OBAMA'S FIRST TERM JUDICIARY

PICKING JUDGES IN THE MINEFIELD OF OBSTRUCTIONISM

Selection and confirmation processes of lower federal court judges during President Obama's first term are overshadowed by unprecedented levels of obstruction and delay but also unprecedented success, despite all the obstacles, of diversifying the federal bench.

by **SHELDON GOLDMAN, ELLIOT SLOTNICK, and SARA SCHIAVONI**

President Barack Obama's stunning victory in 2008, along with firm Democratic control of both houses of Congress, augured well for the President's agenda, which included staffing the judiciary with liberals and moderates to offset the conservative legacy resulting from Obama's Republican predecessor, President George W. Bush.

Although the Obama administration saw major legislative victories during the first two years, its path was much harder than anticipated largely due to partisan obstructionism in the Senate. Judicial selection and confirmation politics were also problematic due to partisanship and the slow start of the administration in nominating lower court judges.

The 2010 midterm elections saw Republicans gain control of the House of Representatives and eat into the Democratic majority in the Senate. This new political dynamic raised the ante of obstruction and delay in anticipation of Republican recapture of the White House and Senate. Of course the outcome of the 2012 election defied Republican hopes, but the consequences for selection and confirmation of federal judges during Obama's second term appear uncertain.

Our focus in this article is on the Obama first term judiciary with particular attention to lower federal court confirmations during the 112th Congress. Following the format of earlier articles in this series,[1] we will be examining the selection and confirmation processes during President Obama's first term with special emphasis on 2011 and 2012 (coinciding with the life of the 112th Congress). Our attention will then turn to the backgrounds and attributes of those confirmed during the 112th, first examining district court appointees and then appointees to the appeals courts. We will also be looking at a composite portrait of the entire first term Obama judiciary and comparing the findings to those of the appointees of Obama's four immediate predecessors in office. We will conclude with our take on what may happen during President Obama's second term.

For our examination of the selection and confirmation processes, particularly during the second half of the first term, we relied on extensive interviews with leading participants and observers of these processes; our interviews were conducted with officials in the Department of Justice, the White House Counsel's office, and with Senate staff personnel. We also interviewed interest group representatives from groups ranging from very liberal to very conservative.[2] We gathered data for our tables from

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1. The most recent article in the series is Sheldon Goldman, Elliot Slotnick, and Sara Schiavoni, "*Obama's Judiciary at Midterm: The Confirmation Drama Continues*," 94 JUDICATURE 262 (2011).

2. The authors are very grateful to all these individuals for their invaluable help. Some have no problem with being publicly acknowledged, which we do here. Others prefer to be unidentified, which we, of course, have respected.

various sources: the questionnaires each judicial nominee completes and submits to the Senate Judiciary Committee and the Office of Legal Policy at the Department of Justice; newspaper articles accessible on line; and various websites available on the internet. Data on political party were obtained from one or more of the following: the judicial questionnaires; newspaper articles; registrars of voters or boards of election; and replies from judges to queries from one of the authors. We start with an overview of the first term record in the perspective of judicial selection and confirmation since the presidency of Jimmy Carter over 35 years ago.

An Initial Assessment

Assessing presidential performance and success in nominating and seating judges to the federal District and Circuit Courts of Appeals is a risky business. So much depends on the metrics employed and the narrative frames selected. In no previous presidential term, we suspect, has this reality been more apparent than in assessing the outcomes of federal judicial recruitment during the Obama presidency's first term, corresponding to the 111th and 112th Congresses.

We begin our analysis with numbers that are part of a story, even if that story is devoid of context and nuance, using as a comparative reference point the first term of the W. Bush presidency, corresponding to the 107th and 108th Congresses from 2001 through 2004.

The comparative numbers, based on the data presented in Table 1, offer a clear-cut metric: during his first term in office, President W. Bush confirmed a total of 168 District Court judges out of 192 nominations to lifetime judgeships—an 87.5 percent confirmation success rate. Corresponding numbers for President Obama show a considerably less successful 141 confirmed District Court judges out of 205 nominations, a 68.8 percent success rate. Table 2's presentation of the Index of Obstruction and Delay[3] in Senate processing of District Court nominees underscores that the lesser confirmation numbers under Obama were joined by an enhanced degree of confirmation delay.

TABLE 1. Number and percentage of nominees confirmed by the Senate

Congress	District Courts	Appeals Courts
95th (1977-78)	48/49 97.9%	12/12 100.0%
96th (1979-80)	154/168 91.7%	44/48 91.7%
97th (1981-82)	68/69 98.6%	19/19 100.0%
98th (1983-84)	61/75 81.3%	12/15 80.0%
99th (1985-86)	95/100 95.0%	32/32 100.0%
100th (1987-88)	66/78 84.6%	15/23 65.2%
101st (1989-90)	48/50 96.0%	18/19 94.7%
102nd (1991-92)	100/143 69.9%	19/30 63.3%
103rd (1993-94)	107/118 90.7%	18/21 85.7%
104th (1995-96)	62/85 72.9%	11/19 57.9%
105th (1997-98)	79/94 84.0%	19/28 67.9%
106th (1999-00)	57/83 68.7%	13/32 40.6%
107th (2001-02)	83/98 84.7%	16/31 51.6%
108th (2003-04)	85/94 90.4%	18/34 52.9%
109th (2005-06)	35/64 54.7%	15/26 57.7%
110th (2007-08)	58/79 73.4%	10/22 45.5%
111th (2009-10)	44/78 56.4%	15/22 68.2%
112th (2011-12)	97/127 76.4%	12/21 57.1%

3. The Index of Obstruction and Delay was first introduced in Sheldon Goldman, "*Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*," 86 JUDICATURE 251 (2003).

TABLE 2. Index of obstruction and delay in the Senate processing of district court nominees

Congress	Senate Majority	President/Party	Index
95th (1977-78)	Democrat	Carter (Democrat)	0.0000
96th (1979-80)	Democrat	Carter (Democrat)	0.0750
97th (1981-82)	Republican	Reagan (Republican)	0.0000
98th (1983-84)	Republican	Reagan (Republican)	0.0545
99th (1985-86)	Republican	Reagan (Republican)	0.1364
100th (1987-88)	Democrat	Reagan (Republican)	0.2800
101st (1989-90)	Democrat	GHW Bush (Republican)	0.0488
102nd (1991-92)	Democrat	GHW Bush (Republican)	0.3465
103rd (1993-94)	Democrat	Clinton (Democrat)	0.0375
104th (1995-96)	Republican	Clinton (Democrat)	0.3780
105th (1997-98)	Republican	Clinton (Democrat)	0.5000
106th (1999-00)	Republican	Clinton (Democrat)	0.4722
107th (2001-02)	Democrat	W. Bush (Republican)	0.2432
108th (2003-04)	Republican	W. Bush (Republican)	0.3516
109th (2005-06)	Republican	W. Bush (Republican)	0.4400
110th (2007-08)	Democrat	W. Bush (Republican)	0.5079
111th (2009-10)	Democrat	Obama (Democrat)	0.5088
112th (2011-12)	Democrat	Obama (Democrat)	0.8716

Note: The Index is only for nominations to lifetime appointments to the district courts. Territorial district courts with set terms are excluded.

Index is calculated as the number of nominations unconfirmed plus the number of nominations that took more than 180 days from nomination to confirmation. It ranges from 0.0000, which indicates the complete absence of obstruction and/or delay, to 1.0000, which indicates complete obstruction and/or delay. Nominations made after July 1 of the second session of each Congress are excluded from the Index.

A similar analysis of the data for lifetime appointments on the Circuit Courts of general jurisdiction, heretofore considered the more important metric of presidential success, reveals a somewhat similar portrait. President W. Bush had 34 Courts of Appeals judges out of 65 nominations confirmed (52.3 percent), whereas President Obama's record is 27 Appeals Court judges confirmed out of 42 nominations (64.3 percent), a higher success rate, albeit one that is associated with fewer appeals court confirmations. In all four congressional sessions, Table 3 reveals relatively robust Indices of Obstruction and Delay, although it should be noted that the 95.2 percent index registered for the Obama appellate nominees in the 112th Congress is, by far, the highest we have recorded dating back to the Carter administration. The similar "reelection season" metric for W. Bush in the 108th Congress was 61.8 percent. It should also be highlighted that the highest obstruction and delay index we have measured for District Court advice and consent processes (87.2 percent) also occurred during the 112th Congress's consideration of Obama nominees (compared to a metric of 35.2 percent for W. Bush nominees in the analogous 108th Congress). Making these first term data all the more striking is that throughout, President Obama enjoyed a Democratic Senate majority, albeit not always a filibuster proof majority, whereas President W. Bush's seemingly more successful first term confirmation results were attained during a four-year period when the opposition Democrats controlled the U.S. Senate for two of those years, making it quite understandable had he not fared as well as he did.

As indicated, numbers alone can tell only part of the story but, when viewed from this perspective, it is clear that the W. Bush administration's first term judicial selection "performance" could be judged as more successful than the administration of President Obama. It is also clear that the high-pitched battle over staffing the federal courts has been joined on a new battlefield, the federal District Courts that, until the Obama years, had been relatively immune from the judicial selection wars.

For their part, senior staff members for Republican Senators on the Judiciary Committee offer ready explanations for the numbers. For example, one argues:

> [Obama has] had comparable Circuit [successes] to what most presidents have in their first term....I think if you talk to most Americans, they'd think he probably had one or two [confirmations and] that we filibustered 28 others....He was treated more fairly than Democrats would want to admit. They focus on a couple of numbers... and the vacancy rate...The difference in the numbers you can attribute to just a slow start....

Curt Levey, President and Executive Director of the Committee for Justice, a prominent group active in judicial selection politics advocating the conservative perspective on

judges, strongly agrees with these assessments:[4]

> Nobody can follow all of the statistics that get thrown around, much less even know what ones to rely on....[But] when you really look at it, that's just not the case....Especially on the Circuit Court nominees he did fine. The little bit that he is behind on some measures...let's put it this way, it's amazing that he's not more than a little behind on those measures given...the two Supreme Court nominations and just the lack of making it a priority. Remember, we're comparing...these measures...to Bush's first term when he made judges a big priority....If you look at Bush's numbers they were way down in the second term, so I'll bet you Obama, at the end of the day for eight years, beats Bush.

Levey's notice of the two Supreme Court vacancies during the first half of Obama's first term in office is a point well taken and was alluded to in virtually all of our interviews when the administration was characterized as being slow out of the gate in its nomination behavior. As a Republican Senate Judiciary Committee aide added:

> Having two Supreme Court nominees in one Congress, two successive years, nobody really denies that it takes over and everything else is put on the back burner. That's the way it is every single time....If you compare that Congress to the one other time that we had two Supreme Court nominees, which was Bush's second term...he did really quite well.

It is important to insure that comparisons drawn between administration records make substantive sense. Certainly, focus on the context of Obama's first two years of judicial selection activity, when two Supreme Court vacancies dominated the scene, is an important corrective. It also, however, is critical to emphasize that there has been a good deal in judicial selection politics during President Obama's first term that was far from "routine" or "business as usual." There are additional perspectives on the numbers, Supreme Court vacancies notwithstanding, that need to be added to the explanatory brew. For one, it can be argued that the Obama approach to judicial selection "policy" at the outset of the administration was much like the Obama approach to policy-making more generally when he first took office; a "post-partisan" attempt to govern that assumed the participatory good will of a "loyal opposition."

From this perspective, it is understandable that, while the Republicans could offer reasonable explanations for the low numbers, some of which were shared by the administration itself, it remains the case that the conservative Right had a justifiable sense of satisfaction with where things stood at the end of Obama's first term on the judicial selection front. As Curt Levey put it:

TABLE 3. Index of obstruction and delay in the Senate processing of courts of appeals nominees

Congress	Senate Majority	President/Party	Index
95th (1977-78)	Democrat	Carter (Democrat)	0.0000
96th (1979-80)	Democrat	Carter (Democrat)	0.0682
97th (1981-82)	Republican	Reagan (Republican)	0.0000
98th (1983-84)	Republican	Reagan (Republican)	0.1429
99th (1985-86)	Republican	Reagan (Republican)	0.0690
100th (1987-88)	Democrat	Reagan (Republican)	0.4762
101st (1989-90)	Democrat	GHW Bush (Republican)	0.0625
102nd (1991-92)	Democrat	GHW Bush (Republican)	0.5000
103rd (1993-94)	Democrat	Clinton (Democrat)	0.0625
104th (1995-96)	Republican	Clinton (Democrat)	0.5263
105th (1997-98)	Republican	Clinton (Democrat)	0.6932
106th (1999-00)	Republican	Clinton (Democrat)	0.7931
107th (2001-02)	Democrat	W. Bush (Republican)	0.8387
108th (2003-04)	Republican	W. Bush (Republican)	0.6176
109th (2005-06)	Republican	W. Bush (Republican)	0.7308
110th (2007-08)	Democrat	W. Bush (Republican)	0.6500
111th (2009-10)	Democrat	Obama (Democrat)	0.6500
112th (2011-12)	Democrat	Obama (Democrat)	0.9524

The Index is only for nominations to courts of appeals of general jurisdiction. This means that the U.S. Court of Appeals for the Federal Circuit is excluded. The Index for the 107th Congress excludes the nominations made by President Clinton shortly before leaving office that were subsequently withdrawn by President Bush.

Index is calculated as the number of nominations unconfirmed plus the number of nominations that took more than 180 days from nomination to confirmation. It ranges from 0.0000, which indicates the complete absence of obstruction and/or delay, to 1.0000, which indicates complete obstruction and/or delay. Nominations made after July 1 of the second session of each Congress are excluded from the Index.

4. Interview with Curt Levey, January 9, 2013. All quotes from Curt Levey are from this interview. All the quotes in the text are from extensive interviews we conducted during the week of January 7, 2013, in Washington, D.C. We are grateful to those who spoke with us. Because some of those, particularly Senate staffers on both sides of the aisle, spoke to us on a not-for-attribution basis, we have not only not identified them by name but we have also tried to conceal their identities.

> Things went as well for our side as they could given that we had, for much of the first two years, not even a minority that could filibuster. They had sixty and a president who was, at least at the beginning of his term, very popular, could have made judges a higher priority so, all said and done I don't have much to complain about.... I think the other side has been successful as well in that even with two Supreme Court nominations, their numbers fell a little short on various measures, but not by much, and that's without really making it a priority. So I'm not sure that either side has much to complain about.

It is at this final assessment of reality where the two sides in the judicial selection struggles diverge sharply and part company. Reacting to the notion that the President's numbers "fell a little short," a senior aide to a Judiciary Committee Democrat responded:

> Through extraordinary effort we were able to...keep the numbers from falling off the table...I could understand if I were a Grassley guy...'Look, we did over a hundred guys, what are you talking about? That's a pretty good two years.' And the answer is 'Yes,' taking credit for twenty that should have been done at the end of the last Congress, and just making us work our guts out we got 100-something pretty consensus nominees. Still filibustered virtually all of the Circuit [including] a number of really good people like Caitlin Halligan.... Nice of them to take credit for the numbers, but it was really in spite of them that we got to those totals.

In short, an initial assessment of the Obama first term record in federal judicial selection reveals competing narratives that belie easy characterization or a summary judgment based on numbers alone, a reality not lost on the administration's Christopher Kang, Senior Counsel to the President, who oversees the White House's selection processes.[5] "If you look now at the end of the President's first term...the nomination numbers have largely caught up. Where we are still lagging...is the confirmation numbers and the vacancy rate," said Kang.

In the sections that follow, we shall further explore the Obama first term record, turning first to the drawing of some more detailed comparisons of the accomplishments of the last two years, those of the 112th Congress with those of the 111th Congress, the first two years of the Obama presidency.

A Tale of Two Congresses

We have already alluded to some differences between judicial selection outcomes in the 111th and 112th Congresses, with President Obama attaining a more robust record of confirmations, overall, in the latter two years of his first term in office. Specifically, while fewer Appeals Court judges were confirmed in the 112th, a drop from 15 to 12, representing a 20 percent decline in confirmations, the number of District Court confirmations more than doubled, skyrocketing from 44 to 97, an astonishing gain of more than 120 percent. All told, the administration saw its lower court confirmations nearly double, from 59 to 109 seated District and Courts of Appeals judges in the 112th Congress.

As described by a senior congressional aide to a Judiciary Committee Republican, Obama's pace of confirmations in the 112th could be characterized as record breaking:

> In the 112th, he passed all kinds of records. He had the highest number in an election year. He had one of the highest in any congressional session, any Congress. So we had a pretty good pace, but this hole he dug himself in the very first session [of the 111th], he carried that baggage with him, and we got blamed a lot for that.

A number of explanatory factors have already been alluded to regarding the different outcomes in the 111th and 112th Congresses, most specifically, the presence of two Supreme Court vacancies during the 111th serving as a great inhibitor on lower court recruitment success and, as well, the presence of numerous "holdover" nominees who might have been confirmed during the 111th but were lined up at the head of the queue in the 112th. Our interviews and analyses have revealed a number of other reasons that might be characterized as structural or institutional in nature contributing to the better confirmation outcomes enjoyed by Obama in the 112th Congress.

These reasons start at the doorstep of the White House itself and were even noted by those who were not generally supportive of the President's nominees, such as the Committee for Justice's Curt Levey who found the White House, "better organized in terms of nominating." People for the American Way's Marge Baker sensed, "better systems and more prioritization of the importance of filling the vacancies in the second two years."[6]

Nan Aron, President of the liberal Alliance for Justice, a group that participates regularly in the judicial selection domain, made a similar point regarding advocacy:[7]

> We have seen a marked change in the last two years...The President has now heard from numerous individuals at meetings he attends, fundraisers, events that he participates in around the country. One of the things that we have worked really hard at doing is making sure that when he is out and about that there are individuals in the room, particularly lawyers...who will raise the issue. I believe that he has gotten the message that judgeships are important and that...a significant niche of lawyers cares passionately about judgeships.

It is difficult to pinpoint reasons for precisely why the White House appeared to have placed increased emphasis on the judgeship issue in the latter half of the President's first term, although several sources pointed to the departure of Chief of Staff Rahm Emanuel. Emanuel was said to have "no interest, he tamped down any discussion about judges." It seems his departure was, at least, a catalyst for a new approach.

5. Interview with Christopher Kang, January 10, 2013. All quotes from Mr. Kang are drawn from this interview.

6. Interview with Marge Baker, January 9, 2013. All quotes from Ms. Baker are drawn from this interview.

7. Interview with Nan Aron, January 7, 2013. All quotes from Ms. Aron are drawn from this interview.

The lack of emphasis extended to the White House Counsel's Office where, early on in the administration, Counsel's Greg Craig and, to a somewhat lesser extent, his successor Robert Bauer were portrayed as not prioritizing judgeships. This is in sharp contrast to Kathryn Ruemmler, the current White House Counsel. "My assumption is that when Kathy Ruemmler came in, she [made it clear] that this needs to be a priority" thought one interest group leader. Another added that, "We've seen some changes as White House Counsel Kathy Ruemmler is more engaged [in judicial selection] than her predecessors were."[8]

Similar observations were made about the work of the Office of Legal Policy (OLP), the Department of Justice (DOJ) office most active in the DOJ facets of judicial selection processes. One close observer of judicial selection noted that "when Chris [Kang] decides to go...with someone... [Deputy Assistant Attorney General] Mike Zubrensky pretty much gives the candidate a call the same day."

Summing up the changes in the administration's judicial selection environment during the 112th Congress, Vincent Eng, CEO of the Advocacy and Governmental Affairs consulting VENG Group concluded:[9]

> I think as compared to two years ago it's a lot smoother....Things are moving quicker in the White House area and my general feeling is that groups appear to have better access... Chris Kang is very accessible, always open to taking names. He may not agree...and the President may not agree with them, but they've always been open....I think it's better now in the sense that groups get better feedback on why a nominee may not have gone forward.

Understandably, the opposition's perspective on the 112th Congress's record of confirmations traces the President's increased success to other sources. As suggested by Curt Levey:

> I'd say that the difference is that the Republicans were more cooperative. I think they were less cooperative in the first two years if only because it was just closer to the source of their anger which was the obstruction of Bush's judges and maybe because they were clearly an opposition party....So I think things were less contentious in the second two years.

While not disputing the emergence of some beneficial changes in the administration's stance on judicial selection described above, our sources in the trenches of the Senate's confirmation processes, particularly Democratic staff members for Senate Judiciary Committee Democrats, were less certain that, in the final analysis, increased confirmations were a direct result of such changes. More to the point, as will be developed throughout our analysis, they would continually take great issue with any portrayal of Republican cooperation or even a notion that the 112th could be characterized as a record breaking success. In the words of one such aide:

> I didn't see much change in their approach and what they are doing, although we did it with Grassley in a pretty gentlemanly way. At the end of the day, they get to the calendar, [judges] get held up, virtually everybody gets held up, and they won't go through before a recess before the end of a session.

Another Committee aide articulated a similar sense of frustration:

> We were able to confirm more nominees in the last two years and didn't, in effect, fall further behind than we had fallen in those first two years. But a lot of that was marked by the characteristic that instead of the normal order on nominations, which is if the nominee has the support of the home state senators and is reported by the Committee they're quickly taken up by the Senate, continued to not be true at all. They had a wait three to five times longer for... nominees on the floor and with this trend, every recess, every long break, instead of clearing the calendar, which is traditional, the nominees would be held on the calendar. Republicans would refuse to consent....So, again, we're starting the year [with last year's nominees]. We're going to make some progress, I'm sure, but doing last year's nominees.

This unprecedented level of frustration, in this instance articulated by senior Senate Judiciary Committee staff aides, appears more pervasive than we have ever witnessed in our research. It is a frustration that is longstanding, found on both sides of the partisan aisle, in both the executive and legislative branches of government, and in interested groups and observers actively engaged in judicial selection politics, the reasons for which we now explore.

Judicial Selection in a Sea of Frustration

While the judicial selection domain has been mired in dysfunctionality featuring extensive obstruction and delay in recent decades, it is also the case that, far from getting better or even maintaining a troubling status quo, the judicial selection environment we are documenting for the first term of the Obama presidency appears to have deteriorated. It reached new levels of pervasive frustration among both active players in advice and consent processes as well as among parties interested in the outcome of those processes. This mirrors the historic levels of obstruction and delay we have documented in the 112th Congress.

