemented by the observations of other actors in the process including Senate staffers, interest group representatives, and other expert analysts. As noted, in all previous iterations of this series, we have benefited from interviews with the relevant Associate White House Counsel working on judicial selection. While researching this article, we were denied such an interview despite

numerous efforts. One interest group advocate observed that, after the midterm election when the Democrats lost their majority in the House and came close to doing so in the Senate, "I think there was a clamp down... There is a...filter now on their e-mail system.. Individuals I know who used to communicate with the White House now get an automatic bounce back."

While there are significant similarities between nomination processes in die Obama Administration and recent presidencies, it is also evident that there are several key differences. Viewed collectively, they have enhanced the White House role, while repositioning that of the Justice Department's Office of Legal Policy. As explained by Christopher Schroeder:

We do... the professional evaluation of the candidate... After we finish our process and after we've prepared a written memo and after the White House decides on the basis of what we've gathered so far [that] it's worth going further with the nominee, we tee it up For the FBI ..... The decision making as to who the presumptive nominee is, is now concentrated in the White House Counsel's Office. They do ali the outreach to the home state senators or the legislative delegation in the case of states where there are two Republican senators and no Democrat. They do the intake, decide which of the nominees that are in play at this stage should be evaluated further, and send us a name.

Once a week, there is a "status meeting" on the various prospective nominees under consideration which, unlike die Joint Selection Committees of White House and Justice Department personnel utilized by every administration starting with Reagan's, includes no joint face-to-face meeting during which nomination decisions are definitively made. The status meetings are presentiy held via telephone. According to Schroeder:

My understanding is that in the early days [of the administration]. ..there was an effort made to continue die live meetings which involved the same cast of characters but was in person at the White House. White House Counsel representatives found the meeting unwieldy and not as efficient use of their time as they wanted. And, so, they both simultaneously shaved down the number of people participating in it [and adopted a telephonic process]. Apparently, prior to these changes, the group's size had grown to a point where it was proving inefficient.

As one observer of the change noted, "the main attempt may have been to pare down the size of the group and the Way to accomplish that was to change die format and make it less interesting for people to attend."

Assistant Attorney General Schroeder acknowledged that he, personally, does not often participate in these discussions but, radier his deputy overseeing nominations does. In addition, Justice may be represented by nominations personnel direcdy involved in the investigations of the potential nominees to be discussed. The White House Counsel, who typically chaired the Joint Committee's face-to-face meetings in previous presidencies, is rarely a direct participant in the telephone discussions. Associate White House Counsel Susan Davies chairs die status meetings on behalf of the Counsel's office. Also participating routinely is a representative from the White House's Office of Legislative Affairs who will be involved in the eventual advice and consent processes for those who are nominated.

The President's direct participation in the process appears to enter into play at two discrete stages. Thus, early on during a nominee's consideration, "The White House Counsel will prepare a decision memo for him that typically involves more than one vacant seat and that will come up to him and he'll come back with, \*Yes, no, let's talk about this." The Office of Legal Policy will be given a signal at that point on whether to go ahead with their professional evaluation based on the President's preferences. At the back end of this decisional process, "he gets a more elaborate decision memo... when we've completed all of our work and the FIBI has completed its work and the ABA has completed its work." This memo will be focused "on the people that we've evaluated thus far as to whether to go ahead and nominate them."

In our interviews beyond the direct participants in the administration's processes there was a clear recognition of the White House's ascendancy at the expense of the Justice Department. Some attributed this, in part, to the unusual length of time, over a year, that it took to confirm Assistant Attorney General Schroeder to head the Office of Legal Policy. For some, this delay was seen as a purposeful strategy of the minority Republicans. Schroeder, himself, questioned whether such a strategy would have had a significant impact:

I don't think we'll ever know. I do think there was a [Republican] strategy fairly early on to slow walk as many judges as possible and it's conceivable that somebody saw keeping this office empty as a way to further that....I don't think they would think that very long because, in fact, the part that we have done, you can do without a confirmed Assistant Attorney General and the part the White House does was in place. The people there are staff without the need for Senate confirmation. So I don't think, as a practical matter, it did slow the process down very much if it all.

It remains true, however, as a Senate Judiciary Committee Democratic staffer noted, "that as the White House and DOJ were working out their processes for vetting nominations, there wasn't a full operation at DOJ." An expert observer added that the Schroeder situation, "aborted liftoff of the staffing at OLP. You just can't fly with one wing."

It does not appear that the emergent dominance of the Counsel's Office followed any concerted plan of the administration but may have simply "happened" as a response to the rhythm, ebb, and flow of the playing out of actual selection processes. At first, even though the Office of Legal Policy did not have its leadership in place, they were somewhat more active players in the process than they were to later become because there was also an experiential void in the Counsel's Office. There, White House Counsel Gregory Craig was much more engaged in matters of executive power and foreign policy, largely with respect to events at Guantanamo Bay, than he was in the process of choosing judges. His primary judicial selection assistant, Cassandra Butts, was characterized by our sources as well liked and quite competent, but inexperienced in judicial selection. One expert analyst summarized the problematic situation. "I don't see anything that they...did to make it a priority. They didn't staff it sufficiently at the White House. They didn't elevate it."

Two events, it appears, led to the ultimate emergence of the Counsel's Office as the dominant judicial selection player. One was the replacement of Craig with Robert F. Bauer. Nan Aron pointed out that, "when Bauer came in, the process proceeded much more rapidly.... There was a

lot more energy and enthusiasm in the White House Counsel's Office to send up nominees more rapidly." At least as important as the positives associated with Bauer was the perceived failure of Office of Legal Policy staff to catch the gaps in the candidate questionnaire of Goodwin Liu, the administration's most controversial nominee to date.

The primary role of the Obama White House in trumping any potentially substantive Justice Department role in choosing nominees was noted in several of our interviews, often from a less than benign perspective. One interest group leader characterized the situation as one of "total control" by the White House with Justice "solely used as a place to vet nominees," in contrast to previous administrations where Justice lawyers were active participants in the actual selection process.

Another observer further underscored that there was a "scale back from the White House Counsel's Office on...how much they wanted to defer to Justice in doing certain things and then taking a lot more stuff in-house instead.. Justice is kind of irrelevant in the nominations process in many situations." While taking on primacy in the process, little else changed with regard to the resources for the task at hand. A selection lobbyist from the Democratic left observed, "as you had more work being brought to the White House Counsel you still had the same people.. It was the same small team of people just doing more work....Logistically, that is just going to slow you down."

In the final analysis, the weight of the evidence clearly suggests that, during the 111th Congress, the Obama judicial selection machinery suffered from organizational and coordination weaknesses. One critical analyst noted that these were inexcusable flaws. "It's not putting a man on the moon.. ..It isn't rocket science .. You've got... to have the resources ....They just never got it going."

By several accounts, however, the administration may actually have gotten it going towards the end of the congressional session. While the payoff in lame duck confirmations was not substantial, we have noted the recognition that, under Robert Bauer, the White House Counsel's judicial selection activity ran more smoothly, albeit while, still, being short staffed. Similar improvements have begun to be felt at the Department of Justice's Office of Legal Policy as overseen by Christopher Schroeder.

### Consulting senators

One of the central realities of nomination processes and politics during the 111th Congress was the widely acknowledged importance of consultation to the administration as part of its clear effort to avoid battles and facilitate a smooth confirmation process. The lessons of history when inadequate consultation was perceived to have occurred, particularly by the minority party in the Senate, strengthened such a resolve.

As one high ranking Senate Judiciary Committee aide speculated, the President must have thought, "If I can work at the front end of this process.. so I'm nominating nominees that Senator Isakson, Senator Chambliss approve or that Senator Lugar approves or Senator Kyl, Senator McCain approves, then I won't have fights." Such an approach would seem to make even greater

sense for a president, such as Obama, for whom the primary agenda items were bold legislative initiatives, not judges.

