



Justice Can't Wait

An Assessment of Progress Toward Equal Justice for All During the First Ten Months of the Obama Administration

When President Obama and a 60-vote Senate majority were elected in November, 2008, Americans had a right to expect “change we can believe in” when it comes to the federal courts. Our country needs judges who will be strong voices for upholding the Constitution and the law in order to provide equal justice and protect personal freedoms for everyone in America, regardless of wealth, status, or popularity.

In the first ten months of the Obama administration, too little progress has been made toward that goal. Only five judges have been confirmed by the Senate, while 22 nominees remain pending and 97 vacancies remain open. Resorting to the same old playbook of partisan politics, Republicans are obstructing the judicial nomination process as a last-ditch effort to maintain their hold over the judiciary and halt a return to a balance of power. They are also using attacks on Obama’s nominees as an opportunity to keep their base engaged. Americans deserve better than simple party politics, and it is time for the White House and Senate leadership to move expeditiously to nominate and confirm judges.

Obstructionists in the Senate: Delay and Conquer

President Obama has nominated highly qualified attorneys and judges to the federal bench – and yet Republicans have responded by either delaying the votes or outright attacking individual nominees. Every Republican in the Senate signed a letter on March 4, 2009, about six weeks after President Obama took office, effectively appropriating to themselves the nominating power of the executive branch by vowing to block nominees who they did not approve. Since then, they have carried out that threat.

By comparison, in President George W. Bush’s first 17 months, the Democrat-controlled Senate, with Senator Patrick Leahy (D-VT) chairing the Judiciary Committee, confirmed 100 nominees. But, as of November 10th, the Senate has taken an up-or-down vote on only 7 of Obama’s 27 nominees. Republican senators are threatening filibusters or using the practice of putting a “hold” on a nominee to prevent up-or-down votes from taking place.

Abandoning the tradition of challenging only highly controversial nominations, Republicans have indefinitely blocked votes on nominees who were reported out of committee months ago. Senator Jeff Sessions (R-AL), ranking member on the Senate Judiciary Committee, inadvertently conceded that the Senate Republicans have a strategy of delay and conquer in an interview with the

National Journal (October 28, 2009). Noting that some Senate Democrats have finally started to call out their GOP counterparts for stalling judicial nominations, Sessions said, “I think they have a strategy, if they get out aggressively pushing back on nominees, that they can create a perception that we’re delaying a lot of nominees, and it will be harder for us to delay nominees.”

Even worse, Republicans are using the confirmation process to engage in fear mongering and smear tactics against President Obama’s agenda and his progressive supporters. On October 30th, 2009, Sessions sent a letter to his colleagues urging them to reject David Hamilton, current Chief Judge of the United States District Court for the Southern District of Indiana and nominee to the Seventh Circuit Court of Appeals. Sessions suggested that Hamilton has “drive[n] a political agenda,” while citing rulings and mischaracterizing the record on decisions Judge Hamilton issued on religious freedom, criminal law, and a woman’s right to choose. However, Hamilton – who was reported out of the Senate Judiciary Committee in June – has the backing of both his home state senators, Republican Senator Richard Lugar and Democratic Senator Evan Bayh. Senator Lugar stated he is “enthusiastically” supporting Hamilton’s elevation, while Senator Bayh praised the President for selecting nominees that “Republicans and Democrats can work together” on. Moreover, the American Bar Association (ABA) gave Hamilton a rating of well-qualified, the highest level of support it bestows upon a nominee.

Senator Sessions has also recently attacked United States District Court nominee for the Northern District of California Edward Chen for his affiliation with the American Civil Liberties Union (ACLU). Chen, a federal Magistrate Judge, was recommended locally by a bipartisan judicial search panel. He also received a well-qualified recommendation from the ABA. Yet, Sessions played to his base, evoking anti-ACLU sentiment by stating that “I think that we’re seeing a common DNA running through President Obama’s judicial nominees that brings about real cause for concern, and that’s the ACLU chromosome.”

Refusing to Create Urgently Needed Judgeships

As part of their strategy of obstruction, key Republicans have switched their position on responding to the urgent need for more judgeships on the federal bench. When Bush was president, the Judicial Conference, headed by Supreme Court Chief Justice John Roberts, identified the need for at least 63 additional judgeships in order to keep up with rising caseloads. That included 12 new judgeships in 6 courts of appeals and 51 new judgeships in 25 district courts – a very modest increase of an average of about two additional judges for each of those courts.

A large bipartisan majority of the Senate Judiciary Committee accepted these recommendations during Bush’s last term. Just last year, they recognized that even with efforts by courts to manage their huge caseloads, such as encouraging alternative dispute resolution and using retired or temporary judges, more judges are needed to ensure prompt hearing of cases. Since the last time Congress passed a comprehensive judgeship bill in 1990, court filings have risen by 34 percent in the district courts and 42 percent in the courts of appeals. Today’s average filings per district court judgeship, weighted based on the type of case, is 472 per year. In 2008, the average caseload per three-judge appeals panel was 1,049 – dramatically above the 773 average in 1991.