As the Alliance for Justice's Nan Aron lamented:

> When you've experienced life with Republican administrations and judgeships it informs your thinking in a way....You know it can be done well. You know a team can be put in to get judgeships dealt with expeditiously. You know what it's like for a Senate to make a priority of judgeships, we've all seen this.

In drawing distinctions between the W. Bush and Obama approaches to

8. Our personal experience in the field is consistent with these observations. Whereas two years ago we were unable to even secure an interview in the White House Counsel's Office, in our present round of interviews our gaining entree never seemed to be an issue and White House Senior Counsel Christopher Kang gave most generously of his time and expertise. Importantly, one group leader noted that Kang "has a very good relationship with Kathy Ruemmler" and "the White House trusts him on his own judgment...I've not seen anything to make me think otherwise."

9. Interview with Vincent Eng, January 10, 2013. All quotes from Mr. Eng are drawn from this interview.

the aggressive pursuit of judgeships, liberal group leaders pointed to the absence of a well-placed champion:

> The thing we lack most is a Karl Rove in the White House....who, every day, goes into Kathy Ruemmler's office and says, 'Get this done, get these senators to move and put different kinds of people on the bench....The White House has...good public servants. They understand the vacancy issue. But there is no one who is saying, 'Oh my goodness. Look at the makeup of some of these circuits. We've got to figure out who the counterparts are to a ...Priscilla Owen on the 5th Circuit, a William Pryor on the 11th Circuit and so on.' No one is doing that....Not only is there no Karl Rove, but there is no seasoned player in the White House, a Ken Duberstein, a C. Boyden Gray, who can walk into a Senate office and sit down with the senator and talk turkey. Talk judges and make a deal.

Other broad expressions of frustration with the administration emanating from its putative friends added a more substantive thrust to this more generalized concern about the lack of a highly placed and effective champion on the judges issue. Thus, for example, one liberal group leader expressed chagrin at the seeming failure of the President to recognize judicial recruitment as an important "legacy issue" that helps define (and preserve) the accomplishments of a presidency. That same group leader also turned a critical eye inward at the reality that public interest progressives on the Left have simply failed to win the important framing battle for defining the terms of the judicial selection debate:

> We have to somehow find the mantra that is about the right wing activist's court's frame that works for us.... They want balanced judges, they respect the Constitution and that's what it's fundamentally about now. You have judges who aren't doing that! It's a totally legitimate frame, but it has been totally captured by the right wing. They own the language, but they're not acting in accordance with that language....And one of our challenges is how do we fight back and talk about the courts in a totally legitimate way, which is about having the courts not frustrate a [president's] policy agenda, because that's not what they're there to do.

The concerns and frustrations expressed by the active governmental participants in selection processes are more specific and substantive in nature and pragmatic in tone. For example, we heard several expressions of frustration from congressional staff assistants to Judiciary Committee Democrats who couldn't reconcile the debates swirling around nominees who did not appear, on any metric, to be controversial candidates. As articulated by one interviewee who has served as a source for our process narratives for several years:

> What's shocking is the character of the nominees. The President has reached across the aisle. These are not firebrand ideological nominees. And when you nominate moderate, well-qualified nominees that have Republican home state support, the thing that should result is quicker and easier confirmation, and what's actually resulted is an across the board obstruction that is really just... slowing it down.

The notion that District Court nominees have now become fair game for battle, particularly seemingly noncontroversial ones with home state senatorial support, even from home state Republican senators, is a particularly vexing point for Christopher Kang:

> You ask, 'Why is that?' And the thing that is most striking...is that from time to time, you will hear the response of essentially, 'Stop complaining. These people will be confirmed eventually.' And that sort of mentality, from our perspective, especially from my perspective working on this every day, is that it is such a diminution of the third branch of government. To suggest that these nominees will be confirmed anyway, so the fact that you would fill a judicial emergency doesn't make a difference? Or the fact that you're supported by the Republican senator and otherwise noncontroversial doesn't make a difference? Or the fact that you often have your life and career on hold doesn't make a difference? That's really where the frustration sets in in terms of our inability to get people confirmed. Not just for our own record but, really, for the administration of justice.

It is in such a context that the unprecedented and continuing vacancy rate can best be understood. As Kang opined:

> The more appropriate way that you should be looking at this should be the vacancy rate. But I know what's going to happen. At some point, we will match President Bush's confirmation numbers, and some will use that as justification to slow down even more. Whereas the number of vacancies is still going to be eighty instead of forty....The thing that is most compelling here...is the fact that the vacancy rate has never been this high for so long. During President Bush's presidency, the vacancy rate decreased by 30 percent. That's the way it should be. But so far, we've moved in the other direction. And I don't know what it is going to take to break through that other than us just continuing to push.

Kang's concerns about the vacancy rate are most acute, understandably, in the subset of vacancies classified as judicial emergencies:

> Shouldn't it be the case, especially after you come out of the Judiciary Committee and you are going to fill a judicial emergency that you move more quickly? Shouldn't that mean something? But it doesn't....I don't know how that dialogue changes.

The continuing inability to staff judgeships that are determined to be judicial emergencies is an ongoing sore point both for the administration and the Senate Judiciary Committee staff aides who labor in the minefields of confirmation processes. One senior aide commented:

> The needs of the judiciary, we used to think about that....[Republican senators] don't seem to think about it. So that when the Judicial Conference says, 'We really need 80 more judges,' and they're willing to sit there with 75-80 vacancies, when there are a dozen or sometimes two dozen nominees who they don't really object to, ready for confirmation, that seems to me to be indicative of another way in which it has changed in the last four years.

Another aide underscored the practical realities of the current situation:

> The way we approach it…is looking at the needs of the judiciary and there are actual people who are going to rely on the justice that the courts are supposed to administer. This would be a lot worse if we didn't have a bunch of…Senior Judges who are continuing to do full caseloads trying to keep this thing afloat. But you've got the Administrative Office of the United States Courts telling us they need 80 judges. We already have about 80 vacancies. When you look at the vast need and you've got perfectly well suited judicial nominees that are not controversial coming out of the Committee, why do these things not compute? I think that if we can restore a sense of, 'We're trying to address a need for the courts to do their jobs' we'd be better off….And it may be our fault to focus on numbers so much, but everybody looks and looks for the scorecard instead of the crying need.

This "metric mentality" is both embraced and bemoaned by close observers of and active participants in judicial selection and, in the end, contributes to the dysfunctional nature of contemporary advice and consent. One Senate leadership aide observed:

> If you're not really involved in it, I think both sides are pretty good at throwing out the statistics as though they are 'truth.' But the two statistics don't line up. One side saying there's no problem and the other side saying there's a huge problem, so it just sounds like 'he said, she said.' [The end result was] a pattern of stalling. It may go well for a little while, and then it peters out, and then he [Senator Reid] threatens cloture on everybody and it spurs a deal, and then things run along very well for a little while until that deal runs out and then it slows down again.

Summing up the litany of frustrations we have documented, a senior Senate Judiciary Committee staff aide concluded that the Committee is "continuing to have success with normal order, trying to get people through, trying to have regular hearings and get them reported. What we're not seeing is that process yield fruit on the floor."

One of the reference points continually returned to by Senate Democrats is that of the lack of equivalence to what transpired during the W. Bush years. "I think it is qualitatively different….You can find things that look similar, but…they treat nominees in very different ways. They group them in very different ways…. The Grassley statements are all in terms of 'tit for tat.'"

In the view of Senate Democrats, we are witnessing "a tit without a tat":

> We may have opposed a handful of the most ideological nominees, but all of the other nominees, we almost made a point of moving quickly to try to set a record. When we opposed someone it was for a real reason, and everybody else should be confirmed. That has almost been flipped on its head. Who are the real opposition nominees? Who are the fake opposition nominees? Who knows? Because it's the across the board slowdown, and that's an inversion of how we handled it…You can find numbers to say a lot of things…but there's no equivalence.

While the opposition Republicans share in articulating frustrations with the current state of judicial selection politics, their focus, as we have seen, is quite different. They continually point to the administration's slow start as the root of all that has happened since and the number of vacancies without nominees and the use of what they characterize as misleading metrics. Further, they argue, there have been prominent instances (such as during the approach to the fall 2010 congressional recess) where their own overtures for compromise were rejected by the Democrats. Finally, for the Republicans, there is a fundamental denial of the characterization that the Bush/Obama comparisons rely on false equivalencies:

> The bottom line from our perspective is, whatever the rules are, they've got to be the same for both sides. [During the W. Bush years] the Democrats were not shy about the fact that they were changing the rules with respect to using cloture on nominees. So Republicans said at the time, 'This hasn't been done in the past, we ought not to do that. Everyone ought to have an up or down vote.' We lost. We lost that fight. Now the tables are turned and you can't expect us to, for the Republican president's nominees, to subject them to a 60-vote threshold and the Democratic president's nominees to be subject to a 50-vote threshold.

The Democrat's response, of course, focuses on the numbers and types of nominees for whom such cloture is now sought and required to move forward. It also centers on the treatment of President Obama's noncontroversial nominees, whom, they argue, are not treated fairly because they have to wait far longer for confirmation than President Bush's.

With this contextual foundation regarding the contemporary judicial selection environment as background, we now move to a more complete presentation of the actual processes followed by the White House for nominating judges and the subsequent Judiciary Committee and Senate floor action processes that follow.

Judicial Selection within the Obama Administration

We now turn to a description of the processes utilized by the Obama administration for selecting judicial nominees, focusing in particular on the roles played by the White House Counsel's office and the Office of Legal Policy (OLP) in the Department of Justice (DOJ). It should be noted at the outset that in our analysis of the Obama selection processes written at the midway point of the President's first term, some critical notes were sounded with regard to the relative lack of prioritization of the issue by the Counsel's office. Two years later, such concerns about the work of the Counsel's office and OLP appear to have largely disappeared.

As underscored by one close observer of the White House Counsel Office's work from the vantage point of the Senate, "I know that they were slow in the beginning and that things have picked up…I think they're moving pretty much as quickly as they can."

The picture of the relationship that emerges today between the Counsel's Office and colleagues with whom the Office interacts and works with in

OLP is highly collaborative, efficient and effective. Indeed, in several of our interviews, specific references were made to the very strong and positive working relationship between Senior Counsel to the White House Chris Kang and Deputy Assistant Attorney General Mike Zubrensky. The emergence of the Kang/Zubrensky nominations axis after the slow start of judicial selection processes under President Obama seems to be universally viewed as an advancement in the administration's handling of the issue. As one source observed:

> I think many people view having Mike doing judicial nominations in Justice and Chris Kang at the White House Counsel's Office as a positive thing in the sense that at least the relationships between Justice and the White House [are] strengthened. There were concerns earlier that they may not have been as strong.

At the same time that early concerns were heard about the judicial selection work of the Counsel's Office and OLP, additional voices were raised suggesting that judicial selection was insufficiently staffed in both domains. If that was ever the case, Chris Kang suggests that such concerns are presently a "nonissue" indicating, as well, that this may simply be a case in which perceptions of the different organizational styles for approaching judicial selection under W. Bush and Obama may have led to faulty conclusions.

In the name generation and "political" phases of the selection process it remains the case, as it has in past administrations, that interactions with senators are handled almost exclusively by the Counsel's Office as Kang noted:

> My office and the Office of Legislative Affairs works with the senators to solicit recommendations and works with them to obtain the Blue Slips.... That part of it is still run out of the White House. [On District Court nominations, historically tied more closely to home state senators than Circuit nominees.] We ask senators to send us three recommendations for each vacancy. That doesn't happen as often as we would like, but that is the goal, to have options.

As names surface for a vacancy, a fairly routine yet painstaking process follows. Kang continued:

> When we vet a candidate, our process at the beginning is that we do a little bit of work here in the White House Counsel's Office. Even if we don't receive three names, we do a preliminary check to make sure that the recommended candidate meets the qualifications we think would be appropriate. We then send them to the Department of Justice for their vetting and the Department of Justice takes about one month to vet a candidate. They work on...the paperwork, they read everything that a candidate has ever written or has said, speeches, presentations, interviews, opinions, all of that. They also make about 25 to 50 phone calls, depending on whether it is a District versus Circuit Court nominee. And then we bring in a candidate for an interview. DOJ vets both District and Circuit Court nominees with this full professional evaluation which, I think, takes an average of 60 to 80 hours per candidate, obviously a little bit more for the Circuit Court in part because we do that many more calls.

The White House Counsel's Office is the initiator of DOJ activity in signaling "to OLP when to begin a thorough evaluation of potential candidates." Unlike virtually all cases of District Court vetting, "with respect to Circuit Court nominations there can be more than one [person vetted for a vacancy], and then OLP will go through the process of doing the evaluation and writing a memorandum." While not an ideal situation from the perspective of efficiency, there can be important reasons for vetting two names for a single Circuit vacancy:

> Oftentimes, here at the White House, we'll identify several very promising candidates and we'll narrow it down if we can and then ask the Department to do its thorough vetting on more than one person....Then, after the interview, we'll again sit down with the Department and have a conversation...and determine who we think might be the better candidate to move forward...based on the more thorough substantive evaluation. It's giving ourselves more options based on more information and...more often than not, those are the hardest decisions we make, that we have two incredibly good candidates who we really like a lot and you're working at the margins for who you think might be better to then move on [to the next] stage.

It is after the OLP vetting that, for District and Circuit nominees, there is a joint interview of the candidate with members of the OLP, "certainly the Deputy [Mike Zubrensky] always comes, the line evaluator from the Department comes and other senior people from the Department come" and meet with Chris Kang and members from his office:

> At that point, after the interview, we go back over the thorough vetting, we go over the interview, and at that point we make a decision whether or not to send them to the next stage in the nomination process...the ABA professional evaluation [and] the FBI background investigation.

At the stage that names are forwarded to the ABA and FBI, the formal

vetting roles of the Counsel's Office and OLP are largely done, though these offices may be involved further in gathering information and developing responses to developments from these external evaluative reviews. It is also at this stage of the process, when a home state Republican senator is involved who may not yet have been consulted, that such consultation takes place:

> We wait…for the same reason that we don't send people to the ABA and FBI immediately. We don't want to waste anybody's time and resources.... When we send somebody to the ABA and FBI, we feel comfortable enough that if the ABA rating comes back positive, if the background investigation comes back clean, then that person likely will be nominated.

It is only after the joint Counsel's Office/OLP interview with the candidate and the ABA and FBI evaluations are done, that OLP and the Counsel's Office will sign off informally on a nominee. "From that point, just prior to the nomination and through the Senate Judiciary Committee hearings, OLP takes the lead on preparing the candidates for that process."

While it is the Attorney General who sends a formal letter to the President recommending a nomination, it is the White House Counsel's Decision Memo to the President that serves as the operative recommendation. Clearly, the process we have described is a collaborative one in which, at the broadest level of generalization, the White House Counsel is dominant in the political facets of evaluation and advocacy, particularly in working directly with senators, while the DOJ/OLP facets of the process are more focused on professional evaluation, a distinction that has held for successive presidencies dating back to Jimmy Carter.

As alluded to throughout our commentary, the situation can be and often is a good deal more complicated in instances where there are home state Republican senators involved—particularly, as witnessed in nomination and confirmation stalemates in states like Texas and Georgia where both home state senators are Republicans. Admittedly, in such circumstances, things vary a good deal state by state. Yet:

> Even in those cases…we'll try to work with the Republican senators. To varying degrees we will…solicit recommendations from them, and some of them suggest multiple, consensus candidates who they also feel comfortable with. But some are more rigid in their recommendations, so that's a little bit more difficult to navigate.

If there is a single characteristic that distinguishes the processes utilized by the Obama administration's judicial recruitment team from those of all recent presidencies, it is the absence of a formalized "Judicial Selection Committee" with broad representation from beyond the Counsel's Office and OLP and regularized, often weekly, formal meetings. It appears from the nature of the collaborative effort that we have described, however, and certainly in the eyes of the players themselves, that this distinction is more appearance than real.

Indeed, at the beginning of the administration there was some effort to maintain this conventional structure. Ultimately, a more fluid approach was chosen, relying on a smaller, more focused judicial selection operation than has been the norm with relatively few in-person meetings explicitly focused on status briefings. According to Kang:

> I probably talk to Mike Zubrensky at the Department of Justice at least half a dozen times a day. At some point, honestly, we lost the meetings and weekly phone calls because we thought it was inefficient. It's much easier to pick up the phone and call on a rolling basis and say, 'What's your advice on this?' or 'Let's follow up on that,' rather than saying 'Let's hold all of this stuff until next Monday and we'll discuss it.'

It is also the case, as another participant in the process said of the "constant coordination":

> There are meetings regularly when there are interviews at the White House for candidates either preceding the interview or following the interview….[T]here's a lot of interaction going on at various levels but it's not a committee.

Senators and Blue Slips

We have alluded to the interrelationship between President Obama's judgeship record, the Administration's approach to consulting with senators on judicial nominations, and the constraints imposed on presidential success by the operation of the Judiciary Committee's Blue Slip system, topics that we examine here in sharper focus. We have specifically noted the Administration's commitment to extensive consultation with senators regarding vacancies that arise in their states, a commitment that extends to Republican senators.

Many analysts suggest that the level of such consultation pursued by the Obama White House far exceeds that utilized by earlier presidencies and, in particular, that of his predecessor, W. Bush. While such consultation can be commended in theory since, ideally, it should result in a smoother path to judicial confirmation, as one interest group leader has commented, that has not been the case for President Obama. "I think it's probably true that the Obama White House consults far more with the minority than the Bush White House did. He was really making an effort. The problem is, it didn't pay off…." Another group leader lamented such extensive consultation with home state Republicans, noting the deviation from the W. Bush approach and its seeming consequences. "In states with two Republican senators, unlike his predecessor George Bush…this White House is going to sit down and negotiate….They've essentially allowed Republican senators in Georgia and Texas to delay, delay, delay."

Working with minority senators can take many forms and, as noted, "varies very much by state." It may include the actual solicitation of recommendations by the White House Counsel's Office from home state Republican senators at the front end of the process or further down the road in filling a vacancy:

> If Republican senators have not suggested one to us...then after we've completed an initial vetting [of a potential nominee] we'll reach out to the Republican home state senators to see whether or not they would have serious concerns with that person.

For a process that routinely relies on a starting point of suggested names being generated by home state senators, whether from the President's or the opposition party, process slowdowns may have their genesis at a point far earlier than nomination per se. It was suggested by several of our sources that this has been a particular problem in the Obama years, especially in the presidential election environment existing during the 112th Congress. Looking ahead to the 113th Congress Kang underscored:

> We're going to go several months here without District Court nominees and the reason for that is a lack of recommendations for candidates to vet. We are pushing Senators on this at the highest levels. And the outside groups are pushing as well. But we're going to go a long time without names because people...took the fall to focus on the elections.

The problem of slow or, worse yet, dry senatorial pipelines is particularly acute when focusing on vacancies in states with two Republican senators and where protracted delay may be part of a concerted slow down strategy. As a senior Democratic Senate staff aide noted:

> I think the White House has done some of its best work reaching out to Republican senators and trying to get nominees who can pass over Blue Slips. Clearly, we have seen an effort over the last long period of time by Republican senators not to provide names.

Referencing the aforementioned state of Texas, another aide highlighted that it "is one of the big states...and a huge driver of that vacancy number. There are seven current vacancies in Texas and no nominees, including two to the Fifth Circuit. Are they giving names to the President? How are they working that out?"

It is impossible to separate consideration of the nomination generation processes of the White House from the operative Blue Slip conventions followed by the Senate's Judiciary Committee as it relates to the scheduling of hearings for judicial nominees. While not a Committee rule per se, the Blue Slip process is, rather, a norm that has operated with different levels of virility under different Judiciary Committee Chairs. Operationally, the norm dictates that Blue Slips are, literally, sent to the home state senators, regardless of their party, of District and Appeals Court nominees seeking commentary on the nomination. While a senator may respond in a laudatory, noncommittal, or even negative fashion on the Blue Slip solicitation, not returning the Blue Slip—that is, simply holding it—can keep a nominee from even having a hearing scheduled. Depending upon how strictly the Committee Chair "honors" nonreturned Blue Slips, they can serve as effective "pocket vetoes" of nominees by opposing home state senators who never have to utter a word about why they are in opposition.

Since the system operates via "understandings" and not Senate rules, different Committee Chairs have interpreted the norm differently. Thus, for example, during the period of the W. Bush presidency when Republicans held a Senate majority, Senator Orrin Hatch, Chair of the Judiciary Committee, claimed the Blue Slip system did not apply to Circuit Court nominees and, on the District Courts, only required a single returned Blue Slip to go forward to a hearing, thereby effectively cutting off the Blue Slip's power for home state Democrats in mixed state delegations. To date in the Obama years, Democratic Senator and Judiciary Committee Chair Patrick Leahy will not schedule hearings without them, placing potentially enormous obstructionist power in the hands of home state Republican senators if they withhold blue slips "liberally."

Senior Republican Judiciary Committee staffers have been quick to acknowledge Senator Leahy's upholding of the Blue Slip approach most protective of their minority party's rights. "It's Senate tradition. And he's been very clear about it and he has abided by it—even to their side's detriment at times."

In a sense, the White House can be said to be doubly constrained by current Blue Slip conventions. For one, there are a disproportionate number of vacancies in states with at least one Republican senator and, in many instances, two Republican senators. Second, additional constraints may be imposed by the relative ease with which Republican senators avail themselves of withholding Blue Slips. What, ostensibly, was a norm devised to help insure consultation between the White House and home state senators, particularly those of the nonpresidential party has, in the view of some, been stood on its head and, in more instances than has historically been the case, has been used to silently obstruct a nominee from going forward.

A liberal group advocate voiced the concern that the way Republicans have utilized the Blue Slip may have altered the Obama administration's preferred nominating behavior. Fearing the impact "behind the scenes...is how the White House reacts to potential progressive people when they know that senators have more power than they had in the past and that, I think, has affected the quality of the people who are picked....No one even notices it because people, like who we want, never get consideration....[They're] just inclined to say, 'No...impossible.' Even for people who might be possible, they're not willing to fight it because they realize how hard it is going to be."

On the other hand, one observer noted, "There's a myth about the Blue Slip policy that comes with a push for Chairman Leahy to follow Hatch's model or for the President to just nominate someone with a Blue Slip problem. Did Senator Hatch break precedent for President Bush's nominees? Absolutely. But none of those nominees were ultimately confirmed without Blue Slips."