Indeed, the President had already been put on notice by the entire Republican caucus, through an open letter, delivered in March, 2009, vowing to prevent the confirmation of judicial nominees in instances where Republican home-state senators were not properly consulted.<sup>4</sup> This public threat, occurring before a single Obama judicial nominee had even been submitted to the Senate, underscored the central importance of nominating individuals who would pass successfully through the Senate's blue slip process, a mechanism through which the home-state senators of a nominee, regardless of party, can indicate support for, acquiescence in, or opposition to the president's selection. The theoretical importance of gaining supportive or, at least, non-objecting blue slip returns can be critical in a Senate as divisive as the 111th, as an aide to a Senate Judiciary Democrat noted, because, "the nominees who have come through Republican blue slips stand a better chance of success now than other nominees because it is much harder for them to be held.... Nominating a bunch of guys to no returned blue slips isn't actually progress, it just looks like progress."

The administration's unusual success in gaining blue slip support of or acquiescence to its nominees is something that does, however, take considerable time and, as well, can still exact some cost. Nowhere was this more evident than when, after considerable time and much speculation, President Obama unveiled his first judicial nominee, a long-term district court judge who had served a decade and a half on the federal bench, David Hamilton, with the strong support of the respected senior Senate Republican Richard Lugar. (See "A tale of two nominees" p. 282.)

That a seemingly qualified moderate judge like Hamilton, along with a long list of other nominees, were held up and went through torturously slow confirmation processes (discussed below) may not mean that the Obama strategy was "wrong" per se but, rather, it is clear that it did not work because, as a Democratic Judiciary Committee aide noted, "there's this systematic leadership-led refusal to consent. That doesn't mean somebody's sitting, holding Mary Murguia, Scott Matheson or Albert Diaz." It does mean that Senate floor action on Obama's nominees often moved at a snail's pace, with the possibility of having to implement a time-eating cloture process never far from center stage. The consequence for the Democrats, of these Republican tactics, has been great frustration on many levels. As an aide to a high ranking Democratic Judiciary Committee senator stressed:

If you are going to filibuster somebody who is going to be a 99-0 pick, why shouldn't I nominate 100 Goodwin Liu's because they are all going to have to go through cloture anyway? Honestly.. what has the President gotten for working so hard...to get blue slips, for disappointing the liberal base with moderate picks? What has been the outcome of that? It hasn't been getting 80 of your moderate picks through versus 40 of your more ideological picks through. It has been the same as if every one of these nominees were Goodwin Liu.

The portrait we have drawn of the consultative approach of the administration has not been disputed by the minority Republicans who do, nevertheless, offer a somewhat different

understanding of what we have described. As exemplified by comments of the Minority Chief Counsel for Nominations to the Senate Judiciary Committee, Danielle Cutrona:

The administrator) does talk to home state senators...For the most part, I haven't heard any complaints that the administration hasn't run a nominee by a home-state senator. However, it doesn't necessarily mean that the administration is listening to the caucus as a whole.

This suggests the expectation of the minority for an unprecedented de facto veto power never contemplated by the Senate's blue slip system, nor enjoyed by any minority party caucus in any past exercises of advice and consent in judicial selection history.

### Speed and numbers

Throughout the 111<sup>th</sup> Congress, while the organizational and coordination difficulties of the Obama judicial selection processes largely escaped public notice, the same could not be said of the disappointment the President's supporters had with the speed with which nominations were being made. The resulting relatively low number of nominees coupled with the burgeoning number of vacancies and, most of all, the relatively low number of judges actually confirmed during the congressional session were cause for concern.

In a partial response to critics, the President's supporters in the Senate could point to the necessity of separating the issues of nominations and confirmations, and not to conflate the two. As a Judiciary Committee Democrat aide posed the matter:

The important thing when you ask the [nominations] question. ...is to not confuse that issue with the confirmation issue, and that is something Republican senators will do, which is to answer the question, 'Why aren't we acting on these 16 nominees who came out [of the committee] unanimously?' and they'll say, 'Well, where are the other forty?'

As a practical matter, as another Democratic legislative aide pointed out, "Arguably it cuts the other way. You could be so flooded with nominations that you would not have time to attend to all."

Recalling that scenario in the W. Bush administration when the President's highest priority in judicial selection was to send the names of large numbers of conservative nominees to the Senate, a majority Judiciary Committee staff assistant noted, "When Senator Leahy first became Chairman. ...he physically couldn't hold hearings on nominees that they'd been able to push out of the White House." Striking a sharp contrast with the Obama process he added, "Well, they pushed them out because they didn't care about blue slips, and they didn't care about the ABA, and they didn't care about any of the vetting that this White House has done, so they got a bunch of them out."

There is a juncture, however, when the confirmation process reaches a saturation point, an equilibrium of sorts where a balance is arrived at between nominations submitted and nominees processed. The same aide spoke of a hearing process that:

...goes at a certain pace and you can go a little bit faster, but you can't go 100 miles per hour faster. We didn't hold hearings every week... If you take this seriously and really want to give the senators and their staffs a chance to look at these, there is a pace. Now you can go a little bit faster and a little bit slower, but you can't go light years faster. So they couldn't all be done, there was a backlog of nominations in Bush's first year, first year and a half. We started working through them... and it sort of skews the numbers because when people say, 'Oh, well, this nomination was pending for so long...' Yeah, but there were 50 nominations pending. And when we did them in what seemed like a logical order, they couldn't all be in the first year.

Granting these arguments and observations, one still must conclude that the numbers of nominees sent to the Senate by the Obama administration remained small by any standard of comparison. It was reported in our interviews that members of the Obama transition team met with Senator Leahy's staff and received the

...very clear message that the most important thing you could do...for the nomination of judges was to get the pipeline moving quickly. The Senate has a... steady rate that it can process judges and if you're empty in the beginning-there's going to be hearing days, and there are going to be Execs, and there are going to be...moments on the floor that you can't recover.... And for reasons that aren't known, in the early days the administration -wasn't able to act on that news.

While some of the reasons for this, particularly the administration's highest priority, its legislative agenda, help to explain what transpired, as one early participant observer of the process opined, "Particularly with some of the courts of appeals judges, I think we debated for a long time instead of decisions being made with a sense of urgency." At the trial court level:

...less urgency was placed on home-state senators to finish their slate of district court possibilities so the whole process just lacked a sense of urgency in the beginning and at various points that had the effect of slowing down our ability to get names up to the Committee. We got behind and it's very difficult to catch up.

A spokesperson for a liberal lobbying organization in the process confirmed that, "even today, you have Democratic senators, two Democratic senator states where they haven't submitted names for the district courts.... I think the White House Counsel would love to nominate or roll out a number of nominees. I think in many instances the nominees aren't there."

While these points are all well taken, and "it's hard to have that obstruction message.. when you don't have that many nominees out there to begin with," it remains the case that the absolute number of Obama judicial confirmations during the 111th Congress falls short of the bar set by his predecessors, including W. Bush. A majority Judiciary Committee aide reported that, as of the day we were speaking:

With a Democratic Senate we confirmed 100 of President Bush's nominees in the 107th Congress. We reported 100 out of Committee and 100 were confirmed,. Chairman Leahy made a point of wanting to move on noncontroversial nominees expeditiously, and a number of controversial nominees moved... Michael McConnell, who is a very provocative law professor, who is really an analogue to Goodwin Liu...incredibly well regarded, incredibly smart, very

provocative, was confirmed in the lame duck in 2002....So it wasn't like we were just doing the medium nominees ..... There's certainly a tradition of fighting over a handful of controversial nominees. How did we land at 41 today? That's where we are today, 41 versus one hundred-The Republicans have pointed a finger at a slower nominating process...but that doesn't explain the numbers ..... I can't think of an Obama judicial nominee that did not receive the support of the Republican homestate senators, and yet they turned on them and won't let them through.

A question of ideology

Perhaps equaling the disappointment over the speed and numbers of Obama nominees among the President's base supporters was a generalized sense that, while they were of "high quality," they were relatively moderate in their views on the issues that so highly divided the country and that, jurisprudentially, they would not be an effective counterbalance to the W. Bush cohort already on the bench in large numbers.

