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CONSIDERING LESBIAN, GAY, TRANSGENDER, AND BISEXUAL NOMINEES FOR THE FEDERAL COURTS

CARL TOBIAS*

In April 2010, President Barack Obama nominated Edward DuMont to the United States Court of Appeals for the Federal Circuit, and more than one and a half years later the nominee withdrew. The aspirant possesses impeccable credentials, having argued eighteen Supreme Court matters and captured a unanimous well-qualified American Bar Association (ABA) rating. Despite his immense capabilities, the nominee never received a hearing. Because Edward DuMont is an exceptionally competent individual and would have been the first openly gay court of appeals judge, he merited expeditious review. The nominee’s cautionary tale illuminates how excessive Senate partisanship deprived the appellate bench of a remarkable jurist.

The federal circuit and district courts included strikingly few ethnic minority and female jurists before President Jimmy Carter’s administration. Carter invoked strategies to efficaciously proffer strong persons of color and women for the circuit bench and urged senators to propose skilled candidates when trial level vacancies arose. Carter nominated and confirmed a plethora of minority and female judges during his term in office, but failed to nominate or confirm any openly lesbian, gay, bisexual, or transgender (LGBT) court members. His Republican successors also failed to name a

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1. See, e.g., Elliot Slotnick, Lowering the Bench or Raising it Higher?: Affirmative Action and Judicial Selection During the Carter Administration, 1 YALE L. POL’Y REV. 270 (1983) (describing the dearth of female and minority judges prior to President Carter’s administration). For the early history, see SHeldon GoldMan, PIcking Federal Judges: Lower Court Selection From Roosevelt Through Reagan (1999); Tracey E. George, Court Fixing, 43 Ariz. L. Rev. 9 (2001).


4. People of color were 21, and women 14, percent of Carter appointees. Sheldon Goldman, Reagan’s Judicial Legacy: Completing the Puzzle and Summing Up, 72 Judicature 318, 322 (1989); see also Biographical Directory of Judges, http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx (last visited Nov. 11, 2012). This Commentary uses the term “LGBT” to refer
single LGBT jurist. President Bill Clinton asked senators to provide many superb, diverse counsel. He recruited the first openly lesbian judge, Deborah Batts, while establishing records for appointing people of color and women. Nevertheless, minority and female jurists continue to be substantially underrepresented. At Obama’s inauguration, Batts was the lone LGBT federal court judge among 1300 circuit and district court jurists, while African Americans essentially comprised a tenth and women constituted one fifth of the federal judiciary.

President Obama rapidly implemented effective special initiatives to promote diversity vis-à-vis sexual orientation, ethnicity, and gender. This process included contacting less traditional sources for judicial nominations, notably LGBT, minority, and women’s groups and bars, while canvassing and recommending numerous fine persons of color and women and certain gay and lesbian choices. The White House solicited help from politicians, such as minority and female elected officials, carefully asking that lawmakers institute concerted actions to pick diverse candidates. Officers evaluated and


6. George, supra note 1, at 10–11; Sheldon Goldman & Elliot Slotnick, Clinton’s Second Term Judiciary: Picking Judges Under Fire, 82 JUDICATURE 265, 266–67 (1999); see Sheldon Goldman et al., Clinton’s Judges: Summing Up the Legacy, 84 JUDICATURE 228 (2001).


8. See supra note 6. President Clinton named Emily Hewitt as the first LGBT Federal Court of Claims Judge, one Native American, 5 Asian Americans and 24 Latinos. Biographical Directory of Judges, supra note 4; see also sources cited supra note 6.


submitted numbers of very capable LGBT, minority, and female lawyers. Particularly relevant to this effort were New York Senators Charles Schumer (D) and Kirsten Gillibrand (D). They proposed multiple LGBT counsel (Paul Oetken and Alison Nathan) for the Southern District and, rather late in 2012, suggested lawyer Pamela Ki Mai Chen for the Eastern District. Oetken’s recent appointment made him the first openly gay district court judge, while Nathan’s approval promptly thereafter made her the country’s only active lesbian jurist.