A Republican staff member opined that there are ways that the use of blue slips could both be respected and overcome. "There are countervailing methods to push on that. You can bring public pressure on the senator. You can get the local bar association fired up. You bully pulpit from the White House. You keep nominating the same person. Things can be done and, ultimately, it will be resolved."

Ideology, Diversity, and the Obama Record

It has become commonplace in contemporary assessments of the judicial selection accomplishments of sequential presidencies to evaluate them, in large measure, by the degree to which their nominee cohorts have been successful in fulfilling an identifiable presidential goal. While such goals may vary, the two predominant goals associated with contemporary presidents in their judgeship choices have been characterized as either ideologically oriented, with nominations made in the pursuit of an identifiable policy agenda on the one hand, or representationally driven, with nominations made to maximize diversity and to foster a representative judicial branch. These often stated goals of judicial recruitment are not, of necessity, mutually exclusive.

That said, one may fairly conclude that Republican presidents, with the most successful being Ronald Reagan and W. Bush, have maximized their policy goals in their appointments. On the other hand, Democrats, with Bill Clinton being the historical standard bearer, have been more ideologically moderate in their nomination choices while, at the same time, maximizing the gender, racial, and ethnic diversity of those they place on the federal bench. True to this conventional form, it is clear as our data document at nearly every turn, President Obama has amassed an unprecedented record for diversifying the federal bench on metrics associated with gender, race, and ethnicity.

What is less definitively clear at this early stage in the judicial careers of the Obama appointees is the degree to which these appointments will have a policy impact on the direction of judicial decisions in the years ahead. Preliminary data, examined in other contributions to this symposium issue, as well as what we have gleaned in our fieldwork, confirm conventional assessments of the Obama presidency suggesting that he does not view courts as agents of policy change and that he eschews ideologically driven nominations. Yet Obama is committed to the aggressive pursuit of making the federal courts more diverse and reflective of the country that those courts serve.

Interested parties across the political spectrum recognize the relative ideological centrism of the Obama nominees. While suggesting that the President's District Court nominees may have included "more extremes than…expected" on the more critical Courts of Appeals, where ideological proclivities are likelier to impact decisions, Curt Levey of the conservative Committee for Justice noted that, "It's fair to say that Obama's Circuit Court nominees, for the most part, were not as extreme as I expected."

Marge Baker of People For the American Way concurred. Making an observation that would disappoint yet be acknowledged by many of the President's supporters she noted, "Look at whom Bush was able to get on the courts. In comparison, [Obama's are] ideologically mainstream nominees….None of the appellate nominees are on the Left in any way comparable to the people who got through after the agreement in 2005," referring to the bipartisan Gang of Eight senators who brokered a deal that avoided the Senate adopting the "nuclear option," which would have done away with the Democrats' ability to filibuster nominees they viewed as extreme conservatives. Under the terms of that agreement, while the filibuster was saved, it could only be used in undefined "extraordinary circumstances" and, in the process, several very conservative W. Bush Circuit Court nominees, objectionable to groups on the Left , were confirmed.

As a general matter, partisans on the Left are concerned that the kinds of nominees favored by the President are too often safe establishment attorneys. One case in point that was brought up a number of times in our interviews was the nomination of Sri Srinivasan, since confirmed to the D.C. Court of Appeals, a court generally viewed as the second most important in the nation behind only the U.S. Supreme Court. As one close observer of the process noted, "The unions opposed him vehemently because of some cases he argued bolstering the position of corporations and defending human rights abuses abroad."

The importance of lining up support to help move the candidacies of progressives, both to nomination and, ultimately, to the prospect of success in confirmation is one that is now widely accepted today by groups on the Left. "It is definitely possible, but you have to have a group of people committed to helping the candidate and a candidate who is really invested in winning people over aggressively."

Another close observer of the process suggested that the record-setting obstruction and delay confronted by Obama's nominees could actually be viewed as justification for the move to a more aggressive nomination strategy. "People suggest that it wouldn't be irrational for the Administration to start picking more fights. If a non-controversial person has to wait 100 days and a controversial person has to wait 115, what's the difference anymore?" The difference, of course, for President Obama, is that he has shown little inclination to pick fights; it's not his preferred approach to governance, whether in judicial selection or any other policy domain.

In terms of diversity, the Administration's unmatched record of nominating "nontraditional" candidates to the federal bench—namely women, racial and ethnic minorities—is a diversity record that justifiably trumpets an important legacy for the Obama presidency. Kang explains:

> The President's record on diversity is something that we're incredibly proud of. I think that will be one of the longer lasting changes that we're

> going to see and should hope to see. We're hoping we set a bar, and the fact that we're so public about what this bar is...that the next president, Democratic or Republican, is going to have to meet it, too. But the thing for us in the next term is, frankly, living up to the standard we've set for ourselves. That's the best way to assure that the next president does and the next one and the next. We're incredibly proud of the firsts that we've had and our goal really now is to make the firsts not that special. To have seconds and thirds and to not have as many firsts....That is an important part of what I think the President's legacy will be from this.

Given this record, it is of interest to see an emerging issue of "experiential diversity." One liberal group leader articulated the concern simply. "That's our biggest beef with them. The issue of professional diversity. There is a predominance of prosecutors and corporate lawyers." Another close observer of the process added, "One issue we're seeing, especially with the progressive community...the path to a judgeship is turning out to be you go to a top law school, become a USA [United States Attorney] and become a judge....I think you're seeing people not coming from the public interest community....I think they're looking at that, but it's also competing with the interest that they need to get people confirmed."

It is clearly the case that the White House is aware of this concern and wishes to address it. As Kang noted:

> We talk a lot about demographic diversity, but experiential diversity is just as important. If a lawyer has spent a couple of years as an AUSA and a couple years as a federal defender, I think that's experiential diversity, even though he or she will probably be counted in the 'prosecutor' column. We are also trying to encourage candidates from less traditional legal backgrounds to consider applying. Some may not have a lot of trial experience, but it's incumbent on us to make sure that the pool is expanded as broadly as possible. Then, based on their overall qualifications and experience, if necessary, we can engage in a conversation with the ABA on their level of trial experience.

Kang met with the ABA early on in his tenure in the White House Counsel's Office, to have a frank discussion of what the administration valued in a nominee and to get an understanding of what the ABA valued and was looking for as they evaluated potential nominees.

The administration's commitment to experiential diversity is seen as genuine by supportive groups on the Left who recognize the difficulties they will encounter in making this a priority in the second term and, in effect, a "new" factor to be considered when evaluating a President's performance in the judicial selection domain.

Interest Groups and Judicial Selection

We have made several references throughout our analysis to the part played by interest groups, including the American Bar Association, in judicial selection politics. In this section, we will focus more explicitly on their participation in the process. The importance of such groups was emphasized by one senior Judiciary Committee staff member who noted that advocacy makes a difference:

> To the extent there are groups agitating against President Obama's nominees and encouraging Republicans to stand tall against them, I am sure it has an influence. To the extent that other groups are saying, 'Let's fill these vacancies,' I hope that the American people hear them and that elected representatives will hear them.

Another senior Democratic aide described a close working relationship with "friendly" groups who, nevertheless, are "squeaky wheels." That said, "We're in close communication with them, and when we're going to have a battle we work...to coordinate communication strategy and that sort of thing."

Historically, when talk turns to the work of groups in the judicial selection process, it is a truism that groups on the Right have been seen as more successful in moving their agenda, whether in forwarding favored candidacies during Republican administrations or working in opposition to nominations made by Democratic presidents. One Democratic Senate Judiciary Committee aide summarized this reality, noting that it is more than group efforts per se that matter here but, critically, the base constituencies that they represent and their commitment to the judicial selection issue that make a difference:

> There was a very successful generations-long effort on the Right to make judicial nominations one of the key litmus test issues. I think on the Right the base sees judges as equivalents to guns, abortion, gay marriage, whatever...The issues that they feel up in arms about they see it as equivalent to judges. And I'm sure the groups would agree with me, but that hasn't happened on the Left in terms of seeing the two things as equivalent... It's been a generations-long effort on the other side. I'm not sure the base on the Left is as focused on this issue.

For groups on both the Left and the Right, it is also important to recognize that as the courts become identified with specific issues, the groups that become involved in the judicial selection arena go well beyond those groups focused generically on selection politics to include more targeted and, often, better endowed issue specific groups that understand the critical importance of courts to their policy agendas. The Committee for Justice's Curt Levey commented on such groups:

> They can really make the difference. If, at the end of the day, the senators really thought that the only people who cared were the Federalist Society, Committee for Justice, Judicial Action Group and Judicial Confirmation Network nothing would happen. No one's kidding themselves that a majority of Americans, or even a majority of Republicans, that their number one concern is judicial nominees. So a lot of the energy for the opposition comes based on social issues...from groups that are peripherally involved on the conservative side.

Levey specifically cited the growing examples of a number of antiabortion groups and, in particular, the National Rifle Association becoming directly involved in con-

firmation politics. "We went from where they had to be almost dragged kicking and screaming….On Halligan, they were one of the groups taking the lead. So I've seen a real change…It takes less work than it did."

One theme raised frequently during our interviews was the much improved relationship and working environment groups generally supportive of the administration enjoyed in the latter half of President Obama's first term when compared to the first two years. Marge Baker noted that:

> the lines of communication to the White House are as good as they've ever been. There were periods during the first couple of years where there just weren't very good avenues. There's much more collaboration…. We've gotten to know one another, we've worked together, we understand each other. There's a greater understanding, a greater ability to have that dialogue and that conversation and that's far better than it's ever been.

The perception of a better working environment for group activity is inextricably linked to the presence of Kathy Ruemmler as White House Counsel. One group advocate opined that:

> Something that has changed, practically, is that when we met with Kathy Ruemmler at the beginning of her term, someone asked the question, 'Do you need more allies in the White House to fight for judges?' Not necessarily the most progressive people, but just fight generally, and can we go meet with those people, and she said, 'Absolutely.' Not just 'No,' but 'I want you to go. I give you free permission to go talk to people.' And from my perspective that made a huge difference because they weren't scared about getting fired…there was…more institutional support and ability for outside groups to kind of pressure them.

Perhaps in recognition of the changed environment and, also, as an added mover of such change, several group leaders referenced a White House function, a meeting with interested groups, that was held in the spring of 2012:

> They hosted a White House event last spring which was a signal of increased engagement and did bring people in. There were people from around the country, not just D.C. groups, mostly not D.C. groups. This was...a sign of their willingness to do things differently. They were willing to engage, to generously get on the phone with activists from around the country, more on a state-by-state basis...I think it was an eye opener. Maybe not to the folks in the Counsel's Office who work most closely on this, but to the White House. That this was an important priority and it wasn't just the inside-D.C. based organizations, but there's a grassroots and a grasstops that really cared about this issue.

And what the White House heard was not, necessarily, just good news:

> There was a Q&A session, and these people were making it clear that they were not happy with the way things were going, and I think there may have been some people at the White House who were surprised with how forthright their supporters were and how they felt. 'You need to be doing more on this,' as well as 'you need to be confronting the obstruction.' It was such an amazing crowd.

Just as important as demonstrating the importance of the judicial selection issue for group constituencies across the country has been the related necessity for the groups themselves to work more effectively on specific judgeship battles—not only in Washington, but in the Districts and Circuits where conflicts over candidacies are generated. Marge Baker has observed positive activity in this regard:

> State coalitions are being mobilized around the country to deal with their individual circumstances, which are all different, but basically sending the message to their senators that this level of obstruction is not acceptable. We have to fill these vacancies, elections make a difference—and to really call them on this. And there are increasing numbers of folks in states who are willing to mobilize around this who get the courts as part of the agenda that they need to be working on.

For their part, groups like People For the American Way and the Alliance for Justice work to parlay such local efforts with broader messages to all senators, particularly to Democratic senators, back in Washington. The focus of group activity and its increased effectiveness was taken note of by White House Senior Counsel Chris Kang. "I think the groups are certainly doing a better job in laying the groundwork for why the courts matter, period….doing a lot of very good work at the grass roots level….and the evidence of that is seen in letters to the editor and events here and there…focused on the judiciary."

Shifting the debate to such broader concerns about obstruction and delay in judicial selection processes and the necessity for a functioning judiciary, Baker agreed, is the kind of change that group activity can facilitate. "I don't think this is the kind of government the American people want. I think it's part of the overall frustration that folks are not doing the job they were elected to do…. At some point the American people have to say, 'We're not going to tolerate that.' And I think there's enough anger and frustration in the Democratic caucus to make that an issue."

Any consideration of interest groups active in federal judicial selection processes would not be complete without some specific focus on the role of the American Bar Association's Standing Committee on the Federal Judiciary. The Committee, since the time of the Eisenhower administration, has evaluated the professional qualifications of potential nominees prior to their formal nominations by the President.

Such a focus is, perhaps, most appropriate during the Obama administration inasmuch as the W. Bush presidency removed the ABA from its prenomination screening. ABA ratings were only sought, postnomination, at the behest of the Judiciary Committee and, specifically, Judiciary Committee Democrats when they were the Senate's minority party during some points in W. Bush's presidential tenure. Such postnomination evaluations raised concerns about the comparability of the W. Bush nominee ratings to those

of the nominees of other presidents since, it can be argued, the interviews on which the ABA evaluations are largely based, might not have been as candid once a nomination had already been made than they would have been as part of a prenomination screening process.

It is in this context that the most important observation to make about ABA participation during Obama's first term in office is the return of the ABA Committee to its traditional pre-W. Bush prenomination evaluative role. As we have reported, a meeting was held relatively early on between personnel from the Justice Department's Office of Legal Policy, the White House Counsel's Office and the ABA. This was done to help facilitate a mutual understanding of the ABA's evaluative criteria and those facets of potential nominees' credentials that were highly valued by the White House. By all accounts, in the wake of such discussions, the relationship between the ABA Standing Committee and the administration has flowed relatively smoothly in an atmosphere where meaningful conversations can occur. In specific instances, however, they may still not see completely eye to eye. As noted by Chris Kang:

> Broadly speaking, we have a tremendous amount of respect for the ABA and what they bring to this process... We, obviously, don't agree with every rating....Obviously, we're not going to send somebody to the ABA for evaluation unless we think they are qualified. But I also think there is room to agree to disagree at the margins.

Returning the ABA to what some would characterize as a "most-favored status" among interested parties in judicial selection has, predictably, resurrected well-rehearsed concerns. In the words of James Christophersen[10] of the Judicial Action Group:

> Call it jealousy if you will, but the American Bar Association is not a government entity, it's not part of the White House, it's not part of the legislature....They are a non-profit organization that has a position on judicial nominees, yet that position is, somehow, more important....So for their opinion to be elevated above the opinion of everybody else does an injustice to everyone by not fully representing all the voices on the issue and on individual nominees.

Such concerns have been both raised and responded to since the ABA first began its formal involvement in the selection process more than a half century ago. As Kang notes of the ABA's input, "It helps because it's a different source of information. We have the Department of Justice vetting and we have the FBI, but it's very important for us to get a sense of somebody's professional reputation...I think it's very valuable to have the ABA input as well and to have a sense of what people in that legal community think and how the ABA evaluates them."

The Judiciary Committee, the Senate Leadership, and the Troops

In past iterations of our ongoing analyses of federal judicial selection processes and politics, the key focal point for understanding Senate confirmation processes required primary focus on the Senate Judiciary Committee with the expectation that, other things being equal, once nominees were reported out of Committee, confirmation outcomes would follow with some degree of predictability and regularity on the Senate floor. That expectation has been sharply curtailed by the increase in obstruction and delay that has become the norm. More than ever before, understanding the rhythm and pace of confirmation politics requires added attention to leadership strategies and constraints in the scheduling of floor votes on nominees as well as on the role and behavior of rank and file members of the Senate. Nowhere has this been more evident than in an effort to understand judicial selection politics during the first term of the Obama presidency.

Consistent with the historical norm, working relationships between the majority and minority staffs on the Judiciary Committee remain both relatively productive and efficient. The Committee's processing work does get done, and that has remained the norm throughout the stormiest periods of obstruction and delay by senators from within the Committee itself and on the Senate floor. Said one staffer:

> We're professional colleagues. I'm not sure we're best friends. We respect each other. We have a good working relationship. When we have disputes, they're resolved fairly quickly. We respect each other's right to a process....[S]taff fights...[are] not productive. We all have the same goal of getting the best people on the bench. We may differ on who, when, why and how, but that is the goal.

The same approach cannot, necessarily, be attributed to the Committee's members. Noted the staffer: "The Judiciary Committee is probably viewed as the hand to hand combat of the Senate. We try to leave that to the members and the speeches."

We have already seen how Committee inaction can result from any unreturned Blue Slip—nonaction that is fully respected by Judiciary Committee Chair Patrick Leahy. Yet even in those instances when Blue Slips have been returned and Committee hearings have gone forward, significant delays remain commonplace in Committee processing as minority Republican members have used routinely their prerogative to hold over decisional votes on nominees for subsequent Committee meetings because they have not fully vetted a candidate. In the eyes of Republican staff, this is simply due diligence:

> Holding over...is really routine.... Eighteen senators cannot ask all of their questions in a 45 minute hearing. We don't hold these hearings to make it painful for the nominee. A District confirmation is not a Supreme Court hearing. Usually two or three senators come in, do their five minutes and go because they have five other Committee meetings. We have a standard set of questions that I would not want to take time

10. Interview with James Christophersen, January 7, 2013. Other quotes from Mr. Christophersen are drawn from this interview.

PARTISAN MAKEUP OF THE BENCH

Owing primarily to the sizeable number of district court confirmations during the 112th Congress, Obama was able to reverse the trend of his first two years and increase the proportion of active judges on the lower federal courts appointed by Democrats.[1] At the start of the 112th Congress, the proportion of authorized seats on lower federal courts held by judges appointed by Democratic presidents was 37.9 percent, increasing to 44.1 percent as the 112th ended (+6.2%). See Table 1. This is quite substantial and is even more significant when we compare it to recent presidents. As he completed his first term, W. Bush had increased the proportion of Republican appointees by only 1.5 percent (51.1-52.5). However, Obama's success with judicial appointments in the 112th Congress was still not enough to shift the overall partisan balance on the lower federal courts in the Democrats' favor. This is due to the considerable partisan inequity on the lower courts when he entered office, where Republican appointees held 17 percent more seats than judges appointed by Democratic presidents.

While it is instructive to examine the overall partisan change on lower courts, we also separately analyze the district courts and courts of appeals, as two somewhat different stories are told at those different levels of the federal courts.

District Courts

Judicial selection continued to be affected by the bitter partisan political divide we observed throughout Obama's first two years in office, as evidenced by the increase in the Index of Obstruction and Delay for both district court and courts of appeals nominees. (See Tables 2 and 3 in the main text.) However, during the 112th Congress, the White House seemed better positioned to contend with the obstruction, especially over district court nominees, and was able to increase the proportion of authorized seats on district courts held by Democratic appointees by 6.8 percent. This sits in stark contrast to the 111th, during which Obama's impact was limited by a scant 44 confirmations, explaining why the proportion of authorized seats on lower federal courts held by Democratic appointees decreased by 2.5 percent. Overall, as shown in Table1, at the beginning of the 112th Congress, Democratic appointees held 37.3 percent of the total authorized positions for the district courts and by the end, the percent had increased to 44.1 .[2]

As is discussed in the main text, the vast resources devoted to securing confirmation of two Supreme Court nominees, coupled with the typical issues of "setting up shop," slowed the nomination process over the first two years. This was not the case during the latter half of Obama's term. Even with Republicans continuing to treat every district court nominee with the scrutiny previously reserved for Supreme Court or controversial courts of appeals nominees, Obama obtained confirmation of 97 district court judges out of 127 nominations (76.4%) from 142 appointment opportunities during the 112th Congress, bringing the total for his first term to 141.[3] After four years in office, President Obama's appointees accounted for 21.1 percent of federal district judges in active service. While at first blush this seems robust, it is considerably lower than the 25.2 percent and 26.2 percent of district court judges appointed by W. Bush and Clinton at this juncture in their presidencies.

Obama's successes at the district court level during the 112th Congress can be explained in part by the fact that more than one in 10 seats on the district courts were left vacant at the end of the 111th, accounting for 48 percent of his appointment opportunities.[4] By the time Congress adjourned, the vacancy rate had decreased to 6.8 percent. Even with the surge in district court confirmations, Obama's ability to shift the overall partisan balance on the district courts was constrained, as was the case during the first two years of his presidency, relatively large numbers of prior Democratic appointees retired, resigned, or were elevated.

To a considerable degree, the pattern observed for the 111th Congress, at least at the district court level, was replicated in the 112th: a Democratic president replacing judges appointed by his Democratic predecessor. During Obama's first term, 158 vacancies occurred and the vast majority of those vacancies came from Democratic appointees, a full 70.3 percent. This makes sense: Judges who are eligible to take senior status or retire with full benefits would probably do so under a partisan-compatible President and Senate since their replacement is more likely to be ideologically similar. However, the President's ability to alter the partisan makeup of the bench is contingent upon his ability to replace appointees of the other party with his own. Given that more vacancies occurred on the district courts during Obama's first term than in recent times—158 compared to 132 during W. Bush's first term—and that the overwhelming majority of these vacancies came from Democratic appointees, Obama was more limited in this regard despite the considerable number of appointments during his last two years.[5]

Also notable about the vacancies that occurred during the 112th Congress is that, of the 74 judges who left active

1. Over Obama's first two years, the proportion of authorized seats on lower federal courts held by judges appointed by Democratic presidents dropped from 39.1 percent to 37.9 percent.

2. Excluding the 45 vacancies, 47.3 percent of active status district court judges were appointed by Democrats.

3. By comparison, at this point in their presidencies, Clinton and W. Bush successfully appointed 169 (83.3 percent of nominees) and 168 (87.5 percent of nominees) district court judges, respectively.

4. Of the 142 opportunities, 68 (48 percent) came from inherited vacancies, 58 from judges taking senior status, five from elevations to the courts of appeals, five from retirements, one from resignation, and five from death.

5. Vacancy data include judges who left the bench due to retirement, resignation, elevation, and death—the overwhelming majority, of course, took senior status.