Ideology is, Of course, somewhat in the eyes of the beholder and, to Danielle Cutrona, Minority Chief Counsel for Nominations, Obama was following "a progressive, liberal view of the Constitution and the law and has chosen judges that are in that vein." A somewhat softer assessment of Obama's choices, however, was offered by Curt Levey, head of the conservative Committee for Justice, a leading interest group opposing "liberal activist" judicial nominations:

I cannot say I expected him to appoint a bunch of Goodwin Liu's.... I always thought he would appoint fairly moderate people because I think you accomplish as much with a lot less headache. I think a moderate liberal will, on the big issues, pretty much vote the same way as Goodwin Liu and...you don't spend nearly as much political capital. I realize that you have to have a certain number of Goodwin Liu's just to keep the base happy. And I know other people have been surprised.... They expected a whole bunch of Goodwin Liu's.

Such expectations were clearly not met and, as Levey's opposite number from a left leaning group characterized the situation, "There was a hope that there would be an opportunity to appoint... progressive judges...I think very soon into the Obama Administration it became clear... that a lot of nominees were consensus nominees." Like Levey, this individual was not necessarily surprised by this turn of events:

When we started thinking about it, it was a little bit more consistent with his philosophy... of trying to work across the aisle. So a lot of the nominees... were good, obviously all of them were good, but they weren't... what I think some of the groups were looking for,- Goodwin was the most...exciting, or depending on where you are coming from, controversial nominee.

The Alliance for Justice's Nan Aron shared the view that the picks have been "solid judges. Solid, solid judges." But save for Goodwin Liu, they have not come from beyond the ideological "safety zone":

What the Bush administrations, the Reagans were able to do was to look outside of the district court bench and look to the law schools. Look to those who have written extensively about the courts and shared their vision of the Constitution....Individuals who can be counters to the

Posners, die Easterbrooks on these circuits. The only individual who really fits into diat category is Goodwin Liu.

Perhaps those who lamented the consensus nature of the Obama nominees would be less critical if the approach got the President something in return, large numbers of confirmed judges for example, bipartisanship on the nominees themselves or in other policy arenas. Consequently, their biggest frustration has been the seeming lack of such comity. This point was not lost on an aide to a senior Judiciary Committee Democrat who noted:

I think die left has been very disappointed in the picks.. .And so you would diink, taking that hit, that you'd at least get the volume of well qualified picks through... These are not controversial nominees and they have been used as a tool by the Republican leadership....They've been held hostage.

An other participant in the process considered the relationship between the nominee choices and the multiple goals of the White House. "There are a lot of vacancies and sometimes you do different things with different vacancies." In a few instances, the White House might have diought a judgeship could advance another presidential priority, perhaps, "a key legislative initiative by accommodating Republican senators on judges." In such limited instances, quality and integrity were never sacrificed, but it was, "basically a pragmatic call." Some people were nominated, as in every presidency, "with a calculation that was predominantly political, not policy or personal." While such an approach was not utilized often, perhaps in contrast to previous administradons, "At die end of die day, I don't think it got us anything we wouldn't have had otherwise."

## Priorities

The surest key to understanding die politics, processes, and outcomes of the Obama judicial selection record in die 111th Congress is die recognition that judges were not seen as a priority by those closest to the President. Judicial selection was not a major focal point in the administration's legislatively driven domestic policy agenda, nor was it seen as a "legacy" issue. There was a failure to understand that die judiciary would inevitably become particularly central to the very legislative agenda, health care reform, that was the President's greatest priority.

The low prioritization of judicial selection was an initial puzzlement to many, perhaps none more so than to the "other side" as exemplified by Curt Levey, the Executive Director of the Committee for Justice:

One o◆ the biggest surprises is that he hasn't made it a big priority. I know the left is unhappy with dial. I think the conservatives are surprised by it Certainly everyone I talk to is surprised by it.

At first blush, it is easy to find scapegoats somewhat distant from the White House itself, given what we have already noted about die lengthy start-up difficulties encountered in the Office of Legal Policy (OLP) as well as the reality that, ultimately\* once nominees were moved from the

Senate Judiciary Committee to the chamber floor, the matter of scheduling confirmation votes and prioritizing them devolved to Senate Majority Leader Harry Reid.

Both of these explanations fail to convince, however. In Levey's view, one substantive explanation for the administration's relative lack of aggressiveness in pursuing the courts card was its wish to steer clear, as much as possible, from engaging the social issues that were of such critical import to the opposition. "The judges fight is so closely tied to social issues," he observed. Characterizing Obama as "sheepish" on such issues, Levey saw a "deliberate strategy" to not engage on:

... issues like abortion and gay marriage and guns....He has just picked his fights.. ..I think you can't fight hard on judges without getting into.. ..a lot of these social issues. I just don't think he has the stomach for it

For his part, Harry Reid was facing a difficult re-election battle at home, one that would not benefit from his delivering up to the President a strong cohort of judicial nominees approaching Election Day. As Curt Levey noted, a similar difficulty may have brought down Tom Daschle, a Senate leader facing re-election and, perhaps, paying too much attention to the President's priorities and not his own. Still, nevertheless, as a group spokesperson sympathetic to the administration noted, "Nobody is pinning this on Harry Reid."

At the most basic level, staffing the federal bench was not a high priority likely because administration officials\* particularly Chief of Staff Rahm Emanuel, did not view the judiciary as an institution that could facilitate the administration's agenda nor assure its legacy. One expert observer noted, "The single biggest roadblock was Rahm," along with the first White House Counsel, Gregory Craig. An expert analyst of the process sympathetic to the administration added of Emanuel that:

...there you have somebody who's not a lawyer, came from the House. I don't think he had any grasp of this, had no connection, even though he was the policy driver, to see how important this process and its results were to the firewall for the policy achievements....He apparently governed in a completely, "I'm in control of all this" way.. ..and he was very aggressive about putting down judges.. ..in staff meetings and in other kinds of meetings where people would talk about action priorities.

Put succinctly by an interest group leader from the political left, "Rahm Emanuel kept the trains moving and the trains were legislation." As for White House Counsel Craig, it was suggested in our interviews that his priorities were elsewhere. He was concerned with "Guantanamo ... and executive orders about torture," with the judges issue falling off the radar screen.

That the administration arrived in office with an aggressive legislative agenda and that it was successful in passing its greatest priorities, albeit with much compromised in the give and take of legislative policy making, can be readily acknowledged. And as an expert analyst noted, "the legislative agenda being pursued was so aggressive that it simply drowned out other stuff."

Curt Levey underscored that, 'You can only make so many things priorities....There is limited board time, limited speech time.' And what time there was, Danielle Cutrona opined, had to be devoted to prioritizing campaign pledges.

I think there were very high expectations, given all the promises that were made during the campaign. And those were the centerpieces. I just think he needed to devote all of the resources that he could to those things, I think it is as simple as that.

The lynchpin of such legislative pursuits was, of course, health care reform, and the overwhelming dominance of that single hydra-headed issue came to demand all of the administration's energies. Vincent Eng, Deputy Director of the Asian American Justice Center, summarized the setting facing those who wished to jumpstart a judges agenda:

Health care was his biggest thing...and the entire White House, the administration, was set up around that. Everything yielded to this giant. It didn't make a difference if it was judges, international relations, whatever. Everything revolved around this.... I think the difficulty is when you have a strong legislative agenda, everything yields to that.

While the demands of health care reform undoubtedly exhausted the administration's energies, a thoughtful participant in the process made a more generic observation.

My perhaps overly simplistic judgment is that Democrats are essentially the party of legislating and the Republicans are much more concerned with making sure that people who are sympathetic with their policy interpretations of the Constitution are on the courts. They have more invested in it...and their base cares more about it....We tend to think we can accomplish the objectives of the Democratic agenda by legislating, by being active in the elected branches. That's oversimplified, but I think there is some kernel of truth to that.... I don't think President Clinton invested enough capital in judicial candidates and I think we've seen something of the same underinvestment in this administration so far.

