

# AS VAUGHN WALKER MOVES ON, THERE ARE NO REPLACEMENTS

✘ As you have probably heard by now, Vaughn Walker, the Chief Judge for the Northern District of California, has announced his retirement:

The United States District Court for the Northern District of California announces today that Chief Judge Vaughn R. Walker will step down as chief judge effective December 31, 2010. Also, Chief Judge Walker notified President Obama by letter today that he will leave the court in February 2011.

Chief Judge Walker has been a United States District Judge since February 5, 1990 and has served as chief judge of the court since September 1, 2004. Before becoming a federal judge, Chief Judge Walker was a litigation partner at the firm now known as Pillsbury Winthrop Shaw Pittman LLP. Upon leaving the federal bench, Chief Judge Walker plans to return to the private sector.

In his letter to the President, Chief Judge Walker said: "Concluding twenty one years of judicial service, I leave the bench with the highest respect and regard for the federal judiciary, its judges and their staff and the essential role they fulfill in our constitutional system."

By statute, United States district chief judges are selected based on a combination of age, seniority and experience and may serve in the post for a maximum of seven years. 28 USC § 136. By application of this statute, District Judge James Ware will assume the post of chief judge of the Northern District on

January 1, 2011.

That was the formal announcement I received from Walker's chambers. For further reportage, see the always outstanding Bay area legal reporter for the San Francisco Chronicle, Bob Egelko. (I will take issue with one thing Egelko reported though, that Walker's announcement was "unexpected"; I have heard rumors of him retiring at the end of the year for several months now.)

I started to write this post last night with a million thoughts swirling in my head on the plethora of important cases Walker has handled over the years and erudite opinions rendered thereon. There is far more to the man's record than *al-Haramain* and *Perry v. Schwarzenegger*; he also sat on such blockbuster cases as the Hearst/ SF Chronicle Antitrust litigation, the Apple/Microsoft intellectual property battle, and the knock down drag out Oracle/Peoplesoft takeover war. And hundreds of others over the years that, from every opinion of his I have read over the last couple of decades, he treated with pretty much the same dedication and attention to detail as you see in the landmark cases you know him from now. Vaughn Walker was both driven and meticulous, they simply do not make many like that; even in the cream of the crop hallowed halls of the Federal judiciary, Vaughn Walker stands out and above.

But that part of Vaughn Walker's career is winding down now, and in a little more than three months he will be out the door of his chambers at the Philip E. Burton Federal Courthouse for the last time. Many, if not most, Federal judges who retire after they are at least 65 years of age and have 15 or more years on the bench, go on "senior status" where they continue to receive full salary, but work only part time as needed and as they wish. Walker is not taking senior status though, instead planning on returning to the private sector from which he came.

Although there are remnants of his former firm, Pillsbury, Madison & Sutro still in existence in the conglomerate now known as Pillsbury, Winthrop, Shaw & Pittman LLP, the firm as Walker knew it is gone. The rumor I hear is Vaughn intends to relax a little (a tremendously tireless and relentless worker, he has earned it) and do some private judging, likely at a place like JAMS (Judicial, Arbitration and Mediation Services, Inc.) I would not be surprised to see him also pop up on the board of directors of a company or two as well, although I would think he would be pretty discerning as to who he would involve himself with.

Vaughn Walker will leave a man in full, having done all you could ever ask to do as judge, and more. Some people, even Federal judges, shrink from the toughest cases, and most controversial issues; not Vaughn Walker. Like Michael Jordan wanting the last shot with the game on the line, Walker wanted the most important issues of the day and he saw to it that they were handled with determination, fairness, logic, gravitas and with a sense of duty and history. Walker was a man of big moments, and always rose to meet them.

So, who will fill the enormous shoes of Vaughn Walker? The sad and pitiful truth is probably nobody because Barack Obama has displayed a shocking and reckless disdain for his duty to stock and replenish the Federal Judiciary (see here and here). There are currently 105 Federal judicial seats vacant, and that is not including Vaughn Walker's yet; and a grand total of 48 nominees pending, with 25 of them pending in the Judiciary Committee and 23 having already been passed out of Judiciary and placed on the Senate Executive Calendar (although Harry Reid has not scheduled a floor vote for a single one of them).

This is simply inexcusable and a dereliction of duty by the Obama Administration for having named nominees for less than half, well less than half, of the empty judicial seats at a time

when the Federal Judicial Conferences are declaring emergencies and begging for relief. It is also inexcusable for Harry Reid to have not wielded his power as Majority Leader better so as to move nominees that have come out of committee. About the only entity that has consistently done its job on this is, in fact, Pat Leahy's Senate Judiciary Committee. Leahy moves the nominees, even tough ones like Goodwin Liu, in and out of committee promptly. And then they die from the not so benign neglect of the Obama White House and Harry Reid and, of course, the intransigence of Mitch McConnell and the GOP caucus.