TABLE 1. Make-up of Federal Bench by Appointing President, January 1, 2013 (Lifetime Positions on Lower Courts of General Jurisdiction)

	District Courts				Courts of Appeals			
	Active		Senior		Active		Senior	
	%	N	%	N	%	N	%	N
Obama	21.1	140 *	0.0	0	16.2	27	0.0	0
Bush, G.W.	36.6	243	0.7	3	31.7	53	1.9	2
Clinton	22.1	147	24.8	101	25.1	42	10.7	11
Bush	7.2	48	14.3	58	6.0	10	18.4	19
Reagan	5.0	33	30.5	124	9.6	16	35.0	36
Carter	0.75	5	18.4	75	3.0	5	18.4	19
Ford	0.15	1	2.2	9	0.6	1	2.9	3
Nixon	0.15	1	7.1	29	-	-	8.7	9
Johnson	0.15	1	1.5	6	-	-	3.9	4
Kennedy	-		0.5	2	-	-	0.0	0
Vacancies	6.8	45			7.8	13		
TOTAL	**100.0%**	**664 ***	**100.0%**	**407**	**100%**	**167**	**100.0%**	**103**

* This number differs from the total number of district court judges appointed by Obama because one of Obama's district court judges was elevated to the Ninth Circuit Court of Appeals.
**Does not include temporary District Court judgeships. (Percentages were rounded to 100%.)

		2011	2013
District Courts	D	37.3%	44.1%
	R	52.5%	49.1%
	Vacancies	10.1%	6.8%
Courts of Appeal	D	40.1%	44.3%
	R	51.5%	47.9%
	Vacancies	8.4%	7.8%
Overall	D	37.9%	44.1%
	R	52.3%	48.9%
	Vacancies	9.7%	7.0%
Overall (not including vacancies)	D	42.0%	47.5%
	R	58.0%	52.5%

service on the federal district courts, 50 (67.6%) were Clinton appointees.[6] This represents the "generational effect," which posits that the overall complement of departing judges in any given administration is dominated by the appointees of a specific predecessor of the same party as the sitting president. Carter appointees departed during Clinton's administration, Reagan appointees departed during W. Bush's eight years, and now we see Clinton appointees leaving in abundance. In fact, nearly 42 percent of active Clinton judges left the district court during Obama's first term. However, considering the large number of outstanding vacancies, if the White House is able to continue the pace of confirmations from the 112th Congress, Obama may be able to bring partisan equity back to the district courts by the end of the 113th Congress, even without Congress passing some form of legislation creating new judgeships for both the district courts and courts of appeals.

Courts of Appeals

The courts of appeals reveal a somewhat different picture. While his successes at the district court level during the 112th Congress represented a turnaround of sorts, Obama was actually less successful at the courts of appeals during the latter half of his term; he secured confirmation of 12 out of 21 nominations (57.1%) in the 112th compared to 15 out of 22 nominations (68.2%) during the 111th. This represents a 62.8 percent confirmation rate for the first four years.[7] But even with his diminished achievement, the appeals courts moved closer

6. This includes three Clinton appointees who were elevated from the district court to the court of appeals.
7. At this same point in W. Bush's presidency, only 34 of his 65 nominees had been confirmed (52.3 percent).

to partisan equity—36.5 percent of authorized seats on the courts of appeal were held by judges appointed by Democratic presidents at the start of Obama's term, and this number increased to 44.3 percent at the end of his four years in office.Moreover, taking into account only active judges, parity is even closer—48.1 percent of active judges are Democratic appointees.

In a comparison of district courts to courts of appeals, another difference emerges when we analyze vacancies and appointment opportunities. At the start of the 112th Congress, there were 14 appellate court vacancies, and only 11 additional appointment opportunities arose during the term—nine judges took senior status and two died. This is proportionately fewer than at the district court level, 6.6 percent compared to 11 percent. In total, over his first four years, Obama had 54 appointment opportunities to the courts of appeals, for which he submitted 43 nominations. He succeeded in getting 27 nominees confirmed (50%), which is less than the 141 of 253 opportunities at the district court level (56%). This represents a turnaround from the pattern of the 111th Congress, during which he was much more successful at the appeals court level than the district court.

But once again, and most importantly, the President can only impact the balance on the bench if he is able to appoint judges to seats previously held by the opposing party or newly authorized seats. This is where Obama's confirmations to the appeals court truly make their mark. Of his 27 appointments, 14 were to seats where the incumbent was appointed by a Republican and one was to a new seat (55.6%). Also, whereas 70.3 percent of those who left the district court were appointed by Democrats, this number was considerably lower at the courts of appeals (14 of 27, or 51.9%). In fact, more Republican appointees left active service during the 112th Congress than did Democratic appointees. This means that, going forward, Obama does not have to play as much "catch up." Indeed, Obama may be able to more greatly impact the overall partisan makeup of the bench because, at the court of appeals level, the Clinton cohort seems to be retiring and resigning at a far lesser rate.

Another way to evaluate the impact of a president's appointees on the partisan makeup at the appellate level is to aggregate by circuit, thereby allowing an assessment of how many circuits have

Republican-appointed majorities or vice versa.[8] Analyzing the 112th Congress in this manner confirms the considerable impact of Obama's appointees at the appellate level. At the start of Obama's presidency, nine of the 12 geographical circuits had Republican-appointed majorities, one had a Democratic majority, and two were evenly divided.[9] After his first term, however, only seven courts had Republican majorities and five had Democratic majorities.[10] This stands in contrast to the changes Clinton or W. Bush were able to exact after their first terms, where they were able to shift the court majority on only one and three courts of appeals, respectively.

Additionally, Obama made significant strides in decreasing the number of courts on which Republicans, particularly W. Bush nominees, constitute a supermajority. When he entered office, six of the 12 geographical circuits had Republican supermajorities where Republican appointees occupied at least twice the number of seats as Democratic appointees.[11] At the end of his first term, only three Republican supermajorities remained—in the Fifth, Seventh, and Eighth Circuits. Projecting out to the end of Obama's second midterm, given the recent vacancies on the First and Tenth Circuits and the Obama administration's increased promptness in offering nominees, it is very likely we'll see the partisan balance of these two courts shift in the Democrats' favor.

Overall, Table 1 highlights W. Bush's success in making his mark on the lower federal courts: 36.6 percent of judges remain on the district courts, and 31.7 percent on the courts of appeals were appointed by him. The data in Table 1 also underscore the impact of judges opting to take senior status, since the number of senior judges is more than half the number of active judges on each court level. Republican appointees make up a clear majority of senior judges—55 percent and 67 percent on the district courts and courts of appeals, respectively. While senior judges have reduced caseloads, they nonetheless are a critical component of the judiciary, and certainly the strong Republican majority has an impact on judicial decision-making. Even with the increase in Clinton judges taking senior status, especially at the district court level, absent a dramatic rise in the number of full retirements by senior judges, Republicans will have the numerical advantage for many years to come.

To impart change on the partisan makeup of the bench, the hurdle Obama must overcome grows when considering senior status judges. Combining both court levels, 54.3 percent of all judges currently hearing cases were appointed by Republican presidents.[12] The Republican edge is slightly more pronounced at the appellate level, where 58.3 percent were appointed by Republicans, as compared to 53.5 percent on the district courts. Reagan appointees continue to dominate the group of senior judges—they comprise nearly one third of the judges on the federal district and appellate courts. ★

8. For our discussion of the partisan makeup aggregated by circuit, we are referring to majorities and supermajorities of active judges, not authorized judgeships.

9. Throughout our analysis, we consider Roger Gregory to be a W. Bush appointee. The circuits with Republican majorities are the First, Fourth Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits; even are the Second and Third Circuits; and the Democratic majority is the Ninth Circuit.

10. The circuits with Republican majorities are the First, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits; Democratic majorities are the Second, Third, Fourth, Ninth, and Eleventh Circuits.

11. On January 1, 2009, the circuits with Republican supermajorities were the Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits. However, the Republican supermajority on the D.C. Circuit was lost when Reagan appointee, Douglas H. Ginsburg, took senior status, not with the confirmation of an Obama nominee.

12. Adding senior judges to those in active service totals 1,281 judges, which increases to 1,339 when including vacancies.

> in a hearing [with]. If I need to drill down on… some controversial ruling, we're going to spend our time there, not 'Tell me your judicial philosophy? What sources of law will you use?' …Those kinds of things already go out routinely to every nominee and then in the hearing you can focus on where you need to hear the nominee's response to one or two issues that are troubling. So there's always questions….It's not delay.

What the Republicans characterized as the necessity for more time to get responses to routine questioning is viewed by others as a drastic change in the "routine" of Committee processes in the W. Bush years. One close observer of the Judiciary Committee process noted, "Of course there is some delay between the hearing and the Committee vote so that nominees can answer follow-up questions. But those answers are always submitted by Monday afternoon before a Thursday morning Committee meeting. Some cases might be unusual, but I'm not sure why it takes more than three days for every single nominee's answers to be reviewed and considered."

The alleged differences between the standards used by the Republican minority in a Democratic Senate during the Obama presidency and a Democratic minority in a Republican Senate during a period of the W. Bush presidency may only have been exacerbated by the different leadership styles of the Republican Judiciary Committee Chair Orrin Hatch and current Democratic Judiciary Committee Chair Patrick Leahy. As noted, Leahy has been an "absolutist," providing the greatest respect for minority prerogatives and the strictest interpretation of Blue Slip norms whereas, at times, Hatch allowed W. Bush nominees to proceed to a Committee hearing with the return of only a single Blue Slip, one deviation among a number of "looser" interpretations of protections for the minority within the Committee."

Over the years, Senator Leahy has been portrayed to us by several observers of Committee processes as universally respectful of minority rights and largely focused on the efficient processing of nominations at the Committee stage. While Leahy participates in discussions with leadership about scheduling floor action, his voice is one among several in working with Majority Leader Reid in mapping out strategies for moving nominees beyond the Committee stage.

One close observer of Committee processes noted, "[Leahy] has never been someone who uses power in a kind of way that forces people to act…. He is really sharp witted, smart, and I would also say he really cares about judges…and talks about it more than other people. But he doesn't do the things he'd need to do to galvanize people." Another observer added in a similar vein, "Leahy does what he can do. He is there on the floor all the time talking about judges. And they put together great pieces of information for the press and offices. And they are helpful in framing things… in a sound biteish way for us to complain about the pace. But, ultimately it's Reid who has to find the time in the schedule. Everybody knows that Leahy wants to move judges quickly. I don't think there's that much more that he could be doing."

Before moving on, note should be made of an additional ripple in Committee behavior associated with nominee processing during the 112th Congress. After Senator Charles Grassley replaced Senator Jeff Sessions as the Ranking Minority Member on the Committee, we have discerned a change in how self-reporting of drug usage during FBI investigations of nominees has impacted their movement through confirmation processes. For quite some time, such self-reporting of drug indiscretions by potential nominees, generally occurring during their youth in the volatile 1960s, were handled on a case-by-case basis. During the past two years, however, the standard for evaluating illegal drug use by judgeship candidates has been interpreted through strict and unyielding guidelines. In short, a nominee who has used marijuana postbar or a nominee who used any illegal drugs other than marijuana at any time after the age of 18 will be blocked from going forward to a hearing by the minority. Inasmuch as this constituted, at minimum, a "more focused clarification" of existing rules, according to a Republican Committee staff aide, or a stricter use of information gleaned from the FBI reports on specific nominees than existed in the past, as viewed by some in the majority, some nominees and potential nominees were caught in the interpretive transition and never went further in the process.

Justifying the imposition of a strict standard at the onset of Committee processes, a Republican Committee staff aide asserted, "It's in no one's interest to send up a nominee who's not going anywhere. It's a waste of time for the White House, a waste of time for the home state senator, it's a waste of our time. The pre-nomination can go months. If you find something early on that's going to be a show-stopper, cut and run. That's practical good government." The point is well-taken, and the standard to be used is widely understood, whether it is supported or not. Thus, as one senior Democratic Senate aide reported, "In the beginning, it was a new standard, so folks weren't aware about it on our side and now we're kind of catching up. So now we know. We get it." Getting it, however, remains a far different sentiment than liking it or being happy about its consequences. One opponent of the approach opined that the standard was, "A criterion that, one, has knocked out a lot of really good people and, two, I don't understand the relevance of a mistake you made when you were 18 or 19 on the kind of lawyer you've been for the decades since."

Once nominations are reported out of the Judiciary Committee, focus shifts to the majority party's leadership structure, specifically to the Senate Majority Leader, Harry Reid, who schedules nominees for floor consideration. Under present circumstances, this is no easy task. As a general matter, Reid employs a dual tracking system, dividing nominees according to whether they have been

nominated to a District or Circuit court seat.

Within each track, nominees tend to be brought forward in the order that they were reported out of Committee, with the District track queue moving at a quicker pace than the Circuit track. Rendering the processing order even more irregular is the reality that within the District and Circuit queues nominees are subdivided into those who are anticipated to require cloture before a vote can be had and those who are not. As a consequence of the obstruction and delay that we have alluded to throughout our narrative, what has resulted throughout President Obama's first term is a seeming ebb and flow in confirmation activity.

As one close observer of Senate processes described this reality:

> The last burst of activity you just saw [13 post-election lame duck confirmations discussed below] was the result of...threats that were made.... We have settled into a pattern of stalling. It may go well for a little while, and then it peters out, and then he threatens cloture on everybody and it spurs a deal, and then things run along very well for a little while until that deal runs out and then it slows down again....[During these deals] for a little while...they were moving every week a whole group of folks who were reported out at the same time. So it would be three or four District Court nominees per week and that's a great pace....But that's only happened for short little bursts of time.

For Reid, scheduling judgeship candidates requires the difficult acrobatics of balancing numerous and conflicting or shifting priorities in real time. A senior Democratic aide underscored the "zero-sum game" confronted by the Majority Leader. "He's got squeaky wheels in his caucus, so there are ten senators coming up and saying to him, 'You have to move the DOD authorization before the recess' and one senator coming up to him and saying, 'I have to get a judge done.' He hears DOD, but if he's got seven senators coming to him and saying 'My judge is stuck in the queue,' and the longer the queue is, the more there will be people talking to him. So, 'Okay, this really is a problem, it's time to have another throw down on the judiciary fight.'"

Some observers of the way in which the Majority Leader has gone about executing his delicate balance have been critical of what they see as an insufficient amount of aggressiveness on the part of Senator Reid. A Republican Senate aide chimed in, "Who's controlling the Senate? This is a Democratic Senate. It's not like Chuck Grassley and Mitch McConnell can run down and say, 'Hey, you're taking too much time on these votes.' Harry Reid is the Democratic leader. He sets the floor schedule and I can only think of three occasions when we said, 'Whoa, stop!' And those were the three clotures where votes went forward."

In our effort to better understand Senate floor action and the phenomenon of unprecedented obstruction and delay, our interviews included a focus on who, ultimately, was most responsible for the delay. Just as we have concluded that it would be difficult to fault Judiciary Committee Chair Patrick Leahy for floor inaction once his Committee had reported nominees, one cannot "credit" Ranking Minority Committee Member Charles Grassley for post-Committee processing delay.

As one senior Democratic Senate aide commented, "Once it's been reported from Committee, I don't think Grassley's a problem." As one would anticipate, conventional assessments of the unprecedented levels of obstruction and delay have placed primary responsibility at the doorstep of the Republican Party leadership, both in the Senate and beyond.

As articulated by People For the American Way's Marge Baker:

> I think it's coming from the highest levels of the Republican Party and I think this was part of 'Anything Obama gets blocked.' And this was a no-brainer for them because it met their ideological needs on the right.... The degree to which the Republican Party is willing to be so disrespectful of the Office of the President and so disrespecting of the American people [is astounding]. There was an election. And the continuing willingness to deny the legitimacy of the election and this presidency is beyond frustrating. It's ominous, and judicial nominations are part of that.

Most broadly, what Baker sees occurring is "Republican party discipline....This is a matter of a caucus determination that we are going to obstruct. And there aren't voices within that caucus who can speak up with any kind of authority and say, 'No, this is the wrong thing to do.'" Part of the equation includes electoral fear among Republican senators generally and, intramurally, immediate concerns about Tea Party power. This even touches Minority Leader Mitch McConnell who undoubtedly has concerns of a Republican Party primary challenge from the Right as he faces a reelection bid for a sixth term in 2014. One group leader from the Left opines:

> The problem is that you have a Republican Party that is so intimidated by the Tea Party that people have been taken out. Hatch was basically taken out the last two years because he was running and he had to watch his back. He was worried about a challenge. And Hatch, actually, never voted against cloture nor has he voted 'Present' because, I think, in is gut he is really troubled by this....Maybe now, post-election...there might be some voices within the caucus of the Republican Party who can step up and say, 'This is enough.' [But] we're seeing this on every single issue that the Republican Party is looking over its shoulder at potential primary challenges....It doesn't necessarily bode well having to deal with McConnell in this next cycle.

While we readily acknowledge the central role played by the Republican Party leadership and its agenda setting for the party caucus in fostering the unprecedented levels of obstruction and delay, our interviews have suggested an additional consideration has entered into the confirmation equation. Specifically, several interview sources have suggested, in differing ways, that a new, for lack of a better term, "third force" has become a key player in the politics of confirmation delay. An infor-

mal group of Republican senators from the extreme Right of the party who are not members of the Judiciary Committee nor of the party leadership have interceded as yet another informal "approval layer" in the judicial confirmation process.[11]

As one Democratic congressional staff member described this group:

> They've got a couple…on their side like Jim Demint and [Mike] Lee, but it's his little group they had to clear all this by.…I believe after the [Alison] Nathan nomination went through… She had…been cleared, it looked like it was going to be non-controversial, then right before the vote, the right wing got very spun up about her. And I think some of their senators said after that, 'we don't want to be caught unawares again so we, our special group…needs to clear everybody who's going through'. So it slowed down the process and got them even more involved in a way that can only be unhelpful.…I don't think that McConnell has any desire to move quickly and efficiently that is being inhibited, but I don't know if it's him really responding to his crazies or if it's his own agenda.

Succinctly describing the same phenomenon, a second aide noted, "It's almost like two separate processes. Which is…due to some of the right wingers on the other side, catering to them too much on the floor. That's been the frustration."

Viewed collectively, the sum total of processing delays encountered in the Judiciary Committee—the "new normal" for floor action and the added delays contributed by this so-called "third force," the obstruction and delay encountered by President Obama's nominees, particularly during the 112th Congress—was unprecedented. According to some on the Right, such as Curt Levey, what we have witnessed was simply "tit for tat" for the Democrat's treatment of the W. Bush nominees.

But what from the Right is characterized as "tit for tat," the Left see as qualitatively different in kind from what happened during the W. Bush years and, more to the point, ever before. Vincent Eng claimed, "I definitely think it's different in that normal, run of the mill types, the delay time is unreasonable. The holdup on Goodwin [Liu] was expected and probably warranted, they wanted to discuss him longer. But on a lot of these other individuals…when no one had any concerns about them? I do think that when you look at it compared to past administrations…it's definitely different and it's still continuing."

Marge Baker underscored several factors that she saw as deviations from the past:

> The fact that the obstruction is absolutely routine is a qualitative difference.…The fact that it has extended to District Court nominees is qualitatively different. And the fact that they are pushing it further, the fact that they push any number of cloture votes on nominees when…these cloture votes are overwhelming, and there's no basis for it, shows that there's something going on here that goes beyond what we saw in the past, which was the significant ideological concerns about a particular set of nominees who were filibustered.

In the final analysis for the Democrats, as one Senate aide noted, a case could not be made for historical equivalence. "There's a difference between what a home state senator will do in their state regarding those nominees, and that can really vary depending on the state and the senator, versus what a caucus does in an ideological and partisan way about nominees as a whole." Another long-term aide commented on the extension of the battlefield. "The easiest [way] to understand equivalency is District Court nominations.…They've created this new class of hostages that we call District Court nominees that they won't confirm until giving us some of them after many many months." Beyond questions of precedence and equivalence, one thing that is certain is that from the Republican perspective, as a Democratic staffer commented, they were "wildly successful if their goal was to keep the President from confirming Circuit Court nominees.…We didn't confirm a single Circuit Court nominee last year that didn't take us first filing cloture. They didn't consent to a single Circuit Court nominee last year until we had to force the issue, and then only a handful got done." Taking a broader view, a senior Democratic aide concluded:

> [I]t's a very different way of operating, a way of thinking about it, and they've been using tactics for the last four years that have worked out pretty well for them.…Why would they change their tactics? The Demint group may go away. There may be some slight changes. But it seems to me that they're gonna hold over every nominee in Committee, they're gonna take their time reviewing people's files, nobody is going to get a vote in Committee for a month after their hearing, they're going to get piled up on the floor.…All this tit for tat stuff isn't just, 'This isn't so unusual.' It's 'We're paying you back kind of talk.' But it's a tat with no tit or a tit with no tat. There's a vitriol underlying a lot of it that is troubling.

Filibusters, Cloture, and Changing the Rules of the Game

Just as we have witnessed that confirmation statistics can, at times, be interpreted to serve the ends of the interpreter, it is also the case that there is much disagreement among the combatants in the judicial selection wars over the matters of filibusters, filings for cloture, cloture votes, and their consequences. Clearly, in the ongoing game of pointing fingers regarding obstruction and delay in advice and consent, blame lies in the eyes of the beholders. Indeed, it is even the case that during the course of President Obama's first term in office, Democrats and Republicans could differ on how often impasses in the confirmation process resulted in filibusters. For their part, Republicans have accused the Democrats of, at times, conflating the filing of a cloture petition to overcoming the inability to move a nomination forward with the existence of a filibuster.

This may be one of those instances where both sides in the controversy have a good dose of truth on

11. We are confident that this "third force" exists and are identifying it here, for the first time to our knowledge, as an active participant in confirmation politics.

their side. Formal filibustering of nominees was considerably more frequent during the W. Bush years than in Obama's first term largely because Democratic opposition to candidates they viewed as outside of the mainstream surfaced largely on the Senate floor in the form of filibusters. The Democratic Judiciary Committee minority seemed less likely or were unable under different operative Committee rules to hold nominees at the Committee stage. Individual Democrats were not as likely as their Republican counterparts to deny unanimous consent to move a nominee forward. In short, Democrats during the W. Bush years primarily opposed nominees on the Senate floor through the filibuster tactic. Republicans have been unusually willing to deny nominees unanimous consent to move forward at an earlier stage of the confirmation process, thus resulting in filings of cloture prior to any formal filibuster being mounted.