The analogy drawn to the Clinton judicial selection process runs a good deal deeper than the issue of understaffing. One disappointed group spokesperson observed that, other than the controversial remarks the President made about the Citizens United Supreme Court decision<sup>5</sup> in his State of the Union address:

He has been absolutely silent. The process still feels so Clinton in the sense that it's, "Put up nominees, don't ruffle any feathers. Don't provoke organizations on either the left or the right. Find middle of the road candidates; And try to maneuver the process under the radar screen." If you talk to the nominees... it's "do it yourself nomination."... Does the White House make calls?... We don't think they're engaged in this at all.

This view was corroborated by a second group leader on the left. "It's pretty much limited to mostly press releases and statements." The nominees "create their own little support group....They never get any communication from the White House or the Senate."

In the final analysis, the lack of prioritization of judicial selection by the administration and its electoral base was cause for frustration and concern for a staff assistant to a senior Democratic Judiciary Committee senator.

The right wing has, obviously, had a thirty year project of making judges a focus of what they want to do or block ..... This was a long term project. Their base cares. They see it as a proxy for abortion, guns, gay marriage. Our side and our base doesn't understand that the fate of health care is being decided in the courts and it really matters who the judges are. It's a real oversight.

A particular sense of sadness was articulated by an analyst from the left who noted, "The real disappointment and loss in the context of a president who is so ambitious policy-wise is an apparent, complete disconnect between your policy initiatives and wanting to put up a firewall of defense if you can get them through." Assessing the nominations process during the 111th Congress from a political perspective, a liberal group advocate added:

It was ... a broad strategic failure on the White House's part to focus on these giant legislative initiatives, invest their political capital there and then ignore fighting over judges when the judges are going to decide the fate of the legislation. Why couldn't they do both?

In fairness to the administration, and here the perspective of the White House Counsel's office would have been helpful, the administration had two Supreme Court vacancies to fill and guide through the rocks and shoals of the confirmation process. This required a substantial investment of resources and the Supreme Court appointments were of the highest priority for the administration. ( See "Supreme Court nominations," p. 274). That the filling of lower court vacancies did not have a high priority of course is the basis of the criticism cited above.

#### Role of interest groups

Before leaving the focus on nomination politics during the 111th Congress, some focus is warranted on the place of interest groups, particularly since one noteworthy feature of judicial selection during the W. Bush years was the unusually central role played by the Federalist Society. At times, its members served in the White House Counsel or Department of Justice's facets of the selection process.

According to Assistant Attorney General Christopher Schroeder, group participation in the process is considerably different today than during the W. Bush years:

We don't collaborate with them in the way that the Bush administration did or even Eldie's [Eleanor D. Acheson] OLP in the Clinton administration. We encourage them to make their influence known at the senatorial level and to influence the names that come to the White House. And I know there have been meetings with Susan [Davies, Associate White House Counsel] and maybe even [White House Counsel] Bob Bauer and some of the groups interested in judges, but I haven't attended those.

Schroeder noted the stepped up group activity that focused on specific candidacies that have been lightning rods for opposition, particularly that of Goodwin Liu, and he suggested there are, perhaps, more effective avenues for groups to focus their efforts:

If I had a pet theme...almost since the time I got here it was to encourage them to change the focus of their publicity and advertising and speechmaking from the retail level of complaining about how much someone like Goodwin was being delayed and focus more on the broader numbers.

To a certain extent, that has occurred as, for example, in the flyer found on the Alliance for Justice website picturing all of the nominees waiting for a vote late during the 111th Congress.

A group advocate confirmed the openness of the administration to taking names of prospective nominees and placing them under consideration, but "success" for groups has depended, not surprisingly, on such names being ones that could easily have come to the fore without the group's involvement. "When you give out names, for example, individuals who are considered... more progressive than Goodwin Liu... that's just not going to happen."

According to some analysts, the unhappiness of many left-leaning groups with the moderation of the Obama nominees, has resulted in a scenario where relationships are strained between the administration and their "natural" allies:

Democratic groups, instead of becoming a partner, sometimes become a third rail. There are some groups trying to be like [what] the Federalist Society was for Bush for the Dems, but there is simply nobody to dance with.

This has, perhaps, had unhappy consequences because, as one group leader noted, the administration is not taking advantage of the opportunity to play a coordinating role among its supportive groups:

The more insular the Counsel's Office has been with respect to the nominations process-it doesn't have a positive effect on trying to move nominees through.... When you look at the groups, I think there can be more effective coordination with them.... They [White House Counsel's office] viewed them as problem makers. It's better to... help coordinate them and let them go off and do their own thing. ... I have never, in all the years with Democratic administrations, found one as defensive as this one. They don't talk to you.

One group that, of course, the administration has talked to is the American Bar Association, whose Standing Committee on the Federal Judiciary was removed from the prenomination vetting process during the W. Bush years. Ironically, that action tended to slow down the overall advice and consent process further since the Democrats on the Judiciary Committee insisted on receiving the ABA's report prior to going forward with a nomination hearing.

On balance, Assistant Attorney General Schroeder thinks that returning the ABA to its former role is a beneficial change because the ABA's rating "provides significant comfort to Senators and gives them a way to eventually vote 'yes', even if it's somebody from a president whose party

they're not sharing. The idea that they are voting for highly qualified people or even just qualified people is a bonus."

The impact for opposition groups, however, may be less congenial, as noted by the Committee for Justice's Curt Levey. "I think it makes it harder for our side to organize because they go so quickly to a hearing.... I think where we have fallen short is not doing more before the hearings.... We just have not had a lot of time."

For groups in opposition to the President's picks, such as Levey's, major success really lies in facilitating the obstruction and delay of nominees they oppose if and when they are sent to the Senate floor. From that perspective, Curt Levey could claim some success for his group for helping in the effort to keep objectionable nominees from receiving floor votes and being confirmed during the 111th congressional session:

I have been pleasantly surprised in that we really targeted five lower court nominees and none of them have been confirmed,. ...If you had asked me a year ago I would not have predicted that all five would have been stopped.

The trick to blocking nominees, according to Levey, is to work on the red state Democrats:

You stop people the way you stop Chatigny and Liu, and McConnell and Chen and Bttder by having at least a few red state Democrats that the leader isn't sure they can depend on, who actually go to the leader, [or] go to the President and say, "Don't put me in a position of voting for this." That's how you do it. You don't do it by actually filibustering.... You stop people by having dissension in the President's party.... That's part of what our job is. To raise the visibility of a bad nominee enough that red and purple state Democrats begin to feel some heat.

Confirmation: Committee processes

During the dysfunctional judicial selection confirmation processes of the W. Bush and Clinton administrations, acrimony and divisiveness, as well as rule changes and manipulations, prevailed across all phases of Senate activity. In contrast, it is a fair generalization to note that the Senate Judiciary Committee facets of the processes during the 111th Congress offered, at least on the surface, a picture of relative calm. The Committee did its job, with the greatest obstruction and delay of Obama nominees occurring at the floor stages of confirmation. Behind such a generalization are layers of nuance that shaped both committee and floor activity and, at times, the lack thereof. As noted by a senior Judiciary Committee staff member:

I think things ran relatively...smoothly. We've had some success at the committee level.... The floor... is much more a function of the caucus leadership than any individual senator...During the Clinton years I can remember individual senators taking on particular nominees...! haven't seen that here. It's all been this systematic approach.

As we will explore below, systematic opposition could also be felt at the committee level but it did not, in any significant way, bring the processing of nominees to a complete standstill. Indeed,

our interviews revealed relative satisfaction on both the Democratic and Republican sides of the committee with the way the congressional session unfolded. A Democratic staffer observed:

I think Senator Leahy's relationship with Senator Sessions has been fine... The Democratic staff working on the nominations have done a great job working with the Republican staff.... They disagree, but they get along. And that hasn't been a source of difficulty, of controversy, whereas back in the day when we had other Chairmen, there was often a procedural irregularity that was so glaring, that it was, itself, part of the problem.