Judiciary Chairman Leahy issued a statement today on the appalling record being made on the Federal judiciary:

The Senate Wednesday night recessed until after the November elections without confirming any of the 23 judicial nominations pending on the Executive Calendar. One nomination, Fourth Circuit nominee Albert Diaz, was unanimously reported by the Judiciary Committee more than eight months ago, but Senate Republicans have yet to give consent to schedule a vote on his nomination. Seventeen of the 23 judicial nominations pending on the calendar were reported by the Committee unanimously.

"The Senate is well behind the pace set by a Democratic Majority in the Senate considering President Bush's nominations during his first two years in office," Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) said in a statement. "Republicans have allowed the Senate to consider and confirm only 41 of President Obama's circuit and district court nominations over the last two years. In stark contrast, by this date in President Bush's second year in office, the Senate with a Democratic majority had confirmed 78 of his Federal

circuit and district court nominations. That number reached 100 by the end of 2002, all considered and confirmed during the 17 months I chaired the Senate Judiciary Committee.”

The Senate has taken more than five times longer to confirm circuit court nominations after being favorably reported by the Judiciary Committee than it did in the first Congress of the Bush administration. The Senate has taken three times longer to confirm district court nominations after being favorably reported by the Judiciary Committee.

“Last year the Senate confirmed only 12 Federal circuit and district court judges, the lowest total in 50 years,” Leahy said. “This year we have yet to confirm 30 Federal circuit and district judges. We are not even keeping up with retirements and attrition. As a result, judicial vacancies are, again, over 100 and, again, more than 10 percent. This trend should alarm the American people who expect justice from the Federal courts.”

It is indeed alarming, but it is certainly not all the doing of GOP obstructionism. That simply does not hold water when Obama cannot even be troubled to put up a nominee for well over half of the vacant seats. That is not just alarming, it is appalling. Remediation of the Federal judiciary from the right wing Federalist society coup underwritten by the Bush/Cheney Administration was one of the big things Barack Obama ran on as a candidate in 2008. And it is yet another, in what is becoming a long laundry list of promises and positions, he has failed to live up to.

When Mr. Obama has actually deigned to make judicial nominees, they have been characteristically centrist, milquetoast, unexciting “consensus” hollow suits. When Elena

Kagan was installed on the Supreme Court, there was much talk, and fairly much some consensus, that Obama was moving the ideological spectrum of the Supreme Court to the right to at least some degree, even if not greatly. What has seen precious little discussion, however, is what is occurring to the ideological spectrum of the bread and butter District and Circuit levels of the Federal judiciary. A hint of what I am describing is found in Attorney General Eric Holder's Op-Ed yesterday in the Washington Post:

The problem is about to get worse. Because of projected retirements and other demographic changes, the number of annual new vacancies in the next decade will be 33 percent greater than in the past three decades. If the historic pace of Senate confirmations continues, one third of the federal judiciary will be vacant by 2020. If we stay on the pace that the Senate has set in the past two years – the slowest pace of confirmations in history – fully half the federal judiciary will be vacant by 2020.

These are generally the same kind of numbers I have been hearing for months from a couple of Federal judges who are getting simply apoplectic about what is occurring under Obama's watch (and these are folks that *were* big Obama supporters). What I would like to make crystal clear to any and all progressives out there though, is that it is not just the sheer number of retirements looming, it is *who a great many of the retirees will be*. And this is where we come back to Vaughn Walker, because the coming retirements will, tragically, have a disproportionately high percentage of the old school civil liberties lions appointed by Carter, the first term Bill Clinton and, yes, even Reagan and George H.W. Bush.

President Obama is WAY behind the curve. Remedying this situation, even if he suddenly finds the desire he has lacked to date, will

certainly not get any easier with the greatly reduced Senate majority the Democrats will clearly be faced with, at best, after November's mid term elections. The GOP can already smell the blood in the water. Obama has literally squandered the best conditions imaginable – an unheard of Senate majority of 60 seats and then 59 after Scott Brown – for restocking of the Federal bench with liberal judges. It is simply unfathomable this has occurred after what the Bush/Cheney regime did by turning the Federal judiciary over to the radical right wing Federalist Society types.

With such an inexplicable and unconscionable backlog now created, and in light of the foregoing reduced majority and grounds for increased GOP obstruction, Obama will be beyond lucky, if he fights with a determination and vigor he has never mustered before, to come close to treading water in the next two years. And that is only if he appoints the most milquetoast centrist hacks he can find (which clearly is his default preference). Should Obama continue down the path he has plowed to date and fail to get reelected in 2012, there may be 120-150 judicial vacancies by January 2013 and we will be set up for a President Palin or whatever other conservative crusader comes through, to administer the coup de grace on the wholesale permanent takeover of the Federal judiciary for the next 20-30 years by right wing ideologues that do not represent the common will of the American citizenry, and who will dogmatically attack anything and everything progressive in their sights.

This is what progressives need to understand about the dire predicament we face in relation to the non-SCOTUS Federal judiciary; it is truly bleak. And the Obama White House just completely squandered the best two year window for doing something about it. What now?