In reconciling these differences, it is important to recognize that just as stopping a filibuster through a successful cloture vote requires the mounting of a supermajority of 60 senators, filing for such a cloture vote to move a nominee forward is also fraught with significant risks. When such a cloture petition is filed, it is done with the hope that a deal can be struck to move a nominee forward. That said, as one senior Democratic staff aide explained, in such instances, "We had to be prepared... even if McConnell wanted to move forward, that one of [the Republican senators], and all it would take is one, could make us use…30 hours worth of time. So we need to be prepared, when we threaten to do something like that…that we're not going to be able to do anything else while we run all that time." This reality flows directly from the cloture rules existing during Obama's first term. Noted one staffer:

> Especially when you're filing on one nominee, it's pretty easy for them. It's in their interest to waste our time because it means we can get less done….When we file on one nominee, we have to wait two days for it to ripen and 30 hours after cloture, so you need three days of floor time that you're willing to devote to a nominee. And, yes, it's not that big a deal for them to say we're gonna waste your time and you can't get to the next thing you want to get to until Thursday. We're happy to waste a week staring at each other while we wait for cloture time to elapse….So when folks on the other side say, 'Harry Reid can bring somebody up at any time,' it's disingenuous. He can, but [there have to be] windows of floor time that align up just right [in order to] do that….So, with 17 cloture petitions it is unlikely they are going to make us run all that time but, with one, it's super easy to do that and it doesn't cost them anything.

In the unlikely event that a cloture threat on 17 nominees were to reach fruition, the results for the operation of the Senate would be disastrous. As one Democratic aide put it, in such an instance, "the minority is saying, 'Fine, Harry Reid. You can go and file cloture on these, but it's going to cost you about a month.'"

In such a setting, it is little wonder that speculation heightened during the 112th Congress that the Democrats, through their Majority Leader, would resurrect consideration of the "nuclear option." That is, an approach to altering the Senate's rules such that a simple majority could work its will in confirming judges (and attending to other legislative matters) effectively bypassing current cloture and filibuster rules. The irony of such speculation is that the very same nuclear option was considered by the Republicans during the W. Bush years as a mechanism to overcome Democratic filibusters of W. Bush nominees. This was only averted by an eleventh hour agreement of the so-called bipartisan "Gang of 14" senators. Under the circumstances existing near the end of the 112th Congress, Reid certainly seemed poised to "go nuclear."

Alongside talk of the Senate going nuclear, similar assertions coexist about the necessity and eventuality of forging a compromise. A senior Republican staff aide asserted, "I think that bipartisan groups will get together like we saw in the Gang of 14. I don't think that anybody wants to blow up the Senate. It's all kind of reckless talk." Democratic supporters of Obama's nominees, many of whom feel that too much was given up in return for the Gang of 14 solution the last time around, are fearful that a similar deal would be reached this go round. Indeed, one close observer of judicial selection politics predicted, "They're gonna make some pathetic agreement….They're gonna get rolled…because they're Democrats. We need some fighters in there who will put on brass knuckles and play some hardball."

Contemplating the parameters of a possible deal that might significantly shorten the post-cloture time, at least on District Court nominations (a deal that came to pass in the 113th Congress), White House Senior Counsel Chris Kang admitted, "That gets you somewhere," tempering the thought, however, with his broader concerns:

> In the grand scheme of things, it shouldn't get you anywhere. It shouldn't be that we're changing the rules for filibustering District Court nominees. Before President Obama, cloture had only been filed on 3 District Court nominees. And the fact that Senator Reid had to file cloture on 20 of President Obama's District Court nominees in order to get them moving is sort of absurd….It is nice if you have to do that again we're only talking about taking up 40 hours instead of 600 hours. But that can't actually be progress.

While Kang was somewhat more supportive of a similar rule change that would address delay in Circuit Court confirmations, such an agreement is not in place as of this writing and does not appear to be in the offing. More to the point, Kang and others consider such agreements, "a solution in search of a made up problem. This shouldn't be a problem we're trying to solve." Kang cites Denny Chin and Barbara Keenan as two examples of Obama nominees who Democrats widely viewed as consensual and noncontroversial but who, nevertheless, experienced lengthy confirmation delays and cloture filings before being confirmed unanimously.

As noted above, some Senate rules reforms were passed in late January of 2013, post-dating the 112th Congress and the scope of our analysis. At bottom, the changes agreed to were relatively minimal in scope. Among them was the inclusion of a standing order that includes limitation of post-cloture debate from 30 hours to two hours, albeit only on District Court nominees. Thus, in practice, the Senate was enabled to confirm 15 District Court nominees in the same time that it could previously confirm only a single nominee. Once again, many Democratic supporters were disappointed with the agreement, as they had been with the Gang of 14 solution years earlier, underscoring that it was premised only in a Standing Order, only in place for this Congress, and not a change in the Standing Rules per se. Clearly, the change was limited in scope, not reaching the critical obstruction and delay in Circuit Court confirmations.

That said, a senior Democratic Judiciary Committee aide could still point to an important silver lining. "With the rules change it seems like the leadership hand on both sides has been strengthened in a way. Something that is opposed by one senator is not just going to be held any more. Especially with nominations, if you can get cloture, it's not 30 hours anymore, just two hours. The person says his piece and then we move on."

Clearly, the new agreement on District Court nominees will not end the discussion of both additional potential rules reforms aimed at blunting the impact of cloture rules and filibusters imposed in judicial nominations. Nor will it end continued discussion and consideration of Democratic resort to the nuclear option. Indeed, as the agreement continues to hold sway in the 113th Congress, its utility or lack thereof will contribute a good deal to the future terms of the reform debate.

The D.C. Circuit Court of Appeals

The D.C. Circuit Court of Appeals is universally considered the second most important court in America, both because of the nature of its docket that includes an unparalleled amount of litigation on the scope of federal governmental regulatory authority and because it's a stepping stone to the High Court. Four of the present justices, including Chief Justice John Roberts, were elevated to their present seats directly from the D.C. Circuit. As a consequence of both the importance of its docket and the potential "rising star" status of its members in an era of extreme partisan and ideological divide on the issue of staffing the federal courts, filling D.C. Circuit vacancies has become second only to filling Supreme Court vacancies in the attention its nominees draw and the controversies that they can engender. Indeed, the circuit has particular relevance for the Obama administration as much of the legitimacy of its domestic policy agenda has and will be decided by the court's judges. As one group leader commented, "Putting aside ideology, putting aside politics, this is the circuit that is going to decide, one way or another, much of Obama's first term agenda. So it's in your own interest to fully seat those vacancies."

For his part, while President George W. Bush experienced some obstruction and delay in filling vacancies to the D.C. Circuit, including an inability to seat successfully two nominees, Miguel Estrada and Peter Keisler, he was able, nevertheless, to fill four seats on the 11-member court, three of whom (Janice Rogers Brown, Thomas Griffith, and Brett Kavanaugh) remain on that bench today. His fourth D.C. Circuit appointee, John Roberts, was later elevated to the Supreme Court Chief Justiceship, succeeding William Rehnquist. It is in this context that the difficulties that the Obama administration faced in its first term, when it enjoyed the prospect of three D.C. Circuit judgeships, but ultimately did not fill any, can best be understood.

One of the three seats, coincidentally the Roberts seat, did have an Obama nominee, Caitlin Halligan, languish without an up or down Senate floor vote from the time of her nomination in September 2010 through several renominations after being returned to the President, as is required, at the end of congressional sessions. Halligan had been recommended for approval by the Senate Judiciary Committee on a straight 10-8 party-line vote but ultimately lost a cloture vote to bring her nomination to the Senate floor in December 2011, after which her nomination saw no further formal Senate action for the remainder of that session. After Obama's reelection, Halligan was renominated to the D.C. Circuit for consideration in the 113th Congress, only to lose another attempt at cloture in March 2013. A few days later, at Halligan's request, the President reluctantly withdrew her nomination.

The Halligan outcome represented a serious blow to the President's judicial selection efforts generally and, specifically, to his quest to make inroads on the critical Republican-dominated D.C. Circuit. Much like Goodwin Liu in Obama's first term, Halligan's candidacy became a lightning rod for Republican opposition. Like Liu, she was portrayed as a liberal extremist, particularly "bad" on the hot-button issue of gun rights.

Particularly irksome for the Democrats was their inability to find "comparables" in the W. Bush experience to the Halligan opposition. People For the American Way's Marge Baker saw "no earthly reason why she should be denied a confirmation." Drawing analogies to the confirmation of the very controversial Janice Rogers Brown[12] to the same court during the W. Bush years, a senior Democratic congressional staff member exclaimed, "But the NRA didn't get a vote. Was she Janice Rogers Brown? Janice Rogers Brown is serving on the D.C. Circuit right now. Caitlin Halligan? In terms of ideology, is that equivalent?...[Brown] said, 'Social Security is cannibalizing our young! Remember that?"

The failure to gain cloture on Halligan in March 2013 and her sub-

12. Brown, along with fellow controversial nominees William Pryor and Priscilla Owen, had gained confirmation as an explicit part of the bipartisan Gang of 14's agreement that had averted imposition of the nuclear option in 2005.

sequent withdrawal from further consideration, along with the Srinivasan confirmation early in the 113th Congress, blunted any possibility of a package of four nominees for the D.C. Circuit. But in nominating a slate of three candidates in June 2013, none of whom would satisfy any Republican willingness to compromise on a negotiated approach to filling the D.C. Circuit, the Obama administration has clearly thrown down the gauntlet on a coming D.C. Circuit battle.

From the Democratic perspective, the question arises as to why such a compromise—one that, for example, included Peter Keisler—would be necessary. Directly addressing the question of a package possibility, a senior Democratic Judiciary Committee staff member observed, "From where we sit, these are the kind of nominees that should be able by any standard that's ever been used for nominees…be confirmed. If you're the administration and you look at that, you can bang your head against the wall and say that there's nobody we can get through…or you try to construct a deal….We gave them Janice Rogers Brown. We gave them their part of the deal already."

The second Obama nominee to the D.C. Circuit, Sri Srinivasan, was nominated late in the President's first term in June of 2012. Understandably, his nomination did not move forward in the context of the 2012 presidential election cycle. That said, his nomination was not one that, out of the gate, thrilled the Democratic base, particularly in juxtaposition with the stalled Halligan candidacy.

In particular, concerns were raised that Srinivasan did not fit the profile of a judge Democrats would find congenial in cases pitting labor interests with those of business. With some sense of irony, a progressive advocate generally supportive of the administration's nominees said of Srinivasan, "Here you're gonna have a candidate who should sail through. Republicans ought to be thanking the President for nominating someone like Sri….He'll probably be good on a few civil rights issues but on business issues I worry. I hope I'm wrong."

Reacting in a similar vein, a senior Democratic legislative aide added, "If I'm the White House and I'm looking at what they did to Caitlin Halligan and the demands that have slowed down the nomination of Sri Srinivasan, who is no left winger, I think you've got to look and say, 'Who can we nominate?'"

After little activity on his nomination in the waning months of the 112th Congress, Srinivasan was renominated by President Obama in January 2013 for consideration by the 113th Congress. There was some expectation that the nomination, despite progressive doubts about his bona fides, would face significant opposition from the Republicans who had shown no enthusiasm for seating any nominee on the D.C. Circuit. While Curt Levey admitted that Srinivasan might get confirmed, he was quick to add, with direct reference to the failure of the D.C. Circuit candidacies of Miguel Estrada and Peter Keisler during the W. Bush years:

> The Democrats set the bar very high for the D.C. Circuit and there's no reason why the Republicans should lower it….He's got a couple of amicus briefs, one was affirmative action… supporting racial preferences in university admissions [and one] opposing voter ID laws. He's also got problems—the bitterness and just the higher level, bitterness aside, the higher level of scrutiny that D.C. Circuit nominees are going to get. And people often point out that the D.C. Circuit doesn't work that hard…. It's not like there's real pressure to fill those.

In the end, Srinivasan was, somewhat surprisingly, confirmed unanimously by the Senate in late May 2013 and is now considered a frontrunner possibility for nomination to any Supreme Court vacancy that might arise during the President's second term. The Srinivasan confirmation notwithstanding, the playing out of the Halligan nomination and her bitter defeat via Senate inaction remained a major blow to the President and progressive Democrats who were still smarting from a similar denouement in the failed 9th Circuit nomination of Goodwin Liu during the 111th Congress.

In the final analysis, what happens on the D.C. Circuit during President Obama's second term in office may better define his legacy of success or failure in filling Circuit Court vacancies. Indeed, at the end of the 112th Congress, Vincent Eng reflected the views of many progressive forces supportive of the President yet seeking a more aggressive stance on judicial nominations when he concluded, "The D.C. Circuit will set the temperature for the President's nominees going forward, especially for the more exciting, on the progressive side it's called exciting, on the Republican side it's called controversial. I do think that if the President can get some wins on the D.C. Circuit, [it] will provide some more strength within the White House to go a little bit more progressive."

Following the Srinivasan confirmation, President Obama nominated a diverse set of three candidates for the remaining vacancies on the all-important D.C. Circuit bench. At the time of this writing, little if any controversy has risen over the professional qualifications or merits of these nominees, all of whom appear sterling. In putting forward a group of three nominees, the White House was acting consistently with the counsel of judgeship advocates.

Instead of attacking the candidates per se, however, the Republicans led by Judiciary Committee ranking minority member Senator Grassley have attacked (via a legislative proposal) the very existence of the seats themselves, claiming that the court is overstaffed and filling the vacancies is unwarranted. Interestingly, the Srinivasan confirmation filled the eighth seat on the D.C. Circuit, with the remaining nominees prospectively filling seats 9, 10, and 11. Despite not successfully appointing Miguel Estrada and Peter Keisler to the D.C. Circuit, President W. Bush was able to fill seats 9, 10 (twice), and 11 on the court with the support of Senator Grassley. Presently, the battle has been joined with the President having introduced his nominees

DIVERSITY OF THE BENCH

As an infographic on the White House website succinctly states, Obama's judicial nominees embody "historic successes," especially in terms of adding diversity to the federal bench. Building on the historic "firsts" of the 111th Congress, during which 70.5 percent of Obama's appointees were nontraditional, the administration continued its efforts to shape the judiciary so that "it better reflects the nation it serves."[1] In the courts of appeals, Adalberto Jordan is the first Hispanic American to serve on the Eleventh Circuit and Jacqueline Nguyen is the first Asian American woman to serve as a federal appellate judge. The results are similar for the district courts: Women were confirmed to district courts in two of the seven states in which no woman previously had served (Maine and Alaska); the first Hispanic was confirmed to a district court in Oregon; and the first Asian American was confirmed to district courts in Nevada and Pennsylvania. Notably, during the 112th Congress, three openly gay judges were confirmed to district courts one of whom, Paul Oetken, is the first openly gay man confirmed to any federal court.

These historic firsts are not surprising, given the high proportion of nontraditional appointees during Obama's first term. Out of 170 appointments to lifetime judgeships on courts of general jurisdiction, 105 were nontraditional, that is, were not straight white males, and total a remarkable 61.8 percent. As Table 1 notes, 70 women were confirmed, which constitutes over 40 percent of Obama's appointees. Of these 70 women, 39 percent were women of color. The proportion of women confirmed far exceeds that of any previous administration (including Clinton's, which made the largest impact on diversifying the federal bench prior to Obama). African American appointees also enjoyed great success, as they comprised 17.6 percent of those confirmed, and Obama's 20 Hispanic American appointees constituted 11.8 percent of his total appointments. Both were proportionately higher than any previous administration's. However, the most striking comparison across presidential administrations is for Asian Americans and openly gay individuals. During his first term in office, Obama appointed 12 Asian Americans and three openly gay individuals to the federal bench, which, in absolute numbers, *triples* that of any other president during an *entire* presidency. The Asian American appointees constituted seven percent of those confirmed over Obama's first four years; the next largest proportion is 1.4 percent during Clinton's tenure, a truly remarkable difference. Furthermore, when he named three openly gay individuals to the bench, Obama appointed more LGBT jurists than had ever served as federal judges in the entire history of our nation.

As these extraordinary statistics illustrate, President Obama is committed to increasing the diversity of the federal judiciary, and, proportionately, in every category he has exceeded prior administrations. It will be of interest, however, to see if in absolute numbers he will surpass Clinton's record of nontraditional appointments by the end of his second term.

When we left our discussion of Obama's impact on the overall diversity of the federal courts at the end of his first two years, our conclusion was that despite his attention to appointing diverse judges, the relative impact of the new set of appointees was fairly small. In fact, the percentage of nontraditional judges in active service (when not double counting women who also belong to a racial minority group or who are openly gay) 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 at Obama's first midterm. We hypothesized that three factors helped explain why the overall impact of Obama's confirmed judges was so small, despite the large proportion of nontraditional nominees.

First, in absolute numbers, especially at the district court level, Obama made fewer appointments than his immediate predecessors. Thus, 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, there were more vacancies created by nontraditional judges leaving active service or being elevated to a higher level court during Obama's first two years in office (37) than during either W. Bush's (13) or Clinton's (17) first two years. So in effect, Obama was playing catch-up—appointing a diverse set of judges to fill the gap left by the previous cohort but not moving the "diversity" ball forward. Furthermore, while it appeared that Obama's diverse appointees had more of an impact on the appellate level (he was able to increase the overall diversity of the appeals courts by 11 percent during the 111th Congress), he did so for the most part by elevating nontraditional judges from the district courts, not by adding *additional* "diverse" judges to the bench.

Third, he appointed a high proportion of "double diverse" nominees, i.e., those with more than one nontraditional characteristic. 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.

However, we predicted that, given the large number of district court vacancies left at midterm, the waning focus on elevating nontraditional district court judges and the administration's continued emphasis on diversity, Obama would be able to impact the overall diversity of the federal courts much more significantly during the second half of his term, and this indeed occurred.

As of January 1, 2013, 28 percent of judges in active service were women, an increase of 10.8 percent from Obama's first term. In terms of racial and ethnic diversity, 11.7 percent of federal judges were African American, 8.2 percent were Hispanic American, and two percent were Asian American, an increase of 7.7 percent, 15 percent, and a stunning

1. Federal Judges That Resemble the Nation They Serve, http://www.whitehouse.gov/blog/2012/03/29/federal-judges-resemble-nation-they-serve.

TABLE 1. Nontraditional Lifetime Judicial Appointees to Federal Courts of General Jurisdiction by Presidential Administration from Franklin Roosevelt through Barack Obama's First Term

President	Women		African American		Hispanic American		Asian American		Openly Gay	
	#	%*	#	%*	#	%*	#	%*	#	%*
F. Roosevelt	1	0.5	—	—	—	—	—	—	—	—
Truman	1	0.8	1	0.8	—	—	—	—	—	—
Eisenhower	—	—	—	—	—	—	—	—	—	—
Kennedy	1	0.8	3	2.4	1	0.8	1	0.8	—	—
Johnson	3	1.8	10	5.9	3	1.8	—	—	—	—
Nixon	1	0.4	6	2.6	2	0.9	1	0.4	—	—
Ford	1	1.5	3	4.6	1	1.5	2	3.1	—	—
Carter	40	15.5	37	14.3	16	6.2	2	0.8	—	—
Reagan	29	7.8	7	1.9	15	4.0	2	0.5	—	—
G.H.W. Bush	36	19.3	13	7.0	8	4.3	—	—	—	—
Clinton	108	29.3	61	6.6	25	6.8	5	1.4	1	<1
W. Bush	69	21.4	24	7.5	30	9.3	4	1.0	—	—
Obama	70	41.2	30	17.7	20	11.8	12	7.1	3	1.7

*Percentage of total number of appointees to lifetime judgeships on courts of general jurisdiction (U.S. district courts, U.S. appeals courts, and the U.S. Supreme Court).

112.5 percent, respectively. Additionally, less than one percent of federal judges were openly gay, but this still represents a 200 percent increase from the start of Obama's first term. As discussed earlier, the percentage of nontraditional judges in active service (when not double counting women who also belong to a racial minority group or who are openly gay) was 39.5 percent at Obama's first midterm and totaled 42.1 percent at the end of the 112th Congress.[2] This represents a 6.6 percent increase over the last two years and a robust 8.6 percent increase for his entire first term. (Table 2) It is clear that the Obama appointees are literally changing the face of the federal judiciary.

District Courts

This trend holds when examining the district courts separately, where the proportion of nontraditional judges at the end of the 112th Congress is 42 percent—an increase of 8.1 percent from the preceding Congress and 6.9 percent for Obama's first term. Every group made gains—women (+11.4 %); Hispanic Americans (+16.7%); Asian Americans (+87.5%); and openly gay individuals (+200%)—except African Americans, who were equally represented on the district courts at the beginning and end of Obama's first term.

Even though the same number of nontraditional judges left the district courts during the 112th Congress as did during the 111th (33), the fact that Obama was able to secure confirmation for nearly 120 percent more district court judges, 55 percent of whom were nontraditional, explains how he was able to add considerable diversity to the district court.

The aggregate increase in diversity is diminished a bit when we look at individual district courts. Women fared best, as they were appointed to eight district courts on which there previously had been none; however 15 courts remain where there has never been a female judge.[3] African American and Hispanic judges were confirmed to two district courts on which there previously had been none, but an astounding 40 district courts (44 percent) have never seated an African American judge, and 64 (70 percent) remain without Hispanic representation. Asian American judges are present only on district courts in seven states, but President Obama is credited with appointing the "first" Asian American to district courts in four of those seven, a truly historic accomplishment. All told, at the start of Obama's presidency, 14 district courts had never seated a nontraditional judge, and at the end of his first term this number dropped to nine—considerable progress in terms of diversifying the district

2. Obama continued to appoint a high proportion of "double diverse" judges during the second half of his term—11 to the district courts and two to the courts of appeals.

3. This is out of 91 district courts and does not include the three districts in the territories of Guam, the Virgin Islands, and the Northern Mariana Islands.

4. The district courts that remain all white straight male are as follows (parentheses represent the number of seats on each of the district courts): Idaho (2), Illinois-S (4), Montana (3), New York-W (4), North Carolina-W (4), New Hampshire (3), North Dakota (2), Oklahoma-E (1), and Virginia-W (4).