Senator Sessions' Minority Chief Counsel for Nominations Danielle Cutrona was in fundamental agreement with this assessment:

I have actually had really good relationships [with the majority staff] and we've gotten along really well... We're at a huge disadvantage in votes on the committee so we really don't have a choice but to cooperate.... Where we can cooperate, why not cooperate? It just fosters good faith.

"Cooperation," of course, can take place in degree and kind, and it would be a vast overstatement to suggest that the minority members on the committee simply "went along" with the administration's picks. To the contrary, there was a pattern of regularized and systematic opposition that had an impact on the processing of virtually all Obama nominees, but that impact could be seen, in most instances, in processing delay, not definitive and resolute obstruction save for a handful of identifiable nominees, most prominently Goodwin Liu.

One of the areas of particular concern to the Judiciary Committee majority was the manner in which scrutiny was taking place at the district court level. For a staff aide to a senior Judiciary Committee Democrat this represented a sea change in the process:

They have approached district court nominees with the same exacting inquiry standards that used to be reserved for the Supreme Court and for controversial circuit court nominees, not even all circuit court nominees. But now it extends to every lifetime appointment. You hear Senator Sessions talk about it, he talks about "these are lifetime appointments. It's not a blank check, a rubber stamp...." It used to be that district court nominees, unless quite extreme, quite unusual, were accorded a different path forward. And now, that's changed.

When viewing the district court "No" votes, another majority Judiciary Committee aide commented:

A couple of them we know why. They've said why. We think it's totally wrong, but there have been a couple of these that have come out with party line votes with no explanation. We show up expecting them to be reported out unanimously. We're actually surprised when the "no" votes start coming in.... We have to look back at the questions from the record to figure out what is the basis.... It's like reading tea leaves.

The magnitude of this change appears to have been substantial. According to Judiciary Committee data, of the approximately 2100 District Court nominees processed since 1945, only

five were reported out on a strict party line vote, with four of the five occurring during the 111th Congress.

Danielle Cutrona took strong exception to any notion that district nominees should be given a "pass" from committee scrutiny and she strongly articulated and shared Senator Sessions' viewpoint:

Each nominee is assessed on his or her own merits regardless of the position in the court system to which they are nominated because this is a lifetime appointment.... They [district court judges] deal with serious issues. They deal with Proposition 8, they deal with "don't ask, don't tell," they deal with terrorism cases, health care, and that's my boss's view of it.. ..When President Bush was in power and you didn't want to do this and you just rubber stamped District Court nominees, that's your problem.

Whether the focus was on district or circuit courts, for its part, the majority committee staff felt guided by an imperative to move nominees and get the work done:

Chairman Leahy did not want to do the tit for tat on nominations.. ..The Chairman takes very seriously the need to provide judicial resources for courts, and court after court after court don't have enough judges.. . . We acceded to die Republican request not to overload hearings, not to put multiple circuit nominees on a hearing, to have hearings only once every two weeks, have only five nominees during a hearing.

One particular Republican request that appeared to be accommodated in committee was to "go slow" with the Goodwin Liu nomination:

After the President had nominated Liu there was a discussion about when to hold a hearing,... The Chairman... acceded Lo a Republican request to not proceed immediately to Goodwin Liu. Did that twice....It wasn't like the Senate got die nomination and held die hearing within 48 hours.... People took advantage of their rights. I don't think that a single Republican senator could say that when die committee first considered this nomination they did not have sufficient time to prepare.... And they had rounds and rounds.... They had multiple rounds of followup questions. He took 500 written follow-up questions which is similar in number to Supreme Court nominees.

With Liu and virtually all nominees, die committee majority simply accepted that the process would have its own rhydim and pace, one that was somewhat slower than what they would have preferred, but one that, in due course, would bring committee closure on the vast majority of nominees and would do so in a manner that allowed die committee to continue to operate efficiently.

Holding over a nominee was often seen by the majority as an effective nuisance tactic in that, as one aide noted, it had the ultimate impact of simply stretching out the Senate's calendar and piling up nominees towards the end of the congressional session:

The reason why we have so many left is because right before Thanksgiving break we had a ton of folks who were on die agenda who got held over two weeks. Not a week, two weeks because of the Thanksgiving break. But they were on the agenda then, having been on the agenda before the election recess. These were September hearings whose files were completed, who were ready for committee consideration before die election recess in October, but since our normal day of meeting is Thursday, we didn't meet that day because the Senate recessed on Wednesday night....So they were on our agenda, six, seven weeks later we finally have die meeting, but they have to hold them over for two more weeks. Does diat make any sense?

Describing the structured committee routine as they were nearing the end of the congressional session, a majority committee staff member added:

What you're going to see tomorrow, there's going to be a vote tomorrow,...! think die committee coidd be prepared to report almost all of them. But what you'll see instead is Republicans will take advantage of die rule and say, "Oh, but four of them we haven't held yet, so of course we're going to take advantage [of that] ." If this were a football game, you have to use all your time outs. You don't have to. They do as a matter of course....But as you get towards the end, and you're disadvantaging people for no good purpose, they're still doing it.!

Danielle Cutrona took issue with the characterization of these practices having "no good purpose."

Senator Sessions felt very strongly diat this practice was critical to allow die public ample notice that a nominee was on the Committee's agenda and to allow for public comment.

It was, ultimately, frustration with not getting anything in return from the Republican caucus for the way the minority was treated in committee that most rankled the Democrats. To them it appeared that:

...all die regularity that's been built into the process to protect them, to protect their rights, to ensure that die administration and. ..the Democratic Chairman are not overreaching in the way other chairmen have been, they've been willing to take all of those courtesies, and take advantage of all of that largesse, but there's nothing in return.

Acknowledging their relative success at the committee level and ability to get nominees sent to the floor in due course, the question remained for the majority, "Is that, you know, a good accomplishment?", when the perceived response on the floor is, "Now I'm going to do the hostage taking."

For some group advocates die answer was that die committee's accomplishments were not enough and that committee leadership should have played a more aggressive role when names were sent forward to the floor to champion the nominees. One noted:

One side is playing with brass knuckles and the other side is giving fifteen minute speeches about the vacancy rate.... You don't bring a library book to a knife fight \_\_ Those guys fight and ours are very weak, very weak.

## Senate floor action

While left leaning groups and participants in the committee stage of the process both lament the relative lack of progress in confirming judges through the congressional session, the minority Republicans placed such a failure squarely on the majority and not their own floor actions. Beyond the five most controversial nominees targeted for Republican opposition in the congressional session, (appeals court nominees Chatigny and Liu, and district court nominees Buder, Chen, and McConnell) it was Danielle Cutrona's view that virtually all other nominees:

...could move in regular order if the majority leader decided to make that a priority on the floor. Now maybe this is the same reason that the Obama administration has not made it a priority to send us the nominees, that the very aggressive legislative agenda, that's clearly the priority for Senator Reid.

Cutrona mapped out a process through which more nominees might have gone forward to floor votes:

If Senator Reid wants to bring up a nomination, his floor staff goes to Senator McConnell's floor staff.. and then we come to a timeframe, and that's how many judges have proceeded through the process in this Congress.... A lot of times it's just Senator Reid's not coming to us and asking for time agreements, or can we UC (unanimous consent) these? It's just not happening.

More to the point, in Cutrona's view, the kinds of negotiations that might have led to greater confirmation activity have not been the order of the day:

If Senator Reid had gone to the Republican leader and said, "we want to move these three judges," and Senator McConnell says, "well, you know, we really want a vote on this," and Senator Reid says 'no.' That could happen....It really hasn't been Senator Reid's priority to move these people.

