

# OBAMA'S INFIRM LUMP OF COAL JUDICIAL POLICY

❌ Lost in the blizzard like white out of other concerns by the push by the Obama Administration and Congress to handwrap a huge present for the rapacious healthcare insurance industry, has been intelligent coverage of the breakdown of Barack Obama's naive and feckless judicial policy and the emerging harm to the U.S. Federal Court system it portends.

Maybe that is starting to change.

At the end of last week, David Fontana at TNR penned an article entitled "Going Robe" noting the ever more glaring lack of accomplishment by the Obama Administration on judicial nominees. Since then, Scott Lemieux and Kevin Drum at Mother Jones have both followed up. All of these came on the heels of a startling editorial by the New York Times last month that received far too little play.

The facts and figures are stark and certain to be depressing to progressives and liberals who voted for Barack Obama and a Democratic majority with an eye to halting the rightward shift of both the Supreme Court and lower Federal court benches. Two months ago I wrote:

Three out of 23 [confirmations out of total nominations], with a popular President possessing a real electoral mandate and the supposed holy grail of a 60 seat caucus majority in the Senate, is a batting average that screams lame. But the real eye opener painting the full color of the context is that George W. Bush sent 95 nominees to the Senate for confirmation by this point in his first term. Whatever happened to the big push Greg Craig (he of two first names) was spearheading on this? And make no mistake, it is not as if there are not

plenty of judicial seats to fill – there are currently at least 90 waiting to be filled – and it is having a deleterious impact on the ability of Federal courts across the country to function.

...

Time is wasting, there is no reason not to put up big blocks of nominees. Get on with it, make the Republicans vote in good faith or expose them as unprincipled obstructionists. Fight for your nominees and use the 60 seat majority. You can bet your family farm that is exactly what the Republicans would do; it is what they do when in the Presidency.

What has happened since that time? Not diddly squat with the exception that Obama has finally managed to get the centrist milquetoast David Hamilton confirmed. Despite the rejoicing, this is precious little to cheer. Which brings us back to where we stand now, and Scott Lemieux nails it perfectly:

But with respect to judicial appointments, Obama's preemptive concessions really have been counterproductive. It's not at all surprising that his attempts to put forward moderate appointments is not working – after all, we're dealing with conservatives willing to claim that Cass Sunstein is a wide-eyed radical.

And, what's worse, putting forward moderate nominees will continue the asymmetry in which Republican presidents take the ideological direction of the federal courts very seriously while Democratic presidents are willing to settle for moderates to focus on other priorities. There's no reason to continue this. Given that Republicans will portray anyone to the left of Anthony Kennedy as a lawless Trotskyite, Obama needs to make stronger liberal

appointments and accept that not everyone will get confirmed.

Exactly. The problem, however, is that is just not who Barack Obama is. Scott seems to think there may be a more progressive judicial attitude lurking within Obama. Kevin Drum not only bites off on that questionable proposition, but adds:

But it's been nearly a year now and Republicans, if anything, are more intransigent than they were on inauguration day. How much longer does Obama give them? Another year? Two? At what point does he finally give up and decide that he's just being played for a patsy?

At what point do progressives quit perpetuating the unsupportable dream fixation of a living, breathing principled progressive lurking beneath the slick dick political marketing gloss that is Barack Obama? Obama is not a patsy and he is most certainly no "Constitutional scholar"; if he were, he would not be letting the health and future of American Article III courts wither while he dithers. Instead, Mr. Obama is a common retail politician that is willing to say what it takes to get and stay elected; principles are seemingly merely the vehicle for attracting the support he needs at any one time.

Barack Obama will never magically make the turn and do what progressives, liberals, and the citizens of this country want and need on resetting the Federal judiciary and courts from the long term relentless march to the conservative Federalist Society right wing ideal unless we – you, me and those of a similar view – force him to. There is no magic bullet for accomplishing the goal, it will take long hard and arduous work; if you want an eye opening explanation of just what this means, read the outstanding recent article by Thereisnospoon at Daily Kos.

Make no mistake however, the stakes in judicial policy are far higher and, ultimately, more consequential than other areas of domestic policy, even healthcare; Federal judges are lifetime appointments and they are the backbone of the rule of law. And while the common District trial courts and Circuit Courts of Appeal may be capable of ambling along in a weakened state from Obama's refusal to get serious with judicial nominations and support for confirmation fights, a reckoning is coming on the Supreme court. Obama has already appointed Sonia Sotomayor, and two more vacancies, maybe three, lurk on the immediate horizon.

Justice John Paul Stevens is done after this term, that is a given; but also Ruth Bader Ginsburg's chair may come open as well. The problem here is that Mr. Obama, even when replacing sitting liberal justices, seems hell bent to move the overall composition of the court markedly to the right with his stated desire to appoint "empathetic moderates" whatever in the world that is in practice. If Stevens and Bader Ginsburg are replaced by a couple of mealy mouthed David Hamiltons, not only will we regret it, but so will our children; that is the gravitas of lifetime appointments. Barack Obama must not be allowed to further shift the Supreme Court to the right.