TABLE 2. Proportion of Nontraditional Lifetime Judges in Active Service on Courts of General Jurisdiction on January 1, 2009, and January 1, 2013

	2009		2013		
	%	N	%	N	% Increase
U.S. District Courts					
Women	25.0*	166	27.9*	185	11.4
African American	11.4	76	11.4	76	0.0
Hispanic	7.2	48	8.4	56	16.7
Asian American	1.2	8	2.3	15	87.5
Openly Gay	0.2	1	0.5	3	200
U.S. Courts of Appeals					
Women	26.9**	45	28.1**	47	4.4
African American	8.3	14	12.6	21	50.0
Hispanic	7.2	12	7.2	12	0.0
Asian American	0.0	0	1.2	2	200
U.S. Supreme Court					
Women	11.1***	1	22.2***	3	200
African American	11.1	1	11.1	1	0.0
Hispanic	0.0	0	11.1	1	100
All three court levels					
Women	25.2	212	28.0	235	10.8
African American	10.8	91	11.7	98	7.7
Hispanic	7.1	60	8.2	69	15.0
Asian American	1.0	8	2.0	17	112.5
Openly Gay	0.1	1	0.4	3	200
Total nontraditional	38.8	326 ****	42.1	354****	8.6 ****

*Out of 664 authorized lifetime positions on the U.S. district courts. Some double counting is inevitable. In 2013, 56 women were also either African American, Hispanic, Asian American, or Openly Gay. Judge Cathy Bissoon (Western District of Pennsylvania) identifies as both Hispanic and Asian American. She is included in both ethnicity categories but is only included once for the purposes of calculating total nontraditional judges.
**Out of 167 authorized lifetime positions on the numbered circuits and the U.S. Court of Appeals for the District of Columbia Circuit, all courts of general jurisdiction. Some double counting is inevitable. In 2013, 11 women also were either African American or Hispanic.
***Out of nine authorized positions on the U.S. Supreme Court. One woman was also Hispanic.
****Totals and percentages do not double count those who were classified in more than one category.

courts.[4] Furthermore, it is worth noting that many of the district courts that remain all white, straight, and male are the smallest courts in the nation and thus provide fewer appointment opportunities. However, as these opportunities arise, Obama seems poised to offer the "first" nomination.[5]

Courts of Appeals

When not double counting women who also belong to a racial minority group or are openly gay, the proportion of nontraditional judges on the courts of appeals is 42.5 percent, an increase of just .5 percent (1 seat) from January 1, 2011, to January 1, 2013, but an increase of 12.7 percent (8 seats) over Obama's entire first term.

As we explored in the main text, the hyper-partisan politics of the 112th Congress significantly hampered Obama's ability to secure confirmation of his courts of appeals nominees; only 57.1 percent (12) of his nominees were confirmed, compared to 68.2 percent (15) during the 111th. Additionally, this second cohort of judges was slightly less diverse than his appointees of the first two years—67 percent compared to 73 percent. However, the primary explanation for the diminishing impact of his appointees at the appellate level in the latter half of his first term is that of the 11 judges who left active service in this time period, seven were nontraditional (64 percent). This stands in stark contrast to the four out of 16 (25 percent) nontraditional judges who left active service during the 111th. Consequently, at the appeals court level, the strong increase in diversity we saw during the 111th, in which diversity increased by 11.1 percent, came to a standstill during the 112th.

Over the past four years, women, African Americans, and Asian Americans made gains, although the net increase of seven seats by African Americans is most substantial. The number of Hispanic judges on the courts of appeals remains the same as it was when Obama entered office, and there are no openly gay appeals court judges, nor have there ever been.[6] During his first term, Obama's appointments led to a majority of nontraditional judges on the Second, Fourth, and Sixth Circuits, as well as an even split on the First Circuit between nontraditional and traditional judges. This achievement exceeds what W. Bush accomplished during his entire presidency. Gender diversity increased on five courts of appeal (the First, Second, Fourth, Sixth, and Ninth Circuits) and decreased on one (the Third Circuit). Presently, all of the geographic circuits have a sitting female judge, and all but the Eighth Circuit have more than one woman. The Ninth Circuit boasts the most female judges in absolute numbers (10), but the Sixth Circuit lays claim to more women proportionately (44 percent).

Most significantly, the racial and ethnic diversity on seven of the geographic circuit courts increased, and four of those courts (the First, Second, Fourth, and Eleventh Circuits) added nontraditional judges not previously

5. Since January 1, 2013, vacancies have occurred on three of the nine districts that have never seated a nontraditional judge and President Obama nominated a woman to each seat.

6. Edward DuMont, President Obama's only openly gay nominee to serve at an appeals court level—on the U.S. Circuit Court of Appeals for the Federal Circuit—asked for his nomination to be withdrawn after waiting over 18 months for the Senate Judiciary Committee to schedule a hearing, which they never did.

TABLE 3. Diversity on the District Courts, January 1, 2013: Active Judges Aggregated by Circuit

Circuit	% Female, District Courts	% African American, General Population	% African American, District Courts	% Hispanic, General Population	% Hispanic, District Courts
First.1	25.9	7.7	3.7	32.3	22.2
First.2 *	25.0	6.0	5.0	8.2	0.0
Second	40.7	16.1	14.8	16.9	3.7
Third	28.3	13.0	15.1	10.8	9.4
Fourth	27.3	22.7	20.0	7.5	0.0
Fifth	31.2	17.3	10.4	30.3	19.5
Sixth	16.9	13.3	15.3	3.9	0.0
Seventh	23.8	11.5	4.8	11.3	4.8
Eighth	35.7	8.0	14.3	5.1	0.0
Ninth	31.3	5.5	8.3	30.0	14.6
Tenth	29.7	4.5	8.1	18.1	16.2
Eleventh	33.9	22.1	12.9	16.2	8.1
D.C.	35.7	50.6	28.6	9.5	7.1

Data on 2012 general population compiled from: http://www.census.gov/popest/data/state/asrh/2011/SC-EST2011-03.html
* Excluding Puerto Rico

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 judges, both currently and historically, have yet to serve on four of the 12 circuit courts of general jurisdiction (the Sixth, Seventh, Eighth, and D.C. Circuits). With the elevation of Jacqueline Nguyen, Asian American jurists currently sit on the Second and Ninth Circuit Courts. No Native American has ever served on the federal courts of appeals.

District Courts Aggregated by Circuit

Table 3 aggregates district courts by circuit. The Table also lists the percentage of women judges in each district and compares the percentage of African Americans and Hispanics 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.[7] Women have the greatest presence on district courts within the Second, Eighth, and D.C. Circuits and the lowest within the Sixth and Seventh Circuits.[8] The Fourth and Eighth Circuits saw the largest percentage increase (25 percent), with a net gain of three seats each. Notably, the number of women serving on district courts in the Fourth Circuit, which includes Maryland, North Carolina, Virginia, West Virginia, and South Carolina, has almost doubled during Obama's first term—increasing from eight to 15. Similarly, there are 50 percent more women serving on district courts in the Eighth Circuit now than when Obama took office.

As in years past, the highest concentration of African American district judges is in the Fourth Circuit, which is also the Circuit with the largest population of African Americans.[9] However, when comparing overall representation on the bench to the general population, only five circuits have African American representation on the courts greater than their representation in the population (the Third, Sixth, Eighth, Ninth, and Tenth Circuits). The largest "overrepresentation" occurs on district courts within the Eighth Circuit, where 14.3 percent of the active district court judges are African American compared to 8 percent of the population. Conversely, there are seven circuits where African Americans are underrepresented at the trial level, with the largest disparities occurring in the most southern circuits (the Fifth and Eleventh Circuits).

Underrepresentation is even more acute for Hispanic Americans, despite a population growth of 43 percent over the past decade according to the latest census; the states within the First, Fourth, Sixth, and Eighth Circuits have no Hispanic district judges and, relative to their representation in the population, the Second and Ninth Circuits have very few. Moreover, in no circuits are Hispanic district court judges "overrepresented" as compared to their representation in the population.[10] The highest congruence between population and judicial representation is on the Third and Tenth Circuits.

Table 3 does not report the relative proportions of Asian Americans on the federal bench as compared to the pop-

7. 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.

8. These percentages are calculated using the number of district court judges in active service as the denominator, thus excluding any vacancies.

9. 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.

10. Since January 1, 2013, Hispanic American district court judges have been confirmed to seats in the Second (2), Third (2) and Tenth (1) Circuits. With these most recent confirmations, the Third and Tenth Circuits now have Hispanic representation on the courts greater than their representation in the population.

ulation since the numbers have been quite small until recently.[11] However, given Obama's historic record of appointing Asian Americans to the bench, which increased their representation more than twofold, we will make a few general observations. Currently, Asian American judges are present on district courts within five circuits—the Second, Third, Sixth, Seventh, and Ninth. This underscores the fact that Obama is not simply appointing Asian Americans to district courts in states in which they are already represented, i.e., New York and California. In the Seventh Circuit, the proportion of Asian American district court judges is greater than the relative proportion in the population, and there is moderate congruence between population and judicial representation in the other four circuits.[12] Lastly, and not particularly surprisingly, the highest concentration of Asian American district judges is in the Ninth Circuit—9.4 percent—since it also is the Circuit with the largest population of Asian Americans (10.9 percent).

We would be remiss not to point out that Obama's dedication to increasing the diversity of the federal bench has continued into his second term. From January 1, 2013, to June 26, 2013, 23 judges have been confirmed to courts of general jurisdiction, 18 of whom are nontraditional (78 percent). Even more astounding is that 26 of the 32 nominees pending in the Senate are nontraditional (81 percent). The historic "firsts" continue: With the recent confirmation of Judge Derrick Kahala Watson, the U.S. District Court for the District of Hawaii will become the first federal court in U.S. history with a majority of Asian Americans.

Furthermore, in addition to appointing a large proportion of "double diverse" judges, we are seeing a critical mass of jurists with a diversity "hat trick" of sorts—Judge Pamela Chen (Southern District of New York) is an openly gay Asian American woman, and Nitza I. Quinones Alejandro (Eastern District of Pennsylvania) is an openly gay Hispanic American woman. They join Judge Deborah Batts and Judge Cathy Bissoon as judges with three diversity characteristics.[13] These judges embody diversity at an entirely new level, and their presence on the bench is representative of the changing citizenry at large.

Influencing Factors

Although much of the credit for diversification of the federal bench can be attributed to President Obama making it a top priority, two additional factors assisted the selection of diverse candidates. First, there is simply a much larger pool of diverse candidates with the necessary qualifications. And second, there is now more active engagement by a broader coalition of groups dedicated to getting names to the right people on the nomination side and helping nominees navigate the confirmation side.[14] Stalwart organizations like the NAACP Legal Defense Fund have been joined by minority bar associations like the National Asian Pacific American Bar Association, which was instrumental in securing confirmation of a record number of Asian American nominees, and the Hispanic Bar Association, which was very visible with Justice Sotomayor's nomination and eventual confirmation. However, over the past few years, a new cadre of interest groups has emerged as players in the game of judicial selection, and their focus is almost singularly on creating a pipeline of individuals who would be competitive candidates and add to the diversity on the bench.

For example, the Infinity Project (2007) was founded in response to the dearth of female judges on the Eighth Circuit Court of Appeals where currently and historically, there has been only one female judge. The Project's concentration is narrow in scope--they only work to diversify courts in states within the Eighth Circuit—and their efforts are centered primarily on "recruiting and preparing women to seek positions on the federal bench" but by all measures their efforts have paid off.[15] Since the inception of the Project, the number of women serving on district courts within the Eighth Circuit has increased by 50 percent—there were 10 female judges on the bench at the beginning of Obama's first term and now there are 15. Additionally, the Project worked tirelessly to ensure a woman was nominated Circuit Court of Appeals, which came to fruition with Jane Kelly's nomination on January 31, 2013. With surprising speed, the Senate confirmed Judge Kelly on April 24, 2013, as the second female jurist in the court's history, which spans over 120 years.

Another example of a new group acting as a clearinghouse for qualified candidates is the Gay and Lesbian Victory Fund's "Presidential Appointments Project." Created in 2008 as a sort of "talent bank for LGBT individuals," it, too, concentrated on expanding the pool of qualified applicants. Specifically, its mission is "to grow the pool of openly LGBT professionals who would be qualified and ready to accept politically appointed positions" and to "provide an easy mechanism for interested candidates to funnel their resumes into the right hands."[16] While it is difficult to say that the dramatic increase in the number of openly gay judges appointed to the bench under the Obama administration is directly linked to the work of the Presidential Appointments Project, it is clear that interest groups working to expand the pool of diverse candidates will make diversification of the bench that much easier.

In the final assessment of President Obama's first term, it cannot be disputed that he is truly committed to transforming the federal judiciary. The White House makes clear that, "These 'firsts' are important…because a judiciary that better resembles our nation instills even greater confidence in our justice system, and because these judges will serve as role models for generations of lawyers to come."[17] ★

11. According to the latest results from the U.S. Census Bureau, Asian Americans were the fastest growing race or ethnic group in 2012, with their population growing at a rate of 2.9 percent. (By comparison, Hispanic and African American populations grew by 2.2 and 1.3 percent, respectively.) In light of this trend, adding the comparison for Asian Americans may be reasonable in the not-so-distant future.

12. Asian American representation out of the general population in the following Circuits: Second = 7.1 percent; Third = 5.2 percent; Sixth = 1.9 percent; Seventh = 3.5 percent; Ninth = 10.9 percent. Asian American representation on the district courts in the following Circuits: Second = 3.7 percent; Third = 1.9 percent; Sixth = 1.7 percent; Seventh = 4.8 percent; Ninth = 9.4 percent.

13. Judge Deborah Batts (Southern District of New York) was the first openly gay individual to serve in the federal courts, she is also African American. Judge Cathy Bissoon (Western District of Pennsylvania) identifies as both Hispanic and Asian American.

14. Although the following discussion centers on more "traditional interest groups," there is also a burgeoning group of consultants who both recruit candidates and assist with confirmation strategy. For example, Vincent Eng of the VENG group has been a leader in the Asian American community for over a decade and is credited with drawing attention to highly qualified Asian American candidates for judicial appointments. Additionally, his group led the confirmation strategy of many Asian American nominees.

15. The Infinity Project makes a strategic choice to prioritize "recruiting and preparing qualified women to seek positions" based on research from political science that finds women are both 1) less likely to be recruited to seek office and 2) more likely to run if they have been recruited. About the Infinity Project, http://www.theinfinityproject.org/about.htm.

16. Presidential Appointments Project, http://www.victoryinstitute.org/presidential.

17. The White House Blog, http://www.whitehouse.gov/blog/2013/05/17/president-obama-nominates-four-distinguished-women-serve-federal-judges.

in an unusual White House ceremony reminiscent of W. Bush's very public Rose Garden introduction of his first nominees, a slate of largely conservative circuit court nominees, including several who were viewed as ideologically controversial. The President's aggressive stance on behalf of fulfilling his constitutional responsibilities in filling these judgeships represents the strongest stance he has taken to date in his presidency on the judgeship issue and the advice and consent processes on his D.C. Circuit nominations in the months ahead will, indeed, help write the final chapter in the judicial selection story of the Obama presidency.

Lame Duck Confirmations

One facet of the judicial selection politics of the 112th Congress that represented unique confirmation activity and was indicative of the unusual obstruction and delay struggles throughout the congressional session was the "lame duck" confirmation of 13 U.S. District Court Judges after the President was reelected in December 2012. The bakers dozen of confirmations represented an unprecedented flurry of activity for the final month of a congressional session, especially in a presidential election year and, clearly, would not have happened if the President had been defeated in November.

That said, the fact that 13 trial court judges were confirmed as the President's first term wound down, coupled with the fact that no appellate court confirmations occurred during this period, was still an unexpected turn of events that warrants our attention. The unusual nature of these lame duck confirmations was noted, tongue only slightly in cheek, by a Republican Judiciary Committee aide who characterized them as, "the fast track hurdling down at record speed" which, nevertheless, "certainly reflected the results of the election."

Our portrait of the negotiated settlement leading to the 13 December District Court confirmations is a composite drawn from interviews with several congressional staff members from both parties, close observers of judicial selection politics, and other interested parties. It was clear from our conversations that until the "back-channel deal" was cut, there were "pretty clear signals from leadership…that nobody was going to go, maybe one or two people." Indications are that Senator Reid was about to file cloture in an effort to obtain a vote on the long-delayed Circuit Court nomination of Patty Shwartz. At that point in December, Senator McConnell made an offer limited exclusively to District Court nominees. Senator Reid agreed to delay the cloture filing and took the offer to his Democratic caucus and they approved it, while Senator McConnell, "cleared it with his [caucus members] pretty quickly which gives me the sense that if McConnell wants to move forward he can."

The quid pro quo of the deal was that the curtain would remain down on Circuit confirmations. Also, inasmuch as Ranking Judiciary Committee Minority Senator Grassley had already gone on record stating that there would be no more judicial confirmations in the 112th Congress, to avoid embarrassment, the agreement was never announced or acknowledged publicly, although 13 District Court judgeship votes were held and 13 seats were filled. In due course, although this was not addressed in the deal, Patty Shwartz was confirmed to the Third Circuit U.S. Court of Appeals on April 9, 2013, by a vote of 64-34, after being renominated by President Obama in the 113th Congress.

From the Republican perspective:

> People recognized that there was a lot on the calendar and the Majority Leader was not going to be patient waiting until February to start confirming….I think it turned out okay. They didn't push for those that we had objections to….I think it was…a reasonable way to deal with it. I would hope people recognize we could have really screamed and fought. You're asking this Senate to do something that no other Senate has been willing to do. Nobody in the lame duck session was interested in filibustering. They had two things on their mind. One is fiscal cliff and, two, is how fast can we get to the airport? People wanted to get the business done and get out of here…. If we had said, 'No,' Harry Reid probably would have come to the floor with 18 cloture petitions. 'We've got to have these guys and we're going to stay here until we do these.' Nobody wanted to do that.

Interestingly, the lame duck confirmation agreement received more of a mixed reception from the Democratic side of the judicial selection divide. Vincent Eng offered a balanced assessment of what transpired:

> I think there was still disappointment that we didn't get the Circuit Court judges….A lot of people felt it was a good win, behind closed doors…. It would have been nice if they just cleared everybody, or even all the District Court Judges. But I do think it was better than anybody expected.

As a practical matter, lowering down the numbers could be seen as beneficial to both sides, making the deal a political win-win. But the disappointment of outside commentators was, in the end, shared by a senior Democratic legislative aide who, nevertheless, concluded, "It was better that there was an agreement and some people got through than no agreement and no people got through." That said:

> [T]he Republicans got 100 percent of what they wanted. Those judges had been ready to be confirmed, most of them by Spring, some of them by Summer. And they actually sat on them until after the election, and let a number of the hostages go just in time to stop the Leaders from being able to take up a single Circuit Court nominee. That was their plan….In every previous instance,…[t]he calendar would have been cleared before the presidential election, if not before the August recess. So by holding them back they could then make a show of doing some while holding another set back.

Perhaps somewhat ironically, because the lame duck confirmations were limited to District Court Judges, some attention was cast, if only by way of contrast, on the

Circuit Court obstruction and delay that continued to remain in play. One particular nomination, that of Robert Bacharach of Oklahoma to the 10th Circuit U.S. Court of Appeals, offered particularly compelling evidence in support of the claims being made by the Democrats regarding the unprecedented nature of the Republican opposition. The Bacharach case, which became political fodder for charges and countercharges by both sides, did not initially start out as a confirmation minefield. Indeed, at the outset, it showed all of the hallmarks of how civil and productive bipartisan advice and consent politics could actually function.

Chris Kang noted:

> I think a great example of that process almost working is Magistrate Judge Bacharach in Oklahoma, who actually was a recommendation of [Oklahoma Republican] Senator Coburn. When he's eventually confirmed we could say that's a true success story. It's a great example of our relationship with Republican senators recommending somebody that we all agree would be a great judge.

Bacharach was recommended by Senator Coburn (with the support of James Inhofe, the other Republican senator from Oklahoma) in October of 2011 and nominated by the President in January 2012. Since obstruction and delay was occurring on all appellate nominees in the 112th Congress, and they were being taken up in order, all waiting their turn in the queue, the nomination, however consensual, moved slowly.

By the summer of 2012, word had gone out that the curtain had fallen on the confirmation of any additional Circuit Court judges in the presidential election cycle. Republicans relied on the traditional but imprecisely defined so-called Thurmond Rule, named after the long-term Judiciary Committee Chairman who first invoked it. The Democrats, whether for reasons driven by good government and efficiency or simply just because it was good politics, recognized that Bacharach was a consensual nominee who had engendered absolutely no opposition and who was supported by his home state Republican senators, one of whom had even suggested his nomination.

In late July 2012, after the Thurmond Rule had been invoked, the Democrats sought cloture on the Bacharach nomination, taking it out of order, seeking to force a floor vote. Either they would gain cloture and confirm a Circuit Court Judge, or they would lose the cloture vote and, perhaps, in the process, embarrass the Republicans. At the minimum, light would be shed on the ultimate irony that a cloture failure would represent. The cloture vote on moving the Bacharach nomination forward failed by a vote of 56-34, with the Oklahoma senators placed in an extremely difficult position. Both voted "Present," so as not to be seen as voting against their preferred nominee although, of course, in the mathematics of winning a cloture vote, the "Present" votes were tantamount to voting against confirming Magistrate Judge Bacharach to the Circuit Court at that time.

As a Democratic legislative aide was quick to point out:

> Robert Bacharach was the first successful filibuster of a Circuit nominee ever who had bipartisan support on the Committee...and two [Republican] home state senators, who until the filibuster, supported him.

A Republican legislative aide was equally quick to offer an alternative view:

> We were surprised...that they went forward with the vote. Republicans are saving the tradition of the so-called Thurmond Rule....Come July, come August, it's clearly not going to happen. There aren't going to be any more Circuits in a presidential election year. That was clear to everyone that you wouldn't do that. Nonetheless, they picked that one up. They skipped several to take that vote to try to make Senator Coburn look bad. Everybody knew that he was going to end up on the bench regardless of what president [was in office]. Just sit tight. It's going to get done. It'll be spring, not fall.