Most broadly, Cutrona noted that Democratic cooperation on other legislative concerns beyond judgeships per se did not help the climate for moving judicial confirmations forward:

The majority leader sets the agenda and he decides what his priorities are and what his caucus' priorities are going to be....And everything is all tied together... .If you look throughout this congress, Republicans felt jammed on big ticket items like health care.... There's not going to be an air of cooperation floating around the Republican cloakroom. So if you're going to tell them that.. ."You're not going to be able to offer any amendments, you're not going to get votes on amendments, you're not getting any debate on this," why would they be willing to agree on anything?.... There are ways to move nominees that have no opposition without making it painful for everybody... .This is not just about judges, it's about the entire schedule, the agenda on the floor.. .It's all interrelated.

In a setting where the judgeship issue was not an Obama priority and where Senator Reid had bigger legislative fish to fry, coupled with his own re-election concerns and a relatively non-

aggressive committee chair sending nominees forward, as Curt Levey underscored, there are ample "reasons for Reid not making it a high priority."

The end result, as Nan Aron sees it, is that the Republicans have:

...been allowed to get away with it for two years.... The majority party isn't forcing them to vote...holding them accountable when they vote against nominees or even vote cloture....This should have been easier.... The Senate is in the hands of die Democrats. And for two years we've had... people say, "What's die holdup?.... Why isn't there more action?".. ..There is no justification for these votes not taking place.

The "holdup" has been seen to be part of a well-articulated legislative strategy for opposition devised and implemented by the Republican caucus leadership and, throughout the 111th Congress, it was a plan that worked extremely well to limit the numbers of confirmed judges. Evidence of such a strategy could be seen in the relationship between committee and floor action as viewed through the eyes of a majority committee staffer. "I can't think of an Obama judicial nominee that did not receive the support of the Republican home-state senators and yet they turned and then won't send them through."

A case in point was the President's first circuit court nominee, David Hamilton, who had strong support from his home-state's Republican Senator Richard Lugar, yet, nevertheless, had to overcome opposition emanating from elsewhere in the Republican caucus. (See "A tale of two nominees," p. 282.) Christopher Schroeder characterized the opposition on the Senate floor as having moved from the traditional targeted kind, aimed at specific nominees, to a more generic form:

I think we've moved from retail opposition to wholesale opposition....When our nominees do get floor votes, the ones who went through die committee without opposition are confirmed without opposition.. .We've had 30 district court judges confirmed. We've had one "No" vote cast among the entire 30. Everybody else has been 97-0 or by voice vote and yet it's been extremely difficult to move nominees tiirough. Not so much in committee where the Republicans will exercise every procedural tactic they have. All of the judges have been held over die automatic week that any Senator on the committee has....The movement at the floor stage has been extremely slow and it's not, I believe, because of any individualized opposition. It's more of a "We just don't want to confirm judges."

For Nan Aron, the fact that die Republicans are "holding up votes on nominees they support" suggests that, "it could simply be a matter of holding enough seats for a future Republican to fill." In effect, all nominees are seen as fungible and there is a linking of those who are viewed as non-controversial with the controversial ones. A majority Judiciary Committee aide characterized this as a fundamental change in the process. In die past:

...Democrats made an effort to keep that separation so that they could make it clear that dieir opposition was a principled opposition to some handful of nominees. It wasn't obstruction. So the presence of one nominee that some on die other side consider controversial, die idea diat diat should then be a cause to hold up every other nomination is something that is new.

Such an approach was characterized by Aron in its broadest light. "I think their goal, as stated by Mitch McConnell, is to bring Obama down. And what better way to weaken the President than to hold his judicial nominees and other executive branch nominees hostage?"

Several different tactics were used to delay floor action in the Senate on judicial nominees during the 111th Congress, specifically, the persistent denial of unanimous consent to a floor vote on a nominee, the resort to holds on nominees placed by individual senators, and, when played out to the end game of opposition, utilization of the threat of filibusters and the necessity for cloture votes to bring a nominee to the floor. Particularly irksome for the Democrats was the minority leadership-led refusal to consent:

That doesn't mean somebody's sitting, holding Mary Murguia or Scott Matheson or Albert Diaz....They're simply holding the entire slate. And one of the things we keep hearing which is just wrong is Republicans saying, "The leader could just call these up." Yet whenever a Democratic senator has sought unanimous consent, not even for an immediate vote, but for "debate and a vote to be set by the leaders" ... they objected to those UCs....So it was obviously the strategy to bottle all these up and...essentially, hold them all hostage.... [The big difference from the past, a giant escalation in the confirmation wars, was] the systematic delay on the floor extending to consensus, non-controversial nominees.

When such delay occurred, the majority could only resort to a call for a cloture vote to end debate in the absence of unanimous consent and try to bring the nominees to the floor. According to the Committee for Justice's Curt Levey, what was occurring was simply a delaying tactic on the non-controversial nominees with no real intention of the necessity of cloture to eventually get them through:

You aren't seeing filibusters, you're seeing not granting a unanimous consent, and then Reid hasn't wanted to utilize [major] floor time on it and that's what I mean about priorities. Those people will all be confirmed eventually.

Levey indicated that it was really the five aforementioned nominees, "who have a good reason to think they are not going to be confirmed." The overall pattern of Republicans refusing to grant unanimous consent, in Levey's view, fits into the tit for tat nature of contemporary judicial selection politics:

It probably is a feeling that, "look, we don't have enough to filibuster, but why should we make it easy for you after what you did during eight years of Bush?" Again, I think the vast majority of them will get confirmed, but Republicans are in no hurry.

In addition to the routine denial of unanimous consent, individual senators can place specific holds on nominees to keep them from going forward to the floor. The implications of such a hold, as Christopher Schroeder explained, was their ability to morph into something considerably more problematic for the nominee:

The mechanism that makes a secret hold viable or tough to get around is the filibuster threat that lies one step away from it.. .McConnell saying. There's somebody in my caucus or more than

one person who is going to oppose this and will object to moving the nominee and you're going to have to file a cloture petition." The secret nature of it is frustrating but it's not as debilitating to the process as...when the caucus is simply opposing nominees for the sake of slowing down the process... He's not trading anything for releasing the holds. So it's not the secret hold to me that is sort of debilitating. It's simply the operating modalities of the Senate which require either unanimous consent or a filibuster fight to proceed to anything.

Earlier, we discussed the extension of opposition at the committee level to district court nominees and it is also important to recognize that division over the federal trial courts was, in several instances, felt as well on the Senate floor, including the utilization of the filibuster tactic. As a majority Judiciary Committee aide commented:

The notion of taking floor time to overcome filibusters of district court nominees is really a way to grind the Senate to a halt. It has nothing to do with these nominees. It is a total shift.... Normally you give a lot of deference to home-state senators, particularly on district court nominees. A lot of deference to the President. Nobody thinks it's worth the political capital of a fight. But what we're seeing is when one side sets that aside, that's what we're left with.

Several such district court nominees were held up from gaining votes on the Senate floor through such filibuster tactics, including Edward Chen of California who had the strong support of Senators Feinstein and Boxer and, as well, John McConnell, a Rhode Island nominee championed by Senator Sheldon Whitehouse. The Senator refused to take what Nan Aron characterized as "the worst insult" lying down and he "articulated the argument of how unprecedented it is for a senator not to get his or her district court nominee through."<sup>7</sup>

In a less than veiled threat to the future of confirmation politics, Whitehouse suggested that once you take the fight to the district court nominees it will be difficult to return to past standards of deference and reciprocity. It was the view of Curt Levey, however, that opposition to district court nominees was not part of any opposition master plan of the Republicans. On one level, it was simply a reflection of the lack of sufficient targets at the circuit level.

He [Obama] has been fairly moderate with his circuit nominees so it just so happens that three of the nominees that really caught people's attention were district court nominees... When you think about it, there is no real reason why district court nominees should be treated as unimportant. I mean... they decide real cases all by themselves.

Focusing directly on the district nominees who have proven to be controversial, Levey added that, "there is a feeling that where vacancies are due to an excessive amount of obstruction by Democrats, those nominees should be held to a higher standard."