Traditionally, Democrats in Congress have cooperated with Republican presidents to create new judgeships when needed even when those positions would probably be filled with nominees of the other party. This was true in 1990, when a Democratic Congress and a Republican president

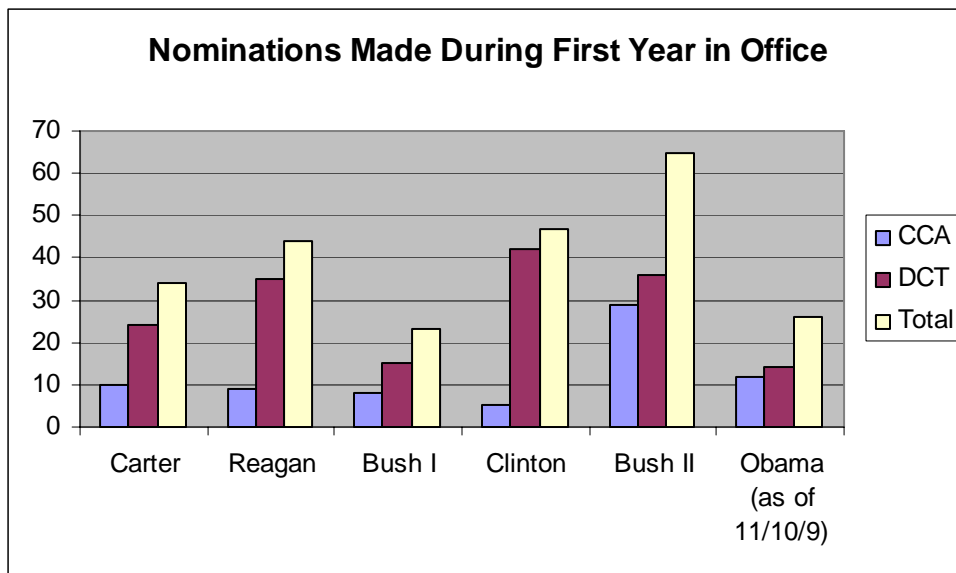
came together in bipartisan fashion to address the resource needs of the judiciary and passed comprehensive legislation creating new judgeships around the country.

The same bill, the Federal Judgeship Act, that drew support from both parties under Bush – including the support of Republican Judiciary Committee members Orrin Hatch (R-UT), Chuck Grassley (R-IA), Jon Kyl (R-AZ), and Lindsey Graham (R-SC) – now has no Republican support. As Senate Judiciary Chair Committee Patrick Leahy (D-VT) said in a letter to *The Wall Street Journal* on Oct. 14, “[j]ust as I have sponsored bipartisan bills incorporating the Judicial Conference’s recommendations during the past eight years, I have done so again this year. The difference this year is that no Senate Republican is cosponsoring the effort. They have all apparently had a change of heart now that we have a Democratic president.”

In addition, Republicans are suggesting that the bill they supported under Bush must now be changed so that none of the new judgeships that are so urgently needed would be added until 2013 – by which time they hope to have regained the White House. No other bill in recent history contained an effective date farther than one-year from passage.

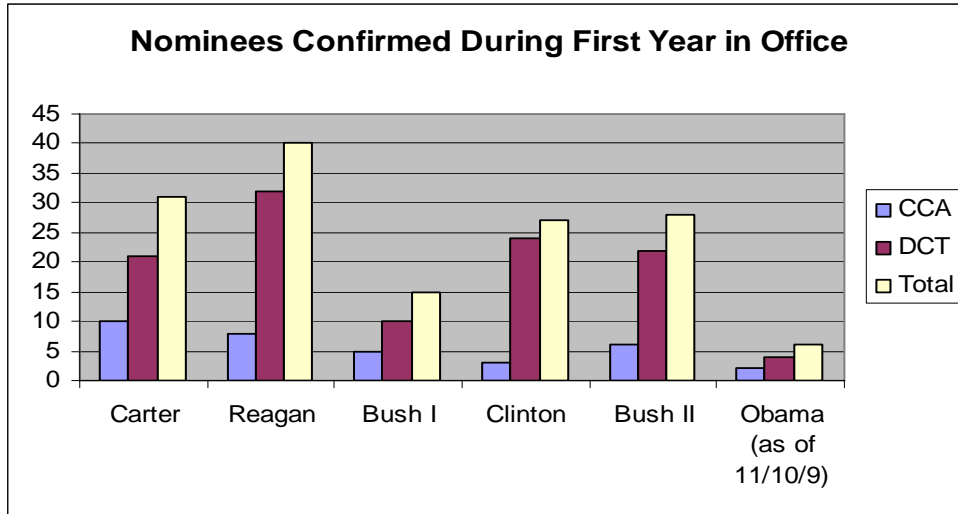
Time For Democratic Action

Republicans are obstructing Obama’s judicial confirmations at historic levels. This is true for both the total number of nominees confirmed as well as the overall confirmation percentage. Consider the following statistics for the last five presidencies. First, a look at Obama’s overall nomination rate compared to recent presidents:

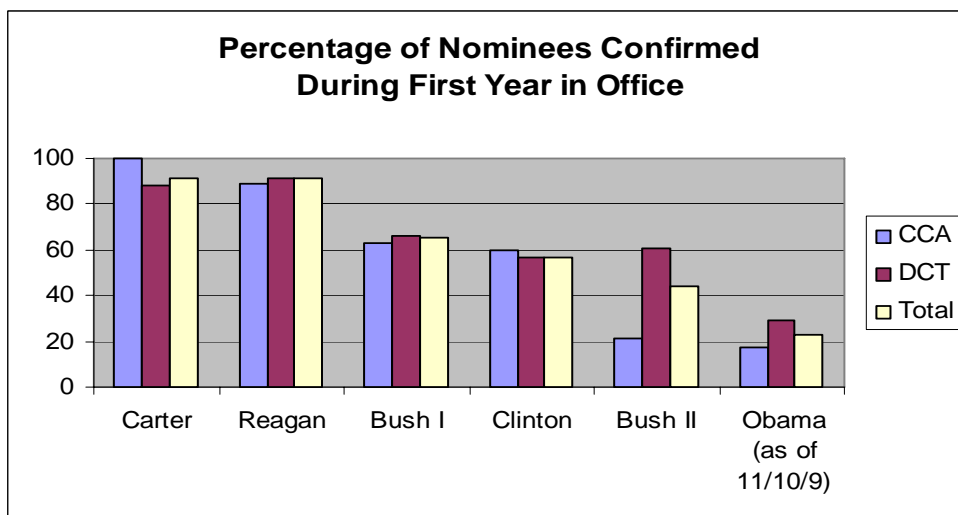


	Carter	Reagan	Bush I	Clinton	Bush II	Obama (as of 11/10/9)
CCA	10	9	8	5	29	12
DCT	24	35	15	42	36	14
Total	34	44	23	47	65	26

President Obama has thus far nominated fewer circuit court judges than Bush II, 12 versus 29 respectively, and fewer district court judges than Carter, Reagan, Clinton, and Bush II, 14 versus 24, 35, 42, and 36 respectively, during the first year of his presidency. However, the rate at which his nominees have been confirmed is significantly lower than it was for his five predecessors – in both aggregate numbers and in the percentage of nominees confirmed. Unless the Senate acts quickly, it will have confirmed fewer total nominees and a smaller percentage of nominees under Obama than under any of the previous five presidents during their first year in office:



	Carter	Reagan	Bush I	Clinton	Bush II	Obama (as of 11/10/9)
CCA	10	8	5	3	6	2
DCT	21	32	10	24	22	4
Total	31	40	15	27	28	6



	Carter	Reagan	Bush I	Clinton	Bush II	Obama (as of 11/10/9)
CCA	100%	89%	63%	60%	21%	17%
DCT	88%	91%	66%	57%	61%	29%
Total	91%	91%	65%	57%	44%	23%

The statistics for federal district court nominees are particularly striking. Whereas Presidents Bush I, Clinton, and Bush II had 66%, 57%, and 61% of their district court nominees confirmed, only 29% of President Obama's district court nominees have been confirmed. This statistic is even more remarkable given the fact that President Obama's four district court nominees who have been confirmed enjoyed votes of 99-0 (Viken), 100-0 (Lange), 96-0 (Berger), and 88-0 (Honeywell).

What's At Stake

Judges make a huge difference in our lives, as Americans were reminded during the eight years before President Obama took office. Cases coming before the Supreme Court addressed whether a big corporation could pay a woman less just because she's a woman; whether an individual hurt by a defective medical device could sue the manufacturer; who should pay for a huge oil spill – Exxon or the small communities affected; and whether the bankers who helped a company like Enron defrauded investors should be liable for their actions. In every case, the Bush court found a way to twist the law based on its own partisan political agenda to favor those at the top instead of upholding the Constitution to provide equal justice for all.

The courts of appeals are no less important. They issued decisions ruling that Chevron could legally mislead employees about their retirement benefits; that consumers can be required to pay for merchandise received in the mail even if they never ordered it; that hospital executives could fire a nurse after she said publicly that she believed new staffing policies jeopardized the health of mothers and their babies; and that an employee could be fired for complaining about serious racially inflammatory comments in the workplace.

Moreover, portions of the Obama administration's agenda, such as health care and economic regulation, may be challenged in court. During the Great Depression, President Franklin Delano Roosevelt faced a similar dilemma. With the support of Congress, FDR passed broad, comprehensive legislative efforts to end the economic turmoil facing America. Yet, the New Deal could not have survived without an independent judiciary. The courts were vital then and are still vital today in ensuring the success of our great nation.

After ten months, the need for a new urgency is clear. It is time for the White House and the Senate leadership to overcome Republican obstructionism and give the nomination and confirmation of strong voices for equal justice the priority it deserves. Justice can't wait.