Robert Bacharach was one of several unopposed Circuit Court nominees, or virtually unopposed, who, nevertheless, did not get confirmed in the 112th Congress. What made his case stand out was the strong support he received from his home state Republican senators and an impassioned statement on behalf of his nomination and decrying the process that was imprisoning it made by Senator Coburn on the floor of the Senate. Almost as celebrated as the Bacharach debacle was the similar playing out of the First Circuit nomination of William Kayatta, who enjoyed the support of his two Republican home state senators from Maine, Olympia Snowe, and Susan Collins. After his first nomination by President Obama in January of 2012, he too had to be renominated in January 2013 for consideration by the 113th Congress. As was the case with many nominees, particularly Circuit nominees in light of the lame duck confirmations, Democrats could also find no comparables to the failure to confirm Kayatta in the 112th congressional session. One Democratic aide stated with a modicum of hyperbole, "There is no equivalent...in history for William Kayatta. Or Robert Barcharach. Where in recent history, ancient history, Greek history, is there an equivalent for filibustering William Kayatta?"

Assessing the situation where largely noncontroversial Circuit Judge confirmations were held up from the summer of 2012 onward through the invoking of the Thurmond Rule in the context of the presidential election, the White House's Chris Kang asked a set of rhetorical questions on the minds of many:

> The purpose of the Thurmond Rule is, obviously, to let the next president make his or her picks. It turns out that this President is going to be the same as the next President, so what is the rationale to not at least confirm them in the lame duck session? Is it just to continue to build up another backlog? What was the point, when Republican home state senators are calling for the confirmation of these nominees, to hold them up?"

As noted, Robert Bacharach and William Kayatta, along with all of

the other remaining nonconfirmed nominees—33 in all, both District and Circuit Court and from the 112th Congress—were renominated by President Obama in January 2013 for reconsideration in the 113th Congress. William Kayatta was confirmed as a Judge on the First Circuit Court of Appeals by a vote of 88-12 on February 13, some 300 days after first being reported out of Committee to the Senate floor. Less than two weeks later, on February 25, 2013, Robert Bacharach was confirmed to his seat on the Tenth Circuit Court of Appeals by a unanimous vote, 93-0, more than 260 days after he was first reported out of Committee to the Senate floor.

The selection and confirmation processes exhaustively discussed above had as its final outcome, however, the confirmations of a total of 109 lifetime appointees to federal courts of general jurisdiction. We now turn to a brief demographic portrait of the backgrounds and characteristics of those confirmed during the 112th Congress. We compare them to those confirmed by the 111th Congress. We also look at all first term appointees, examining differences between the nontraditional and traditional appointees. Then we examine the entire first term Obama-appointed cohort as compared to the cohorts of President Obama's four immediate predecessors. First, we consider the district court appointees and then those appointed to the appeals courts.

District Court Appointees

During the 112th Congress, President Obama nominated 127 individuals, of whom 97 were confirmed, to lifetime positions on the federal district courts. Table 4 examines the demographic portrait of those confirmed during the 112th Congress compared to those confirmed during the 111th. The differences are relatively small and perhaps reveal subtle differences in the selection and confirmation environment after the 2010 congressional elections that changed the partisan makeup of Congress and gave to Republicans hope of capturing the White House in 2012. Among the findings that may be suggestive:

• A larger proportion of the more recent appointees than the earlier appointees had prosecutorial experience. Prosecutorial experience may be a marker of a law and order perspective that is compatible with the ideology of conservative Republicans. Yet more appointees of both groups had judicial experience than prosecutorial, continuing the trend that began with the Carter administration.

• The proportion of the more recent appointees with an Ivy League law school education was slightly lower than that of the earlier Obama cohort. If prestigious non-Ivy law schools are taken into account (such schools as Berkeley, Georgetown, Michigan, NYU, Northwestern, Stanford, Texas, Vanderbilt, and Virginia), the proportions of the more recent appointees with a prestige law school education and the earlier appointees are about the same (about 45 percent). Prestigious credentials may make moderate or liberal nominees more palatable to conservatives.

• There was a much higher proportion of men than there were women confirmed in the 112th Congress as opposed to the 111th. There were higher proportions of whites and Hispanics but lower proportions of African Americans and Asian Americans. Overall, the proportion of white males appointed in the 112th was higher than in the 111th. However, a majority of those confirmed during the 112th Congress were nontraditional women and ethnic minorities.

• The ABA ratings of the more recent appointees on the whole were lower than those for the earlier appointees. However, unlike the W. Bush and Clinton administrations, no Obama appointee received a rating of "not qualified" by the ABA. By not naming anyone rated "not qualified," the Obama administration was clearly removing a potential reason to obstruct a nominee.

• Arguably, the findings for the party variable is the best indicator of the change in the political dynamic of the 112th Congress. Unlike the 111th Congress, in which no identifiable Republican was confirmed, during the 112th, five such individuals (about 5 percent) were confirmed. The large majority of all appointees were identified with the president's party, but a lower proportion of the more recent appointees had a record of previous party activism as opposed to the earlier appointees.

• The more recent cohort had a higher proportion than the earlier cohort whose net worth was in excess of one million dollars.

• The average age of the more recent cohort was about one year older than the earlier cohort.

Fifty-four nontraditional individuals were confirmed to the district courts during the 112th Congress.[13] Thirty were confirmed during the 111th. Thus, a total of 84 nontraditional nominees were confirmed during Obama's first term as contrasted with 57 traditional nominees. Table 5 looks at how Obama's first term nontraditional appointees to the district courts compared to his traditional appointees. The findings suggest somewhat different career paths and backgrounds for both groups of appointees.

• A majority of the nontraditional appointees, over five in 10, came from the judiciary, mostly from the state bench but also from the U.S. Magistrate's office. That was not true of the traditional appointees. Only four in 10 traditional appointees came to the federal district bench from another judicial position.

• About one in five nontraditional appointees came to the federal bench from a nonjudicial governmental position (largely from the U.S. Attorney's office) while only one in about 10 traditional appointees had such a career path.

13. Traditional appointees have been defined as all white male. The Obama Administration nominated two openly gay white males to federal district courts who were confirmed during the 112th Congress. Given the historic discrimination against openly gay individuals, we think it appropriate to now include openly gay white males in the nontraditional category. Gay women and ethnic minorities are, of course, already considered nontraditional. See Carl Tobias, "*Considering Lesbian, Gay, Transgender, and Bisexual Nominees for the Federal Courts*," 90 Wash. Univ. L. Rev. 577 (2012).

TABLE 4. How the Obama appointees to the federal district courts confirmed during the 112th Congress compare to those confirmed during the 111th

	112th Congress %	(N)	111th Congress %	(N)
Occupation				
Politics/government	17.5%	(17)	11.4%	(5)
Judiciary	46.4%	(45)	52.3%	(23)
Large law firm				
100+ members	10.3%	(10)	9.1%	(4)
50-99	4.1%	(4)	—	—
25-49	2.1%	(2)	4.5%	(2)
Medium-size firm				
10-24 members	2.1%	(2)	4.5%	(2)
5-9	7.2%	(7)	9.1%	(4)
Small firm				
2-4 members	6.2%	(6)	4.5%	(2)
Solo	3.1%	(3)	—	—
Professor of law	—	—	2.3%	(1)
Other	1.0%	(1)	2.3%	(1)
Experience				
Judicial	49.5%	(48)	54.5%	(24)
Prosecutorial	46.4%	(45)	40.9%	(18)
Neither	25.8%	(25)	29.5%	(13)
Undergraduate education				
Public	41.2%	(40)	45.5%	(20)
Private	35.1%	(34)	40.9%	(18)
Ivy League	23.7%	(23)	13.6%	(6)
Law school education				
Public	43.3%	(42)	45.5%	(20)
Private	37.1%	(36)	31.8%	(14)
Ivy League	19.6%	(19)	22.7%	(10)
Gender				
Male	65.0%	(63)	45.05%	(20)
Female	35.0%	(34)	54.5%	(24)
Ethnicity/race				
White	70.1%	(68)	59.1%	(26)
African American	11.3%	(11)	25.0%	(11)
Hispanic	14.4%	(14)	4.5%	(2)
Asian	4.1%	(4)	11.4%	(5)
Percentage white male	46.4%	(45)	31.8%	(14)
ABA rating				
Well qualified	57.7%	(56)	75.0%	(33)
Qualified	42.0%	(41)	25.0%	(11)
Political identification				
Democrat	84.5%	(82)	88.6%	(39)
Republican	5.1%	(5)	—	—
None	10.3%	(10)	11.4%	(5)
Past party activism	44.3%	(43)	54.5%	(24)
Net worth				
Under $200,000	6.2%	(6)	2.3%	(1)
$200-499,999	10.3%	(10)	9.1%	(4)
$500-999,999	12.4%	(12)	22.7%	(10)
$1+ million	71.1%	(69)	65.9%	(29)
Average age at nomination	50.9		49.8	
Total number of appointees	97		44	

• About one in four nontraditional appointees came to the bench from private law practice as compared to close to one in two traditional appointees.

• Over five in 10 nontraditional appointees had judicial experience compared to over four in 10 traditional appointees. Over four in 10 nontraditional and traditional appointees had prosecutorial experience. However, while about one in five nontraditional appointees had neither judicial nor prosecutorial experience, the proportion for the traditional appointees was one in three.

• About one in two nontraditional appointees had a state law school education compared to one in three traditional appointees. About one in five nontraditional and traditional appointees were Ivy League law school graduates.

• White women constituted the largest proportion of the nontraditional appointees. Close to six in 10 nontraditional appointees were nonwhite, with the largest group being African American, followed by Hispanic Americans and Asian Americans.

• Over one in two nontraditional appointees received the highest ABA rating compared to about three out of four traditional appointees.

• There were similar proportions of Democrats among the nontraditional (85.7 percent) and traditional appointees (86 percent). But all of the Republicans were white males. And about 14 percent of the nontraditional as compared to five percent of the traditional appointees were not identified with a political party.

• About four in 10 nontraditional appointees had a background of past party activism compared to about six in 10 traditional appointees.

• A large majority of both groups had a net worth in excess of one million dollars, but the proportion for the nontraditional appointees was slightly lower than that for the traditional appointees.

• Nontraditional appointees were on average over three years younger than traditional appointees.

Table 6 presents the composite picture of the Obama first term appointees compared to the appointees of the previous four presidents. The most noteworthy findings include the following:

• Obama's first term appointees are the most diverse in terms of gender and ethnicity in the history of the United States. For the first time, the proportion of nontraditional appointees was close to six out of 10. The proportion of African Americans was second only to that of Bill Clinton's, and the proportion of Hispanic Americans and Asian Americans were historic firsts.

• The professionalization of the bench, a trend that became apparent with the Carter appointees some 35 years ago, is noticeable with close to half the Obama appointees coming to the federal district court bench from other judicial positions, similar to the proportions of Obama's immediate two predecessors in office. It is also underscored by the fact that a higher percentage of the Obama appointees had judicial experience than prosecutorial experience, which has been true of every presidential cohort beginning with the Carter appointees.

An interesting trend beginning with the Ford administration is the promotion from within the federal judiciary (almost all from the ranks of U.S. magistrates). The Ford proportion was eight percent, Bush 1's was 11 percent, Clinton's was 12 percent, W. Bush was close to 17 percent, and the Obama first term record was close to 21 percent.

• In terms of overall professional experience, only 27 percent of the Obama appointees had neither judicial nor prosecutorial experience. Only the W. Bush appointees had a lower proportion.

• The proportion of the Obama first term appointees with an Ivy League law school education exceed the proportions of his four immediate predecessors (although the Clinton proportion was very close). When prestigious law schools are included, the proportion of first term appointees with a prestigious

TABLE 5. How the Obama First Term nontraditional appointees compared to his traditional appointees to the federal district courts

	Nontraditional appointees*		Traditional appointees	
	%	(N)	%	(N)
Occupation				
Politics/government	19.0%	(16)	10.5%	(6)
Judiciary	52.4%	(44)	42.1%	(24)
Large law firm				
100+ members	9.5%	(8)	10.5%	(6)
50-99	1.2%	(1)	5.3%	(3)
25-49	2.4%	(2)	3.5%	(2)
Medium-size firm				
10-24 members	2.4%	(2)	3.5%	(2)
5-9	6.0%	(5)	10.5%	(6)
Small firm				
2-4 members	3.6%	(3)	8.8%	(5)
Solo	1.2%	(1)	3.5%	(2)
Professor of law	1.2%	(1)	—	—
Other	1.2%	(1)	1.8%	(1)
Experience				
Judicial	54.8%	(46)	45.6%	(26)
Prosecutorial	44.0%	(37)	45.6%	(26)
Neither	22.6%	(19)	33.3%	(19)
Undergraduate education				
Public	47.6%	(40)	35.1%	(20)
Private	34.5%	(29)	40.4%	(23)
Ivy League	17.9%	(15)	24.6%	(15)
Law school education				
Public	52.4%	(44)	31.6%	(18)
Private	26.2%	(22)	49.2%	(28)
Ivy League	21.4%	(18)	19.3%	(11)
Gender				
Male	31.0%	(26)	100.0%	(57)
Female	69.0%	(58)	—	—
Ethnicity/race				
White	44.0%	(37)	100.0%	(57)
African American	26.2%	(22)	—	—
Hispanic	19.0%	(16)	—	—
Asian	10.7%	(9)	—	—
ABA rating				
Well qualified	54.8%	(46)	75.4%	(43)
Qualified	45.2%	(38)	24.6%	(14)
Political identification				
Democrat	85.7%	(72)	86.0%	(49)
Republican	—	—	8.8%	(5)
None	14.3%	(12)	5.3%	(3)
Past party activism	39.3%	(33)	59.7%	(34)
Net worth				
Under $200,000	7.1%	(6)	1.8%	(1)
$200-499,999	10.7%	(9)	8.8%	(5)
$500-999,999	15.5%	(13)	15.8%	(9)
$1+ million	66.7%	(56)	73.7%	(42)
Average age at nomination	49.2		52.7	
Total number of appointees	84		57	

*Included in the nontraditional category are two openly gay white males.

TABLE 6. U.S. district court appointees compared by administration

	Obama		W. Bush		Clinton		Bush		Reagan	
	%	(N)	%	(N)	%	(N)	%	(N)	%	(N)
Occupation										
Politics/government	15.6%	(22)	13.4%	(35)	11.5%	(35)	10.8%	(16)	13.4%	(39)
Judiciary	48.2%	(68)	48.3%	(126)	48.2%	(147)	41.9%	(62)	36.9%	(107)
Large law firm										
100+ members	9.9%	(14)	9.2%	(24)	6.6%	(20)	10.8%	(16)	6.2%	(18)
50-99	2.8%	(4)	5.0%	(13)	5.2%	(16)	7.4%	(11)	4.8%	(14)
25-49	2.8%	(4)	4.6%	(12)	4.3%	(13)	7.4%	(11)	6.9%	(20)
Medium-size firm										
10-24 members	2.8%	(4)	5.0%	(13)	7.2%	(22)	8.8%	(13)	10.0%	(29)
5-9	7.8%	(11)	5.0%	(13)	6.2%	(19)	6.1%	(9)	9.0%	(26)
Small firm										
2-4 members	5.7%	(8)	4.2%	(11)	4.6%	(14)	3.4%	(5)	7.2%	(21)
Solo	2.1%	(3)	1.9%	(5)	3.6%	(11)	1.4%	(2)	2.8%	(8)
Professor of law	0.7%	(1)	1.1%	(3)	1.6%	(5)	0.7%	(1)	2.1%	(6)
Other	1.4%	(2)	2.3%	(6)	1.0%	(3)	1.4%	(2)	0.7%	(2)
Experience										
Judicial	51.1%	(72)	52.1%	(136)	52.1%	(159)	46.6%	(69)	46.2%	(134)
Prosecutorial	44.7%	(63)	47.1%	(123)	41.3%	(126)	39.2%	(58)	44.1%	(128)
Neither	27.0%	(38)	24.9%	(65)	28.9%	(88)	31.8%	(47)	28.6%	(83)
Undergraduate education										
Public	42.6%	(60)	47.1%	(123)	44.3%	(135)	46.0%	(68)	37.9%	(110)
Private	36.9%	(52)	45.2%	(118)	42.0%	(128)	39.9%	(59)	48.6%	(141)
Ivy League	20.6%	(29)	7.7%	(20)	13.8%	(42)	14.2%	(21)	13.4%	(39)
Law school education										
Public	44.0%	(62)	49.0%	(128)	39.7%	(121)	52.7%	(78)	44.8%	(130)
Private	35.5%	(50)	39.1%	(102)	40.7%	(124)	33.1%	(49)	43.4%	(126)
Ivy League	20.6%	(29)	11.9%	(31)	19.7%	(60)	14.2%	(21)	11.7%	(34)
Gender										
Male	58.9%	(83)	79.3%	(207)	71.5%	(218)	80.4%	(119)	91.7%	(266)
Female	41.1%	(58)	20.7%	(54)	28.5%	(87)	19.6%	(29)	8.3%	(24)
Ethnicity/race										
White	66.7%	(94)	81.2%	(212)	75.1%	(229)	89.2%	(132)	92.4%	(268)
African American	15.6%	(22)	6.9%	(18)	17.4%	(53)	6.8%	(10)	2.1%	(6)
Hispanic	11.3%	(16)	10.3%	(27)	5.9%	(18)	4.0%	(6)	4.8%	(14)
Asian	6.4%	(9)	1.5%	(4)	1.3%	(4)	—	—	0.7%	(2)
Native American	—	—	—	—	0.3%	(1)	—	—	—	—
Percentage white male	41.8%	(59)	67.4%	(176)	52.4%	(160)	73.0%	(108)	84.8%	(246)
ABA rating										
EWQ/WQ	63.1%	(89)	70.1%	(183)	59.0%	(180)	57.4%	(85)	53.5%	(155)
Qualified	36.9%	(52)	28.4%	(74)	40.0%	(122)	42.6%	(63)	46.6%	(135)
Not Qualified	—	—	1.5%	(4)	1.0%	(3)	—	—	—	—
Political identification										
Democrat	85.8%	(121)	8.0%	(21)	87.5%	(267)	6.1%	(9)	4.8%	(14)
Republican	3.5%	(5)	83.1%	(217)	6.2%	(19)	88.5%	(131)	91.7%	(266)
Other	—	—	—	—	0.3%	(1)	—	—	—	—
None	10.6%	(15)	8.8%	(23)	5.9%	(18)	5.4%	(8)	3.4%	(10)
Past party activism	47.5%	(67)	52.5%	(137)	50.2%	(153)	64.2%	(95)	60.3%	(175)
Net worth										
Under $200,000	5.0%	(7)	5.0%	(13)	13.4%	(41)	10.1%	(15)	17.9%	(52)
$200-499,999	9.9%	(14)	18.0%	(47)	21.6%	(66)	31.1%	(46)	37.6%	(109)
$500-999,999	15.6%	(22)	21.8%	(57)	26.9%	(82)	26.4%	(39)	21.7%	(63)
$1+ million	69.5%	(98)	55.2%	(144)	38.0%	(116)	32.4%	(48)	22.8%	(66)
Average age at nomination	50.6		50.1		49.5		48.2		48.6	
Total number of appointees	141		261		305		148		290	

legal education comes close to 45 percent. This compares to about 31 percent of the W. Bush appointees and 38 percent of the Clinton appointees.

• The Obama first term appointees had the second largest proportion of appointees with the highest ABA rating. Only the proportion of W. Bush's appointees had a larger proportion. It should be noted, however, that during the W. Bush years, because of the administration's removal of the ABA from the prenomination stage, ABA ratings were made only after a nominee had been named. In such circumstances, it might be argued, there could be a tendency for at least some of those interviewed to be less than candid in their evaluation and thus the ratings might tend to be artificially high.

• In terms of political party, there was the largest proportion of appointees who were not identified with a political party (about one in 10). The Obama appointees also had the lowest proportion of appointees without a record of previous partisan activity.

• About seven in 10 Obama first term appointees had a net worth in excess of one million dollars, breaking the record set by the W. Bush appointees. This accentuates the consequences of relatively low judicial salaries, something that Chief Justice John Roberts and his immediate predecessor Chief Justice William Rehnquist warned about, namely that only those who can financially afford it will consider putting themselves up for a federal judgeship.

• The Obama first term judiciary was on average the oldest presidential cohort exceeding the Bush 1 cohort by over 2 years and the W. Bush cohort by half a year.

Appeals Court Nominees

President Obama nominated 21 individuals during the 112th Congress, of whom 12 were confirmed, to lifetime judgeships on courts of appeals with general jurisdiction. Added to these 12 are the 15 who were confirmed during the 111th for a first term total of 27. Table 7 examines how the

TABLE 7. How the Obama appointees to the appeals courts confirmed during the 112th Congress compare to those confirmed during the 111th

	112th Congress		111th Congress	
	%	(N)	%	(N)
Occupation				
Politics/government	—	—	6.7%	(1)
Judiciary	66.7%	(8)	80.0%	(12)
Large law firm				
100+ members	8.3%	(1)	—	—
50-99	—	—	—	—
25-49	—	—	—	—
Medium-size firm				
10-24 members	8.3%	(1)	6.7%	(1)
5-9	—	—	—	—
Small firm				
2-4 members	—	—	—	—
Solo	—	—	—	—
Professor of law	8.3%	(1)	6.7%	(1)
Other	8.3%	(1)	—	—
Experience				
Judicial	66.7%	(8)	80.0%	(12)
Prosecutorial	50.0%	(6)	73.3%	(11)
Neither	8.3%	(1)	6.7%	(1)
Undergraduate education				
Public	33.3%	(4)	13.3%	(2)
Private	41.7%	(5)	33.3%	(5)
Ivy League	25.0%	(3)	53.3%	(8)
Law school education				
Public	50.0%	(6)	20.0%	(3)
Private	25.0%	(3)	53.3%	(8)
Ivy League	25.0%	(3)	26.7%	(4)
Gender				
Male	58.3%	(7)	66.7%	(10)
Female	41.7%	(5)	33.3%	(5)
Ethnicity/race				
White	58.3%	(7)	46.7%	(7)
African American	25.0%	(3)	33.3%	(5)
Hispanic	8.3%	(1)	13.3%	(2)
Asian	8.3%	(1)	6.7%	(1)
Percentage white male	33.3%	(4)	26.7%	(4)
ABA rating				
Well qualified	75.0%	(9)	66.7%	(10)
Qualified	25.0%	(3)	33.3%	(5)
Political identification				
Democrat	83.3%	(10)	93.3%	(14)
Republican	—	—	—	—
None	16.7%	(2)	6.7%	(1)
Past party activism	25.0%	(3)	40.0%	(6)
Net worth				
Under $200,000	16.7%	(2)	6.7%	(1)
$200-499,999	8.3%	(1)	20.0%	(3)
$500-999,999	8.3%	(1)	13.3%	(2)
$1+ million	66.7%	(8)	60.0%	(9)
Average age at nomination	53.3		53.7	
Total number of appointees	12		15	

Note that statistics are for lifetime appointments to courts of general jurisdiction.