When selecting DuMont, Obama remarked that he possesses “a keen intellect and a commitment to fairness and integrity...” DuMont graduated summa cum laude from Yale University in 1983 and received his J.D. from Stanford Law School in 1986, earning membership in the Order of the Coif. The able prospect clerked for the legendary Seventh Circuit Judge Richard Posner. DuMont practiced as a highly regarded Supreme Court


16. Posner observed that “[Edward] DuMont was an excellent law clerk[,] had a distinguished career [and] seems eminently qualified [for] the Federal Circuit.” Chris Geidner, Breaking Barriers, METRO
advocate with the Solicitor General for over seven years and was Clinton’s Associate Deputy Attorney General.\textsuperscript{17} He later practiced mostly Supreme Court litigation as a very respected WilmerHale partner. DuMont has argued numerous Supreme Court appeals and briefed even more. Indeed, these qualities prompted the ABA’s finest ranking.\textsuperscript{18}

Because the Federal Circuit exercises nationwide jurisdiction over specific subject matter, in particular intellectual property issues, such as patents,\textsuperscript{19} the court resolves few disputes over “social policy” questions, like sexual preference and terrorism, which can make appellate nominees controversial.\textsuperscript{20} The Federal Circuit’s sole post-2004 nonmilitary ruling on sexual preference affirmed a Merit Systems Protection Board judgment upholding a federal agency’s suspension of an employee for alleging the employee’s co-workers were LGBT and insisting they “hired Chinese homosexuals to stalk and harass him.”\textsuperscript{21}

Notwithstanding DuMont’s myriad compelling attributes, the competent aspirant received no Judiciary Committee hearing mainly because Grand Old Party (GOP) senators objected. Despite Obama’s coordination with Senators Patrick Leahy (D-Vt.), the chair of the Judiciary Committee, Harry Reid (D-Nev.), the Senate Majority Leader, and the Democrats’ Republican counterparts prior to and following nominations, the GOP has not always cooperated.\textsuperscript{22} For instance, the Senate panel swiftly processed designees.\textsuperscript{23}
However, Republicans automatically held over votes seven days without cogent reasons for minority and female nominees whom they did approve the next week. Senator McConnell nominally cooperated to schedule prompt floor votes, and many of his party colleagues systematically placed anonymous holds or those lacking justifications on strong uncontroversial nominees; these actions delayed Senate confirmations and required that Democrats file cloture petitions. The GOP requested significant floor debate time and roll call ballots, even for nominees who ultimately secured overwhelming approval.

The failure to consider DuMont is an egregious illustration of GOP recalcitrance; the candidate experienced the most intractable dilatory tactics with the least explanation. Press accounts specifically claimed that the “reason for the delay in the process [was] not publicly known.” One Leahy aide found that the chair was reluctant to schedule DuMont’s hearing, as he preferred cooperation with Republicans, who sought more time for examining paperwork. A GOP staff assistant did confirm that the party insisted on an extension; however, she proffered little substantiation for the request. The Washington Post succinctly editorialized: “no one involved in the nominations process can provide a satisfactory explanation,” although it lacked persuasive “evidence that Mr. DuMont’s sexual orientation has played
a role in the delays. 30 Yet, a number of commentators essentially intimated that his sexual orientation may be relevant, 31 and this explanation assumed increasing plausibility with the significant passage of time. DuMont’s languishing nomination sharply contrasts with subsequent Obama picks, especially Federal Circuit nominees. The upper chamber approved Court of International Trade Judge Evan Wallach in fewer than four months 32 and expert counsel Jimmie Reyna in six. 33 Despite the problems regarding DuMont, Obama eclipsed records for advancing highly skilled diverse nominees. 34

In short, this canvass pointedly shows that President Obama rapidly nominated Edward DuMont, but Republicans made the impressive nominee wait longer for a hearing that he never received than all 211 others. Therefore, why the chamber should have promptly examined DuMont and how the Senate could have quickly processed him merit scrutiny.

Article II of the Constitution, venerated norms, and much practice suggest that the President’s strong, noncontroversial judicial recommendations deserve expeditious committee investigation with efficient panel hearings and rapid committee votes, as well as swift chamber floor debates and yes or no ballots. These are ideas that Republicans and Democrats have perennially endorsed. 35 The GOP should have agreed to a quick committee hearing and vote because Leahy cautiously and graciously accommodated its persistent requests to evaluate DuMont in the spirit of consensus and cooperation. 36

31. See, e.g., Crouch & Rantanen, supra note 14; sources cited supra note 27.
36. See supra notes 28–30 and accompanying text; see also Tobias, supra note 11, at 779.
providing ample opportunities for Republicans to investigate the extraordinary selection. One instructive example relates to partisan difficulties respecting the floor and their deft resolution. When the majority insisted that nominee David Hamilton\(^{37}\) warranted a vote, Senator Reid filed a cloture petition. Ten GOP members actually favored cloture, appreciating that Hamilton deserved a vote, even while nine of them opposed his confirmation on the merits.\(^{38}\) Requiring stellar nominees like DuMont to wait indefinitely relegates aspirants to placing their careers and lives on hold, stops many fine prospects from entertaining bench service, deprives courts of necessary judicial resources, and undermines prompt, inexpensive, and fair dispute resolution.