The implicit filibuster threat that could potentially block any and all judicial nominees in the 111th Congress served to alter the dynamic for confirmation that, in the eyes of the Democrats, went well beyond the intention of the Senate's rules. To confirm a nominee, a majority staffer noted:

It's not getting to 51... you need to reach sixty.... It played into this increasing tendency to require an essentially sixty vote threshold on everything to get anything done, which is not the way filibusters should work...The Senate's rules depend on a certain amount of comity, not taking everything to that degree because if you have to file cloture and burn post-cloture dirty hours of debate on every judicial nominee, all you would do is nominees... You can't do it. The twenty three we've got on the calendar, the fifteen we're about to report. Thirty eight nominees times thirty hours?

From the perspective of this aide, this was far from the precedent that was set in the filibuster attempts mounted by the Democrats during the W. Bush years:

One of the things that is lost in history when people talk about Democratic filibusters of the handful of Bush Circuit nominees is what triggered those fights was the Chairman [of the Senate Judiciary Committee] disregarding the blue slip process and letting people go through with one blue slip and not two.

Whether or not blue slip issues triggered the filibusters, Danielle Cutrona suggested that more than a "handful" of such nominees were targeted.

The Democrats forced 30 cloture votes on 17 different judicial nominees and some of those nominees were filibustered multiple times. Miguel Estrada was filibustered seven times.

For Christopher Schroeder, the reform that is necessary is not the alteration of the filibuster rule per se but, rather, the post-cloture rule that forecloses Senate action:

Using this past Congress as a set of data points you could eliminate or greatly truncate the thirty hour post-cloture debate rule to make the cloture petition less costly for judges.... There have been less than a handful of cases in which anything approaching the thirty hours has been actually used and yet, at the same time, many cases in which the Republicans have not waived the thirty hours. So you just have to burn dirty hours. It's just a complete and utter waste of time. It is doing the public no good because you can't do any other business and it's imposing this cost in the process.

Of particular concern in the context of nomination and confirmation obstruction and delay, is the ever increasing number of federal courts that have been designated as Judicial Emergencies because of their out-of-control workloads. The change in the way such vacancies have been treated was noted by a long term Judiciary Committee staff member:

Senator Leahy and other Democratic senators and in the past Republican senators approaching these matters also took into account the vacancies on the courts and concerns about those vacancies.... I remember when there were circuit emergencies in various circuits and that bothered senators. They wanted to quell that... I have not seen that same sense of concern, a feeling of a responsibility to take action, to help resolve the vacancy concerns that have now grown to what are really historic proportions.

Articulating the problem and posing a rhetorical question, another committee aide noted that:

If Senator Leahy received a letter from the Chief Judge of the Second Circuit, or die Chief Judge of die District of Vermont, talking about these problems, lie would be outraged and [have] a huge sense of responsibility. You'd have to ask Jon KyI why he does not feel the same sense of responsibility when he hears from Judge Kozinski in the Nintfi Ctrcutt... Why isn't he turning around and at least confirming those [Ninth Circuit] judges?

The answer, in part, given by Christopher Schroeder, is the difficulty of putting a real public face on the Judicial Emergency crisis and the larger vacancy problem of which it is a part:

One thing is figuring out how to make the vacancy rate tangible and personalized so that people can understand how their ufe circumstances may be adversely affected by a one-diird vacancy rate in some districts. And dial's harder to do dian I've ever thought. [One reason for this] is alt the wonderful senior judges who continue to hold... major parts of dieir dockets because they take dieir job seriously and they don't want to leave in a lurch by just walking off into retirement. At some point diat will break down and then I think you can begin to tell an important story.

Danielle Cutrona observed, "There have been high vacancy rates before and". different people will acknowledge the crisis at different times.... And there's a lot of vacancies that are judicial emergencies for which we don't even have a nominee.. ..That's part of the problem, which I think will change. I can't imagine it wouldn't."

The bottom line from the selection and confirmation process is that when the 1 1 1 th Congress ended, 44 of the 78 nominees to lifetime positions on the federal district courts of general jurisdiction and 15 of the 22 nominees to lifetime positions on the numbered U.S. courts of appeals and the District of Columbia Circuit were confirmed. In percentages, as Table 1 shows, 56.4 percent of Obama's district court nominees and 68.2 percent of his appeals court nominees were confirmed by the 111 th Congress.

Table 1 also reveals that for the district courts, the proportion of confirmed Obama appointees was the lowest since the first half of W. Bush's second term (the 109th Congress), which in tura was the lowest proportion in over 75 years and likely historically. Tellingly, 41 of the 44 district judges were confirmed unanimously, clearly underscoring that they were not controversial yet were subject to obstruction and delay in the context of hyperpartisanship in the Senate, as recounted above. The Index of Obstruction and Delay for district court nominees during the 111th Congress was 0.5088, the highest recorded level, as shown in Table 2. The Index for the 110th Congress, when the tables were turned (Republican in the White House) was about as high suggesting big time payback by the Republicans.

For the appeals courts, Table 1 shows that the proportion of Obama's confirmed appeals court nominees was higher than for any of the congresses during the W. Bush presidency and for most of the Clinton presidency. Yet, that proportion, approximately two-thirds of all nominees confirmed, was also relatively low given President Obama's large margin of victory in the presidential election and with a large majority of Democrats in the Senate. Ten of the appeals court nominees to courts of general jurisdiction, were confirmed unanimously.

The appeals courts as a partisan battleground has been clearly established since the final two years of the Reagan presidency. The Index of Obstruction and Delay for Obama's appeals court nominees during the 111th Congress, as shown in Table 3, was 0.6500, a high level, but lower than that for Clinton's second term and for half of W. Bush's presidency. These statistics suggest that during the W. Bush presidency, Democrats were not shy about payback to the Republicans for their record of obstruction and delay during Clinton's second term. And the Index for the 110th Congress, being exactly the same as that for the 111th suggests that the cycle continues unabated.

The number of Obama's appeals court nominees was low in comparison to W. Bush's nominees during his first term. Indeed, the number was lower than for 3 of the 4 previous congresses and tied with the record for the 110th Congress, W. Bush's troubled last two years in office.

### District court appointees

We turn to the demographic portrait of the 44 confirmed Obama nominees to lifetime appointments on the federal district courts. Several of them are profiled in "Some notable Obama appointees" (page 266). Table 4 presents the findings for the Obama appointees and compares them to those of the previous four presidents. We note here some of the more striking findings.

\* Perhaps the most impressive finding is the remarkable ethnic and gender diversity of the appointees. For the first time in American history, a large majority of the appointees were nontraditional, that is, not white males. Over two-thirds of those confirmed were nontraditional. Of those nominated but not confirmed, about 53 percent were nontraditional. Combining both groups, the total proportion of those nominated by President Obama who are nontraditional is about 62 percent. (See "Diversity on the bench" p. 288.)

\* In numbers and percentages, the Obama administration made history with the appointment of Asian Americans. In percentages, a historic proportion of African Americans and women were also appointed. Indeed, women constituted a majority of Obama's district court appointees.

\* In terms of American Bar Association Standing Committee on the Federal Judiciary ratings, Obama's appointees had the largest proportion of all five presidents with the highest rating - three out of four appointees. Unlike the previous two administrations, none received a "not qualified" rating. Thus far, by ABA standards, it would appear that the Obama appointees constitute the most qualified group of appointees.

\* In terms of party preference or affiliation, the Obama appointees had close to 9 out of 10 whose party preference was identified with the President's political party, which has, for the most part, remained constant throughout American history. The appointees also had the largest proportion of all five administrations for those not identified with any political party. Interestingly, not one Republican identifier, as best as could be determined, was appointed to the district bench.<sup>8</sup>

\* The proportion of appointees with a record of some form of previous political activism was about the same as that of the appointees of the previous two administrations. The Obama, W.

Bush, and Clinton administrations appointed fewer with a record of partisan activism than the Bush 1 and Reagan administrations.