TABLE 8. U.S. appeals court appointees compared by administration

	Obama		W. Bush		Clinton		Bush		Reagan	
	%	(N)	%	(N)	%	(N)	%	(N)	%	(N)
Occupation										
Politics/government	3.7%	(1)	18.6%	(11)	6.6%	(4)	10.8%	(4)	6.4%	(5)
Judiciary	74.1%	(20)	49.1%	(29)	52.5%	(32)	59.5%	(22)	55.1%	(43)
Large law firm										
100+ members	3.7%	(1)	5.1%	(3)	11.5%	(7)	8.1%	(3)	5.1%	(4)
50-99	—	—	6.8%	(4)	3.3%	(2)	8.1%	(3)	2.6%	(2)
25-49	—	—	—	—	3.3%	(2)	—	—	6.4%	(5)
Medium-size firm										
10-24 members	7.4%	(2)	6.8%	(4)	9.8%	(6)	8.1%	(3)	3.9%	(3)
5-9	—	—	—	—	3.3%	(2)	2.7%	(1)	5.1%	(4)
Small firm										
2-4 members	—	—	1.7%	(1)	1.6%	(1)	—	—	1.3%	(1)
Solo	—	—	1.7%	(1)	—	—	—	—	—	—
Professor	7.4%	(2)	6.8%	(4)	8.2%	(5)	2.7%	(1)	12.8%	(10)
Other	3.7%	(1)	3.4%	(2)	—	—	—	—	1.3%	(1)
Experience										
Judicial	74.1%	(20)	61.0%	(36)	59.0%	(36)	62.2%	(23)	60.3%	(47)
Prosecutorial	63.0%	(17)	33.9%	(20)	37.7%	(23)	29.7%	(11)	28.2%	(22)
Neither	7.4%	(2)	25.4%	(15)	29.5%	(18)	32.4%	(12)	34.6%	(27)
Undergraduate education										
Public	22.2%	(6)	35.6%	(21)	44.3%	(27)	29.7%	(11)	24.4%	(19)
Private	37.0%	(10)	47.4%	(28)	34.4%	(21)	59.5%	(22)	51.3%	(40)
Ivy League	40.7%	(11)	17.9%	(10)	21.3%	(13)	10.8%	(4)	24.4%	(19)
Law school education										
Public	33.3%	(9)	39.0%	(23)	39.3%	(24)	32.4%	(12)	41.0%	(32)
Private	40.7%	(11)	35.6%	(21)	31.1%	(19)	37.8%	(14)	35.9%	(28)
Ivy League	25.9%	(7)	25.4%	(15)	29.5%	(18)	29.7%	(11)	23.1%	(18)
Gender										
Male	63.0%	(17)	74.6%	(44)	67.2%	(41)	81.1%	(30)	94.9%	(74)
Female	37.0%	(10)	25.4%	(15)	32.8%	(20)	18.9%	(7)	5.1%	(4)
Ethnicity/race										
White	52.0%	(14)	84.7%	(50)	73.8%	(45)	89.2%	(33)	97.4%	(76)
African American	29.6%	(8)	10.2%	(6)	13.1%	(8)	5.4%	(2)	1.3%	(1)
Hispanic	11.1%	(3)	5.1%	(3)	11.5%	(7)	5.4%	(2)	1.3%	(1)
Asian	7.4%	(2)	—	—	1.6%	(1)	—	—	—	—
Percentage white male	29.6%	(8)	64.4%	(38)	49.2%	(30)	70.3%	(26)	92.3%	(72)
ABA rating										
EWQ/WQ	70.4%	(19)	71.2%	(42)	78.7%	(48)	64.9%	(24)	59.0%	(46)
Qualified	29.6%	(8)	28.8%	(17)	21.3%	(13)	35.1%	(13)	41.0%	(32)
Political identification										
Democrat	88.9%	(24)	6.8%	(4)	85.2%	(52)	2.7%	(1)	—	—
Republican	—	—	91.5%	(54)	6.6%	(4)	89.2%	(33)	96.2%	(75)
Other	—	—	—	—	—	—	—	—	1.3%	(1)
None	11.1%	(3)	1.7%	(1)	8.2%	(5)	8.1%	(3)	2.6%	(2)
Past party activism	33.3%	(9)	67.8%	(40)	54.1%	(33)	70.3%	(26)	66.7%	(52)
Net worth										
Under $200,000	11.1%	(3)	5.1%	(3)	4.9%	(3)	5.4%	(2)	15.6%*	(12)
$200-499,999	14.8%	(4)	16.9%	(10)	14.8%	(9)	29.7%	(11)	32.5%	(25)
$500-999,999	11.1%	(3)	27.1%	(16)	29.5%	(18)	21.6%	(8)	35.1%	(27)
$1+ million	63.0%	(17)	50.8%	(30)	50.8%	(31)	43.2%	(16)	16.9%	(13)
Average age at nomination	53.5		49.6		51.2		48.7		50.0	
Total number of appointees	27		59		61		37		78	

*Net worth was unavailable for one appointee.

Note that the two recess appointments by W. Bush and one by Clinton are not included in the statistics.

Note that statistics are for lifetime appointments to courts of general jurisdiction.

more recent appeals court appointees compare (on the several biographical dimensions with which we have been concerned) to the earlier group of appointees. Because the numbers are relatively small, caution is advised in interpreting differences in proportions. The following findings are worth special consideration:

• Like the findings for the district courts, the gender and ethnic diversity of both groups of appointees was both stunning and historic, with nontraditional appointees accounting for substantial majorities of all appointees. The proportions of white males for both groups were at historic lows. Little difference was found between the cohorts of appointees.

• The large majority of both groups came to the appeals courts from other judgeships, although the more recent cohort's proportion was somewhat lower. About two-thirds of each group was elevated from the U.S. district courts.

• A higher proportion of the earlier cohort had prosecutorial experience, but both groups had only one appointee with neither judicial nor prosecutorial experience.

• About one in four of each cohort had an Ivy League law school education.

• Similar proportions of both groups of appointees received the highest ABA rating.

• A somewhat higher proportion of the more recent appointees were not identified with a political party. Neither cohort included anyone identified as a Republican. The earlier cohort included a higher proportion of those with a past record of party activity.

• Both groups of appointees had similar substantial majorities whose net worth was in excess of one million dollars.

• Both groups of appointees were close in the average age at time of nomination.

A comparison of the first term nontraditional appointees to the traditional appointees was undertaken but because there were only eight traditional appointees, few meaningful differences emerged. Among the few differences that stand out are:

• All the traditional appointees were identified as Democrats. That was not true for the nontraditionals. Even more striking, three of the four traditionals were found to have had some past party activism in their backgrounds. This was decidedly not the case for nontraditionals, for whom under two in 10 had such a record.

• The nontraditional appointees were on average four years younger than the traditional appointees.

Table 8 presents the entire Obama first term appeals court judiciary compared to the appointments of his four immediate predecessors in office. Among the findings that stand out:

• As expected, the composite first term Obama appeals court appointees are the most diverse in U.S. history in terms of proportions of appointees. About seven in 10 were nontraditional appointees. The previous record had been set by Clinton with one out of two nontraditional appointees. About three in 10 of Obama's appointees were African American, more than doubling the proportion of the previous record holder for African American appointees, President Clinton. Obama's proportion of Hispanic Americans was slightly lower than Clinton's, but Obama's proportion of Asian American appointments was a new historic record. The proportion of women appointees was also a new historic high.

• In terms of appointments made that were judicial elevations, about three out of four Obama appointees held judicial positions at the time of their appointments to the appeals courts. This was a considerably higher proportion than that of his four immediate predecessors. This was also true for those with judicial experience and those with prosecutorial experience. Indeed only a very small percentage had neither judicial nor prosecutorial experience. The conclusion is inescapable that the Obama appointees to the appeals courts had the strongest professional experience of all five administrations.

• About one in four had an Ivy League law school education. If we include prestige non-Ivy law schools, about 41 percent of the Obama appointees had a prestige legal education. This compares to the over 50 percent for the W. Bush and Clinton appointees but is close to the Bush 1 and Reagan appointees.

• About seven in 10 received the highest ABA rating, matching the proportion of the W. Bush appointees. The modern record for the highest ABA ratings was that for the Clinton appointees.

• None of the Obama appointees could be identified as Republicans, which makes the Obama administration the first since the Reagan administration not to appoint anyone identified with the opposing political party. However, about one in 10 of the Obama appointees could not be identified with either party, also a modern record. Along these same lines, only one in three Obama appointees had some record of previous party activism, yet another historical milestone. The majority of the appointees of his four immediate predecessors, however, had such a party activism record.

• The proportion of Obama appointees with a net worth in excess of one million dollars was close to two out of three. This was higher than that of previous administrations. These findings suggest that in light of relatively low judicial salaries as compared to the private sector, the pool of potential judicial candidates may be somewhat smaller with a number of highly qualified individuals not being able to afford ascending the bench.

• The average age at nomination was highest for the Obama cohort, nearly four years older on average than the W. Bush appointees. This may also be tied to the pay issue, as older candidates presumably had more time in which to become sufficiently financially secure and able to "afford" becoming a judge. This is highly speculative and runs counter to the finding that three out of four Obama appointees already held judi-

cial positions at the time of their nominations to the appeals courts.

What Lies Ahead

We will close our analysis on a speculative note, looking ahead to what our expectations are for judicial selection and advice and consent processes in President Obama's second term, coinciding with the 113th and 114th congressional sessions. In doing so, we take note that several of the possibilities we raise are closely tied to the contextual realities that have greeted that second term.

At the most basic level, starting with the President, is the reality that Barack Obama has, in all likelihood, experienced his last election campaign, thereby removing any potential electoral constraints from the judicial selection equation.

At the Senate level, one group leader suggested, "Democrats, as always, are fearful of losing their majority in the Senate [and] Mitch McConnell is up for reelection in 2014 and is very fearful of a tea party challenge, which means he will make life miserable for the Democrats."

Perhaps a final contextual possibility worthy of mention is the view that in light of all that had been addressed in the domestic realm during the President's first term, perhaps above all else, the behemoth legislative effort on health care, the administration's policy agenda and consequently, the Senate's workload, would be lightened and more attention could and would be placed on judgeships. A senior Senate aide reacted quickly and strongly against the suggestion that there would be "increased space" for judges in the Senate of the 113th Congress:

> I would question the premise of your question. Immigration...takes up a lot of floor time and energy, so I think that's going to be a high priority when it's ready. Gun control is going to be a high priority. The fiscal cliff issue, debt ceiling is going to be a problem.

Beyond establishing the contexts for understanding judicial selection going forward, at the time of this writing in late June 2013, we also have the luxury of having watched the future unfold as we have witnessed approximately five months of second term judicial selection activity. At this juncture, as we have alluded to in our analysis, several things are already known of the emerging record of the Senate in the 113th Congress. These include the time-bound agreement to a Standing Order, for this congressional session only, that should serve to blunt the impact of the need to successfully meet cloture requirements before moving forward with a nominee on the Senate floor, albeit only for District Court judges. The Standing Order should render the District Judge confirmation processes less prone to obstruction and delay once candidates are reported out of the Judiciary Committee.

As the second term approached, one bellwether of the administration's prioritization of the judicial selection issue was anticipated to be the playing out of nomination and confirmation processes on the critical D.C. Circuit Court of Appeals. Clearly, much has happened already regarding the D.C. Circuit, perhaps far more than could have been anticipated at the end of the 2012 calendar year. Thus far, the President has suffered a big loss (Caitlin Halligan's withdrawal of her candidacy), a blowout win (Sri Srinivasan's unanimous confirmation to a D.C. Circuit seat), and, with three new nominations to fill the remaining D.C. Circuit vacancies, there are three games yet to be decided. Thus far, while the Republicans, led by Senator Grassley, have argued that filling these D.C. Circuit seats is not justifiable, and while they have introduced legislation to eliminate or move the seats elsewhere, President Obama has offered a vigorous defense of his right and, indeed, responsibility, to fill these D.C. Circuit seats. Clearly, the current status of the critical political battle over the D.C. Circuit vacancies is "To Be Continued." With regard to other circuit vacancies, particularly those that engendered considerable attention during the Senate of the 112th Congress, much closure has been reached. Thus Robert Bacharach, William Kayatta, and Patti Shwartz have all been confirmed to their positions on the United States Courts of Appeals.

Viewing the aggregate record for the past five months, the verdict is mixed. While the President renominated the 33 holdover candidates returned to him on the final day of the 112th Congress, one day later, on the first day of the 113th, the necessity of restarting all of these nominations back at the Committee stage of confirmation processes was bound to take some time. Thus, the first Committee hearings of the 113th Congress did not occur until January 23, the first "new" nomination was submitted to the Senate on January 31, and the first judge to be confirmed by the Senate of the 113th Congress, William Kayatta to the U.S. Court of Appeals for the First Circuit, did not occur until February 13, a full six weeks after the 113th Congress had convened, with the second confirmation, that of Robert Bacharach, not occurring until nearly eight weeks into the congressional session.

The pace of confirmations in the 113th Congress has remained relatively steady, neither at glacial nor warp speed. But there are senatorial delays, particularly in states with home state Republican senators, in recommending potential judges, followed by delays at both the Committee and floor stages once candidate's names are submitted and nominated by the President.

To address and prevent such an unfolding of events, analysts say there are two critical variables that come into play. One is the White House's prioritization of the judges issue.

The other part of the equation is the aggressiveness of the Majority Leader in bringing the judgeship issue to the forefront of the Senate's agenda. One close observer of selection politics from the liberal side sees the Majority Leader moving forward in this regard. "And that's happened because of two things. One, his people in Nevada are being blocked.... It's coming home....And the second

one is that Republicans have generally been wasting so much time that he is fed up with it. He lives in this special process world, this timing world, and the judges stuff is starting to encroach on that in a really, really negative way." Marge Baker views the events that transpired at the end of the 112th Congress as generally positive when seen from a presidential perspective:

> The sign that we're looking at right now is that they very quickly renominated everybody including those nominees who were stuck for some reason. We know that they are actively working with the senators on their nominees who have Blue Slip problems and that seems to be moving forward, so that's a level of intervention that is really important. The fact that they didn't just renominate, they made an important statement about getting these nominees, making them priorities. And part of it is you look to what level is the White House speaking on this issue and this was the President speaking on the issue. I think the fact that they continued nominating post-election…and the President himself was quoted as saying, 'I want all my nominees confirmed,' so I think there's some higher level attention to it.…It has to translate into ways in which the issue gets prioritized, the degree to which it is a regular point of conversation, point of advocacy by the White House when its folks are on the Hill on whatever operations they're on. The degree that it gets into the bloodstream, that this is a priority. You know in this town when something is a priority, right? Does the issue of dealing with these vacancies get into the bloodstream? And then it becomes how much does it get on the Senate calendar, how much of the schedule is devoted to addressing judicial nominations? I think there are signs, but the proof is still to be had.

While Baker's statement was made in January, just before the start of the 113th Congress, our own conclusion, based in large measure on the confirmations that have already occurred and the strong action taken by the President on the D.C. Circuit, is that her expectations for the White House part of the equation have largely been met. Indeed, we were struck in particular by the manner in which the President spoke to the issue of his D.C. Circuit nominations, which, largely, took an approach that another group leader had hoped to see. "For years, we've said, 'Stop talking numbers.' No one in America…gets excited about numbers.…Talk about why it's important. What's at stake here? Why people should care."

Beyond the activity on the D.C. Circuit, which included a White House Rose Garden ceremony announcing the three nominees, there have been additional signs of increased White House attention to the judgeship issue since the second term began. In addition to the President himself directly addressing the issue several times, judicial selection has been the subject of several statements made by Presidential Press Secretary Jay Carney in news conferences and briefings, the issue has been addressed by a number of White House personnel in the White House Blog, and there has been an increase in on the record statements about the issue in reports surfacing in the press. While the jury remains out, somewhat, on the name generation facets of the process—particularly in states with Republican senators and in the ability of the Judiciary Committee to make progress in moving the present pending nominees on to the Senate floor efficiently and without the level of obstruction and delay experienced in the first term—the rhythm and flow of second term nominations appears to suggest that at least the first part of this equation is being addressed successfully. It is understandable that the nomination cupboard was bare at the start of the second term, as the White House's prenomination vetting processes take approximately three months on prospective nominees and, towards the end of the first term, both the election itself and the approaching end of the 112th Congress brought name generation processes to a virtual halt. Thus, when the 113th Congress convened, new prospective candidacies would not likely be ready for nomination until the end of March at the very earliest. That aggressive efforts to put names forward have been pursued by the administration can be gleaned from the nomination numbers. Five nominations to judgeships were made by the President in the first four months of the 113th Congress, while a total of 20 nominations have been made thus far in May and June. Sources have indicated that an additional 30 or more nominees will be put forward by mid-September which would go a long way towards addressing the criticism that the administration has failed to make a dent in the large number of judgeship vacancies in part because so many seats have gone without nominees.

If there is one elephant in the room of any discussion of 'What's Next?' it is undoubtedly the question of whether the President will have the opportunity to fill one or more Supreme Court vacancies. Any thinking about the subject remains highly speculative. Much would depend on whose seat was being filled, who the nominee was, and where we were in the second term's timeline.

Granting that there is much that cannot be known at this juncture, there are a few things that can be said. Curt Levey, who would prefer that the President not have this opportunity, recognizes some actuarial realities. "Kennedy and Scalia are both going to be eighty [they are presently 77], and as I'm trying to get my conservative colleagues to come to grips with…the chance that one will be gone is actually better than fifty percent." Unlike the case of the Sotomayor and Kagan appointments, or the possibility of a Ginsburg vacancy (Justice Ginsburg is 80), any vacancy that might emanate from the Court's Right changes its dynamic enormously. If that were to happen, Levey noted, "We probably will have a battle to end all battles, because this would be the hugest swing in the Court arguably since the thirties and that may dwarf anything else.…If they are replacing Ginsburg, it would probably be somebody else who can be counted on to vote the way the liberal justices have consistently voted on the hot button issues. If it's Scalia or Kennedy…I would

expect [the Republicans] would fight very hard and force him to nominate someone who may more truly be a moderate, A Merrick Garland or somebody. But he's not going to do it because he wants to, he'll do it because he has to." On the prospect of such a nominee, Levey continued, "I don't think we would oppose someone like Merrick Garland. I think he's about the best we can do, frankly. I would be shocked if he weren't confirmed."

Discussions with analysts and observers from the other side of the political spectrum revealed a consensual expectation given, perhaps, the history of "firsts" that have occurred during the President's first term, that there was a high likelihood that an African American woman or an Asian American would be tabbed for such a vacancy—with the odds of a prospective woman nominee heightened for a seat vacated by Justice Ginsburg. Regarding the prospect of an Asian American nominee, a progressive group leader commented, "[L]ook at the President's record and how he's appointed individuals. I think it's ripe for an Asian American. I do think that Asian Americans have a pipeline problem. There aren't that many candidates right now, the pool of candidates you can pretty much count on your fingers who would be viable....I think the Asian American community would very much like to see that. I think many other people would really like to see that as well."

The list of potential Asian American nominees to the Supreme Court must start, of course, with current D.C. Circuit Judge Sri Srinivasan, recently confirmed unanimously to what is acknowledged to be the second most important court in the nation. In addition to his recent confirmation, Srinivasan is not, apparently, feared by the political Right although, that said, he would not, necessarily, be the most favored choice of progressives on the Left. Still, it is hard to fathom a circumstance where, for example, during the first three years of the President's second term, the 46-year-old Srinivasan would not be confirmed. Three other Asian Americans whose names have been mentioned as potential Supreme Court nominees include Yale Law School Professor and former State Department Chief Legal Advisor Harold Koh, Second Circuit Judge Denny Chin, and Vietnamese-born Ninth Circuit Court of Appeals Judge Jacquelyn Nguyen.

If there is a wild card among possible Asian American nominees for a potential Supreme Court vacancy it is, without question, Goodwin Liu, who withdrew his nomination for a seat on the U.S. Court of Appeals for the Ninth Circuit during the President's first term. A nominee who truly excited progressives, Liu's nomination was opposed on a number of grounds starting with concerns from the Right about his left ideological leanings and how that could impact his work on the bench. There were also fears that Liu was being placed on the Ninth Circuit preparatory to an eventual Supreme Court nomination. As documented in our last iteration in this series, much else went wrong with the Liu candidacy, including what was seemingly a case of bad timing (he was nominated too late and without any other nominees to draw some of the attention and opposition that he received), some issues that arose in his vetting, and some criticism from Republicans on the Judiciary Committee about how forthcoming he was during its processes. Liu, a law professor at Berkeley at the time of his nomination to the Circuit Court, was subsequently appointed by Governor Jerry Brown as the only Democrat on the California Supreme Court. Only 42 years of age, Liu has, perhaps, resurrected his credibility as a Supreme Court mentionable through his work on California's highest court. When we posed the question to many of our sources of whether Liu could eventually resurface as an Obama nominee, most specifically to a Supreme Court vacancy, no one would rule out the possibility. One Liu supporter underscored that, "If you read his press clips, they all talk about a mainstream judge and he is not the demon he was portrayed to be."

Such a perspective notwithstanding, and despite the popularity a Liu nomination to fill a prospective Supreme Court vacancy would have in the progressive community, it seems to us to be an unlikely choice for this President to make, in effect, picking a fight of major proportions in a circumstance where he has a prospective nominee, Sri Srinivasan, with who he is very comfortable, and who would face a much smoother road to confirmation.

Forecasting the future in the volatile world of judicial selection politics is, of course, a difficult, if not impossible task, especially when that world is itself fraught with possible change. Two years into his second term, with the election of the 114th Congress, the President may be facing a very different judicial selection dynamic, ranging from the prospect of having a greater Democratic Senate majority, which does not seem very likely, to continuation of the status quo, an even smaller Democratic majority in the Senate, or even a Republican-controlled Senate body. With that more distant future still unknown, there remain both critical importance and the assurance of continued drama ahead, both predictable and unforeseen, in the unfolding judicial selection politics during the first half of President Obama's second term in office. ★

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