

# THE NOMINATION GAP IN THE JUSTICE SYSTEM

Hot on the heels of a pretty spirited discussion of the Obama Administration treatment of progressive nominees, both in the blog post here at Emptywheel and yesterday on Twitter, comes the reminder by Main Justice that there are no appointed, nor confirmed, US Attorneys in all of Texas:

Career prosecutors have run the four U.S. Attorney's offices in Texas for more than a year. Obama has made one U.S. Attorney nomination in Texas thus far: state Judge John B. Stevens Jr., who withdrew from consideration for Eastern District of Texas U.S. Attorney.

The Senate has confirmed 66 of Obama's U.S. Attorney nominees. There are 93 U.S. Attorney posts.

Now the framing of the report is a complaint by John Cornyn, which I have little sympathy for, and who has undoubtedly contributed somewhat to the impasse; but that said, the facts are pretty astounding.

Over a year and a half into the Obama Presidency, and still over 30% of the US Attorney positions remain unfilled or, even worse, still under the control of Bush/Cheney appointees. The percentage is only that low due to a recent surge in investitures of US Attorneys; for most of the current Administration's term, the situation was even far worse than it is as of today.

Which led me to wonder exactly what the corresponding status was for federal judicial nominations. It is fairly bleak. There are 103 Federal judicial vacancies and, shockingly, on 48 of them even have so much as a nominee pending. 12% of the 876 total Federal judgeships are sitting vacant. In my own little nook of the

world, the 9th Circuit, there are 13 total judicial seats vacant, and only three of them have even putative nominees.

The critical importance of filling judicial vacancies is explained very nicely in a current post by Gaius Publius at AmericaBlog that expands on my Progressive Nominations/Goodwin Liu post yesterday:

This matters for several reasons. One is that the current judiciary is overwhelmingly Republican-appointed and conservative (including Movement-Conservative):

Over the last three decades, Republicans have put the appointment of conservative judges at the top of their agenda. And controlling the White House 20 of the last 30 years has allowed them to carry out their plan. By the time George W. Bush left office, 60.2 percent of the judges, including two-thirds of the Supreme Court, had been appointed by Republican presidents. The younger Bush appointed nearly 40 percent of all federal judges.

Yet Obama has been cautious to the point of weird about reversing this trend. While news stories on this subject headline his lack of judicial confirmations, stories like this one also contain tales of his caution; Bloomberg:

A lot of groups are still waiting for this president to nominate someone who will really reshape the bench," said Barbara Arnwine, executive director of the Lawyers' Committee on Civil Rights in Washington. The group

supports expanding legal protection for blacks and other minorities.

Gaius Publius is exactly right. In fact, reshaping the Federal judiciary away from the hard conservative Federalist society bent that has been installed and meticulously grown by the Reagan and two Bush Administrations was one of the primary rallying cries for Democrats, including the Obama campaign, during the 2008 election. And, yes, there has been significant and unified Republican obstructionism; that is absolutely a factor. The problem is that there has been little if any fight put up by the Obama Administration and instead mostly weak resignation.

And you have to wonder how the situation on nominations at the White House is going to get any better soon with this news:

White House Counsel Robert Bauer will assume responsibilities for lobbying, transparency, government reform and a host of other government operations issues once White House ethics adviser Norman Eisen departs for his new role as ambassador to the Czech Republic, senior administration officials confirmed Friday.

Since Bauer was supposedly the go to guru for nominations, and especially judicial nominations, It is hard to see how a major dilution of his time (he is already White House Counsel after all, which you would think might take up a lot of time) by adding a giant new portfolio on ethics compliance is going to help the already languishing White House efforts.

There are always excuses like the economy and the push for healthcare; but it does not excuse a failure to make a better effort. And with the losses in both houses of Congress universally expected this November the maximum time of

strength for the Obama Administration has been squandered to an inexplicable extent. It is time for them to make good and get the vacancies in the justice system filled while they still can. The bonus is it is a move that would actually please and fire up their base.

UPDATE: A reader has conveyed off blog some information stated to be more up to date (even though the Federal Courts site I linked said it was current as of today's date) and I want to post it here.

1. While the Administrative Office of the U.S. Courts lists the number of vacancies as of the date of the article as either 103  
<http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx> (used by bmaz) or 104  
<http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx> by my count after taking into account last week's confirmations, as of the date of the article there were only 99 openings (as matters stand presently at least 3 more vacancies will occur later this month) although I have not checked to confirm that the confirmed circuit court and district court nominees have in fact taken their oath of office for their new positions (as Justice Kagan did on the 7th following her confirmation on the 5th). If the new judges have not taken their oaths of office, one could always argue that the positions for which they were confirmed are still vacant.

2. There are only 40 pending nominations  
<http://judiciary.senate.gov/nominations/111thCongressJudicialNominations/Materials111thCongress.cfm> not 48.

Another site which may be useful and which appears to have up to date information is here:  
<http://judicialnominations.org/>

I will admit, I took my figures straight off the Federal Courts site and did not go count and tabulate districts and circuits individually. I don't know which set of figures are the most accurate, so I am leaving them both here. Quite frankly it does not change the point of my post or conclusions one iota; I think it all demonstrates a problem with the Administration taking advantage of the opportunity to fill vacancies in the Federal bench (it is especially worse if there are really only 40 current nominees instead of 48 as I had).