\* Almost two-thirds of the appointees had a net worth in excess of one million dollars, a new record. The increasing proportion of millionaires appointed to the bench underscores the warnings of Chief Justice John Roberts and his predecessor William Rehnquist that judicial salaries are too low and as a result are depriving the nation of legal talent who simply cannot financially afford to ascend the bench. Relatively low federal judicial pay scales can be expected to skew the judiciaries to those with greater wealth.

\* Continuing the trend of recent administrations is the growing professionalization of the bench. A clear majority of Obama appointees were members of the judiciary at the time of their appointment to the federal district court bench. This trend also included promotion from within the federal judiciary, specifically the elevation of U.S. magistrate judges and even on occasion U.S. bankruptcy judges. The trend began with President Ford appointing 8 percent from these positions, climbed to Bush I's 11 percent, Clinton's 12 percent, and W. Bush's close to 17 percent. The proportion of Obama appointees elevated from the U.S. magistrate position was close to 23 percent.

\* The proportion of Obama appointees with prosecutorial experience was approximately the same as that of the W. Bush appointees. But continuing the trend begun by the Carter administration, there was a larger proportion of appointees with judicial than with prosecutorial experience.

\* The proportion of Obama appointees with an Ivy League law school education was the highest for all five administrations. If prestige non-Ivy law schools are included (among them Duke, Georgetown, Northwestern, Stanford, Virginia, and Wisconsin) the proportion of Obama appointees with a prestige legal education rises to about 45 percent. This compares to about 31 percent of the W. Bush appointees and 38 percent of the Clinton appointees with a prestige legal education.

\* The average age at time of nomination for the Obama appointees was slightly lower than that of the appointees of George W. Bush. The average age of appointees to the district courts over the past 20 years has been between about 48 and 50.

### Appeals court appointees

President Obama nominated 22 to the appeals courts of general jurisdiction, of whom 15 were confirmed (several are profiled in "Some notable Obama appointees," p. 266). Table 5 offers a comparison of the Obama appointees to those of his four immediate predecessors in office. Because of the relatively few Obama appointees, caution must be taken when considering percentage differences with previous administrations. Among the more striking findings:

\* Just as with the district court appointees, Obama's appeals court appointees were the most diverse jji terms of gender and race/ethnicity in history. Close to 3 out of 4 were nontraditional.

Of the 7 unconfirmed nominees, 6 were nontraditional. Considering all nominees to appeals courts, 17 of 22 (over 3 out of 4) were nontraditional.

\* One-third of the appointees were women, which was about the same as Clinton's record and higher than the 1 out of 4 record for W. Bush's presidency although his was the best gender diversity record of all Republican presidents.

\* One-third were African American, the highest proportion for all five administrations.

\* The Obama appointees had the highest proportion of all five administrations of those who were serving as judges at the time of their appointment. Four out of five were judges, also the figure for those with judicial experience.

\* About three out of four Obama appointees also had prosecutorial experience, a considerably higher proportion than those for the appointees of the four previous presidents.

\* The Obama appointees had the lowest proportion of those with neither judicial nor prosecutorial experience. Arguably, the Obama appointees had the strongest professional credentials of all five administrations. Two out of three received the highest ABA rating, a proportion lower than that of the Clinton appointees which remains a modern record.

\* For the first time since the Reagan administration, no one from the major political party not controlling the White House was appointed. Republican George W. Bush named four Democrats to the appeals courts. Democrat Barack Obama named no Republican. Would nominating one or more Republicans have smoothed the way for a less contentious confirmation process? Probably not, as naming some Democrats did not lessen the contentiousness surrounding W. Bush's nominees.

\* The proportion of the Obama appointees with a record of past party activism was the lowest for all five administrations.

\* Just as with the district court appointees, a record proportion of appeals court appointees had a net worth in excess of one million dollars.

\* Obama's appointees on average were the oldest of all five administrations with an average age of 53.7.

\* About one in four had an Ivy League law school education; a proportion similar to that for the appointees of the four previous administrations. If we include those who graduated from such prestige non-Ivy law schools as New York University and Vanderbilt, the proportion of those with a prestige legal education was about 47 percent. The proportion of W. Bush appointees with a prestige legal education was over 50 percent, similar to the Clinton appointees but somewhat larger than the proportion for the Reagan and Bush 1 appointees.

The emerging Obama judiciary

Gender and ethnic diversity, as we have seen earlier and whose impact on the judiciary is discussed in "Diversity on the bench" (p. 288), is the hallmark of the emerging Obama judiciary. Table 6 aggregates the diversity numbers and proportions for the lifetime appointments on the three major federal courts of general jurisdiction since the Franklin Roosevelt administration named the first nontraditional federal judge (Florence Allen to the U.S. Court of Appeals for the Sixth Circuit). The table shows the evolution of token diversity to the historic proportions of the Obama administration. It is hard to imagine any backtracking on diversity by the Obama administration.

Given the uncertainties and contentiousness of American politics, particularly in light of the congressional election of 2010 where the Democrats suffered significant losses (losing control of the House of Representatives and losing strength in the Senate), it is a challenge to speculate about the future including what we might expect were there to be a Supreme Court vacancy to fill. (More detailed consideration is in "Supreme Court nominations," page 274) Even though at the start of the 112th Congress, the Senate voted to end the practice of secret holds, there still remained the obstacle of the necessity of unanimous consent to proceed to a vote without having to set aside 30 hours of debate for each nominee. And the filibuster remains unchanged.

As of this writing confirmations have occurred in drips and drabs. If going into the 2012 presidential election the President looks particularly vulnerable, it is likely that Republicans will seek to halt the confirmation process with the hope that a Republican president would be able to fill those positions. If this were to occur, we can fully expect Democrats to exact payback as the cycle continues. With the independence and integrity of the judicial branch of government at stake, it is a fair question to ask, when will the Senate leadership take decisive steps to end this ongoing confirmation crisis?

1. Although the 2008 Democratic Party platform had only one paragraph devoted to the judiciary, it contained the promise: "For our Judiciary, we will, select and confirm judges who are men and women of unquestionable talent and character, who firmly respect the role of law, who listen to and are respectful of different points of view, and who represent the diversity of America." (italics added). See 2008 Democratic National Platform, *Renewing America's Promise*, p. 53. available on [www.democrats.org/about/party\\_platform](http://www.democrats.org/about/party_platform).

2. The most recent article in the series is Sheldon Goldman, Sara Schiavoni, and Elliot Slotnick, TV. Bush's Judicial Legacy: Mission Accomplished, 92 JUDICATURE 258 (2009).

3. Interview with Nan Aron, November 30, 2010. All quotations in the text are from extensive interviews we conducted during the week of November 29, 2010, in Washington, D.C. Some of those we spoke with agreed to be interviewed on a no-for-attribution basis. Although unnamed, we have noted their involvement in the process although not with the degree of specificity that would lead to Uieir being identified.

4. Republican senatorial caucus letter of March 2, 20(A), posted on the Republican-Senate, Gov website.

5. *Citizens United v. Federal Election Commission*. 130 S. Ct. 876 (2010), 538 U.S. \_\_\_ (2010).

6. This is indeed what happened at the December 1, 2010, business meeting of the Senate Judiciary Committee. See the webcast available at the Senate Judiciary Committee website.

7. John J. McConnell, Jr., was eventually confirmed by the Senate in the 112th Congress on May 4, 2011, by a vote of 50-44 after the Senate voted cloture. This also was the scenario for Edward Chen who was confirmed on May 10, 2011, by a vote of 56-42.

8. Note that President Obama on July 14, 2010, nominated Marco Hernandez to fill a vacancy on the Oregon federal district court bench. Hernandez had first been nominated by President W. Bush two years earlier on July 23, 2008. Judge Hernandez was eventually unanimously confirmed on February 7, 2011. Press reports did not identify him as identified with any political party. But his having been backed strongly by then Senator Gordon Smith and then nominated by the W. Bush administration has led some to speculate that he might be a Republican identifier.

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