Enhanced court diversity, including sexual orientation, ethnicity, and gender, is critical. Excellent minority and female jurists ably conduct routine judicial duties, yet also furnish related benefits. They contribute “outsider” perspectives\(^{39}\) and different, constructive views on issues, namely sexual preference, race, employment, constitutional law, and other daunting questions that judges confront.\(^{40}\) LGBT individuals, minorities, and women concommitantly help narrow prejudices based on sexual orientation, ethnicity, and gender that might subvert justice.\(^{41}\) Courts that reflect the nation also inspire more public confidence.\(^{42}\)

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38. 155 CONG. REC. S11,413 (daily ed. Nov. 17, 2009) (statement of Sen. Hatch); id. at S11,544 (daily ed. Nov. 19, 2009). However, this has not always occurred. For example, a lone Republican favored a cloture petition for Ninth Circuit nominee Professor Goodwin Liu, so he received no Senate floor vote. 157 CONG. REC. S3146 (daily ed. May 19, 2011) (detailing results of vote on cloture petition); see Goldman et al., supra note 10, at 282–85.


42. Sheldon Goldman, A Profile of Carter’s Judicial Nominees, 62 JUDICATURE 246, 253 (1978); Sylvia R. Lazos Vargas, Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the
The previous concepts show why DuMont required expeditious processing. Thus, the Senate panel ought to have swiftly proffered the nominee a hearing and vote. Chair Leahy should have guided the proceeding in a way that maximized opportunities for straightforward, thorough exploration of pertinent issues about competence. Article II envisions that senators will consider abilities, character, and temperament. Legislators plainly ought to disregard sexual preference, which is not relevant to skills, ethics, or temperament. Political ideology correspondingly warrants deemphasis effectively because it lacks much salience for those prominent attributes. To the extent a candidate’s sexual preference and ideology could have relevance to service on any of the numbered appellate courts, the composition of the Federal Circuit’s docket radically decreases their potential relevance. Members should have eschewed the practice of rejecting or stalling DuMont premised on speculation about how the nominee would potentially resolve substantive matters because this notion can diminish judicial independence. After the hearing, which the panel should have conducted, Leahy must have enabled the GOP to propound written questions and DuMont to carefully formulate answers. Upon the responses’ completion, Democrats should have rapidly arranged a candid and full debate that would have permitted sufficient time for airing numerous crucial issues efficaciously with a panel vote.

Republicans should only have filibustered DuMont if the extensive inquiry elicited revelations that clearly disqualified him from service as a Federal Circuit judge; these would aptly be characterized as problems in the nature of “extraordinary circumstances.” Had GOP members, nonetheless,


44. Dana Milbank, In a ‘Quiet Moment,’ Gay Judge Makes History, Wash. Post (July 18, 2011), http://www.washingtonpost.com/opinions/in-a-quiet-moment-gay-judge-makes-history/2011/07/18/gQoAo7PhMI_story.html; see supra notes 19–21 and accompanying text. The ideas arguably have no relevance. See sources cited supra notes 35 and 43.


46. See sources cited supra notes 25 and 38; infra note 47. The Senate’s failure to accord Goodwin Liu, Caitlin Halligan, and Robert Bacharach cloture suggests that “extraordinary circumstances” lacks
orchestrated a robust filibuster attempt because the candidate apparently failed to meet their criteria, the Democrats should have promptly and strongly petitioned for cloture and Republicans, who subscribe to the concept that the President’s nominees merit affirmative or negative votes, must have favored cloture.\footnote{For examples of these ideas, see 157 Cong. Rec. S2641–44 (daily ed. May 4, 2011) (floor debate and vote on Jack McConnell); supra notes 25 and 38 and accompanying text. See generally Gerard N. Magliocca, Reforming the Filibuster, 105 N.W. U. L. Rev. 303 (2011). But see supra notes 38 and 46 and accompanying text.}

If DuMont’s nomination had arrived on the Senate floor, the Majority Leader would have needed to expeditiously invoke every route that would promote frank, comprehensive debate on relevant questions about DuMont’s fitness. Reid should have worked closely and diligently with McConnell, responsively and directly fielding requests that would candidly and productively ventilate numbers of applicable matters. Finally, the Senate ought to have provided a yes or no vote.
