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With Sotomayor Confirmed, Focus Should Be on Nominations to Appeals Courts

The Legal Intelligencer
By Howard J. Bashman
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Upon Further Review

A vacancy on the U.S. Supreme Court and the very public effort to nominate and confirm a new justice understandably diverts attention away from nominating and confirming judges to fill the many vacancies that exist on the lower federal courts. But now that the U.S. Senate has confirmed Sonia Sotomayor to replace David H. Souter on the Supreme Court, perhaps President Obama can once again begin to focus on the important task of nominating individuals to serve on the U.S. Courts of Appeals and the U.S. District Courts.



Howard J. Bashman

Of course, it remains to be seen whether Sotomayor's replacement of Souter will result in any noteworthy changes to the Supreme Court's jurisprudence. In cases where the Supreme Court has previously divided along the more or less predictable liberal-conservative lines, court watchers are not expecting any major changes because one liberal-leaning justice has merely replaced another. But in cases where the Supreme Court has divided closely on issues that are not predictably driven by political ideology, such as punitive damages or the confrontation clause, Sotomayor's replacement of Souter could result in significant changes.

All nine of the justices now serving on the Supreme Court joined that court directly from a judgeship on a court of appeals. Indeed, Sotomayor served on the 2nd U.S. Circuit Court of Appeals for a far longer period than Souter served on the 1st Circuit. Regardless of whether it is desirable for service on an intermediate federal appellate court to be seen as a prerequisite to being nominated to the Supreme Court, it cannot be denied that when a vacancy on the Supreme Court arises, the search for a replacement quickly and predictably turns to judges serving on lower federal courts.

Because a Republican occupied the White House for the eight years preceding Obama's election, at present a large pool of relatively young, relatively liberal judges simply does not exist within the federal judiciary. But Obama and the democratically controlled Senate possess the power to change that. Currently, 20 vacancies exist on the courts of appeals and 68 vacancies exist on the district courts. Amazingly, Obama has only nominated 16 people to fill these 88 vacancies, leaving 72 vacancies for which there are currently no nominees.

Seven of those 16 nominees are for vacancies that exist on the courts of appeals, leaving 13 vacancies at the federal appellate level that lack a nominee. Two additional vacancies are scheduled to occur later this year when one federal appellate judge will return full-time to law school teaching and another will take senior semi-retired status. Two federal appellate courts in particular are in dire need of new judges. The Richmond, Va.-based 4th Circuit now has five vacancies, while the New York City-based 2nd Circuit now has four vacancies. Obama has thus far only nominated one person to serve on each of those courts.

When Al Franken was finally declared the winner of a Senate seat from Minnesota, the Democrats in the Senate achieved a filibuster-proof margin of 60 votes. In November 2010, citizens of various states will get to determine who should hold about one-third of the 100 seats in the Senate. Although the size of the Democratic majority in the Senate could increase, history shows that the political party that does not hold the presidency usually gains seats in a midterm election. Thus, the Democratic Party's current filibuster-proof majority in the Senate may only exist for a little more than a year from now.

Although Obama has now been in office for nearly eight months, during which time a sizeable Democratic majority has existed in the Senate, the Senate has not yet confirmed even one of Obama's five federal appellate court nominees. There are several reasons for this. First, Obama did not make his first nomination to a federal appellate court until mid-March, and that nomination was of a single person to fill a single vacancy on the 7th Circuit. Two additional nominations came in early April, another two occurred in mid-June and the most recent two were nominated Friday.

In recent months, of course, the attention of the Senate Judiciary Committee has understandably focused on the Sotomayor nomination. Moreover, home-state senators and sometimes even governors must often be consulted before nominations can be made to regional federal appellate courts. And, finally, delaying the confirmation of the opposing party's judicial nominees has become standard operating procedure in Washington, D.C.

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Nevertheless, the Obama White House must shoulder its fair share of the blame for failing to nominate and attain the confirmation of any federal appellate judges thus far. For at least the next 14 months, the White House may have an unusually easy path toward achieving the confirmation of individuals nominated to serve on the courts of appeals and the district courts. If the White House is able to take advantage of that opportunity, then you may see some new names under consideration when the next vacancy on the Supreme Court arises. But if the White House fails to take advantage of that opportunity, it will have largely itself to blame.

As someone who previously taught constitutional law at the University of Chicago Law School, Obama undoubtedly understands the importance of filling lower federal court vacancies. It would be both shocking and the loss of a tremendous opportunity to shape the direction and diversity of the federal judiciary if Obama fails to nominate and attain the confirmation of individuals to fill these vacancies in the very near future. •

Howard J. Bashman operates his own appellate litigation boutique in Willow Grove, Pa., and can be reached by telephone at 215-830-1458 and via e-mail at hjb@hjbashman.com. You can access his appellate blog at <http://howappealing.law.com>.

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